Executive Powers and Domestic Responses to the Coronavirus Pandemic – Is the Imposition of Restrictions Bill Necessary?

We live in unusual times. The Coronavirus pandemic has altered our lived reality globally, and for the worse, necessitating significant behaviour change on the part of citizens and states alike. Governments everywhere are under pressure to respond to protect and save lives and avert social and economic catastrophe. The Government of Ghana is no exception. That the current situation calls for unusual, even draconian, measures is not in question. The question is how.

Like nearly all modern constitutions, the Constitution of the 4th Republic of Ghana is written for good as for bad times, for peacetime as for war, for a time of Corona beer as for a time of Coronavirus. The Framers of our Constitution were rational beings; they knew that we would not always live in normal times. Thus, as has been said of the American constitution and its framers, our Framers, too, did not intend that our Constitution operate as a "suicide pact" that condemns us all to a collective death because it is too rigid or inflexible to allow us the tools with which to fight off or respond effectively to an attack on or threat to our collective existence as a community. Rather, the Constitution our Framers wrote, like nearly every modern constitution, appropriately anticipates and provides adequately for emergencies, whether arising from armed invasion or domestic insurrection or pestilence or natural disaster.

Of course, not being prophets, our Framers could not have foreseen this particular Coronavirus pandemic, but they were human and intelligent enough to know that emergencies like this, whether localized, nationwide, or global in scale or origin, could arise that would require exceptional response from Government and involuntary sacrifice on our part. Therefore, our constitution rightfully allows, under those circumstances, for our normal flow of life, including our livelihoods, to be disrupted by Government for our collective good and the good of the Republic. It does this by empowering our elected authorities, the President and Parliament, to act swiftly and take extraordinary measures appropriate to the situation, including by imposing appropriate restrictions on our constitutional rights and liberties while the emergency subsists.

The Framers also knew that emergencies are tempting moments for rulers. Conscious of our own history with "preventive detention" (PDA) and military regimes, the Framers did not want determinations of "emergency" or their duration to be left to the discretion of any one person. They also did not want our Parliament to go to sleep and leave the Republic in the hands solely of the Executive during periods of emergency. In short, they did not want emergencies to be abused or turned into occasions or excuses for rule by DECREE or executive fiat.

With these considerations in mind, our Framers laid down, in Article 31 of the Constitution, a simple but sensible framework to govern and regulate this place during periods of emergency. Titled "Emergency Powers," Article 31 empowers (1) the President to proceed, upon advice of the Council of State, to declare a state of emergency by issuing a PROCLAMATION to that effect, which proclamation shall be published in the Gazette so as to put the public on notice that a
state of emergency has been declared. A Proclamation would typically include a narrative, setting forth the facts and circumstances giving rise to the declaration of emergency as well as the raft of extraordinary measures announced and contemplated (if on an escalating basis) in response to the emergency. (2) Having done so, the President must immediately notify Parliament of "the facts and circumstances leading to the declaration of the state of emergency". (3) It is then for Parliament to decide, within 72 hours (3 days) of receiving such notification, whether the Proclamation must remain in force or not.

The decision of Parliament, whether to approve or reject the declaration of a state of emergency, is binding on the President. If the Proclamation is approved by Parliament, it will remain in effect for 3 months (90 days) in the first instance, subject to further extensions, each such extension to last one month (30 days) at a time. If the Proclamation is not approved by Parliament, it must expire after 7 days. Parliament may also revoke a Proclamation it has previously approved.

A state of emergency may be declared for only that part of the country where the emergency situation exists or for the entire country, depending on the nature of the risk or threat. The Framers also wisely left open-ended the facts and circumstances under which a state of emergency may be declared, noting only that those circumstances "include" a natural disaster and acts by persons that threaten the essentials of life, including essential supplies and services.

The import of this provision, contained in clause (9) of Article 31, is to clarify, in case there is any doubt, that “a natural disaster” (such as massive flooding) or act of an individual or individuals that is calculated to lead to an extreme shortage of the essentials of life may give rise to grounds for declaration of a state of emergency. The import of Article 31(9) is not to exclude other obvious circumstances like an armed invasion, insurrection, or an epidemic. To the contrary, article 31(9) should be read to mean, rightfully, that those circumstances are too obvious to require express mention. No doubt a pandemic of the kind we currently face, one whose true domestic scale and scope are unknown and whose duration is uncertain, easily qualifies as the kind of “circumstances under which a state of emergency may be declared.”

Importantly, Article 31, clause 10, allows Parliament to enact legislation authorizing the taking of measures “during any period when a state of emergency is in force,” which measures, if taken in normal times, would constitute an infringement of our fundamental human rights guaranteed in articles 12 to 30 of the Constitution, including our rights to freedom of movement, speech, assembly, worship, and association. However, even during such emergencies, only those measures “that are reasonably justifiable for the purpose of dealing with the situation that exists during that period” are permitted by the Constitution.

Does a state of emergency exist in Ghana today? No, because none has been declared, and no Proclamation to that effect has been issued, gazetted, or presented to Parliament by the President. In other words, whether a state of emergency exists to warrant recourse to emergency powers is a political question for the President to determine in the first instance, subject to the prompt approval of Parliament. Up to this point, no such emergency has been declared.
What, then, is the constitutional basis for some of the extraordinary (though not all radical) measures already announced by the President in the wake of the Coronavirus pandemic? Good question.

In announcing those measures, the President did not proclaim or declare a state of emergency, as other national leaders have done. Neither did the President invoke any specific law as the basis or authority for the announced measures, which included measures infringing certain constitutional rights. He indicated at the time only that he had authorized the Attorney-General to complete the necessary legal papers that would ground the announced actions firmly in law.

What about the Imposition of Restrictions Bill laid before Parliament yesterday under a certificate of urgency? Well, it is not clear what the point is of that newly sought legislation. There is already the Emergency Powers Act (Act 472), enacted pursuant to the provisions of Article 31. If it was felt necessary to amend the Emergency Powers Act for any reason, that law could very easily be amended. The motive for resorting to a new Imposition of Restrictions law is, therefore, hard to divine. As far as I can tell, the bill fills no void in our current arsenal of statutory weapons available to the President to fight the domestic side of the present pandemic.

If the object of the Imposition of Restrictions Bill is to give the President power to take quick extraordinary measures in an emergency, as the Memorandum to the bill suggests, the Emergency Powers Act and Article 31 already give the President the tools to get the job done. (Curiously, while asking for new legislation, the President has not as yet tried to invoke the Emergency Powers Act or any other law for that matter). If, however, the point of the Imposition of Restrictions Bill is to give the President power to assume emergency powers without subjecting himself to Article 31, then there is no constitutional authority for that option of one-man rule by decree, no matter how convenient that option might be for a president.

Emergency powers, which are the powers that authorize the kind of far-reaching wholesale or mass restriction of rights ostensibly envisioned by the Imposition of Restrictions Act, can be authorized or done only "when a state of emergency is in force." Declaration of a state of emergency by Proclamation and, therefore, conformance with the dictates and strictures of Article 31, is a necessary predicate for the invocation either of the Emergency Powers Act or, for that matter, of any law that purports to authorize the assumption of emergency powers requiring the imposition of wholesale or mass restrictions on the range of rights protected as fundamental human rights in articles 12 to 30 of the Constitution.

What if the President has not made a determination that a state of emergency exists or is warranted? Of course, the President need not invoke, rely on or avail himself of Article 31 if he does not wish to declare a state of emergency. In that case, however, he denies himself the kind of sweeping, albeit regulated, emergency powers that a state of emergency would permit.

There are, of course, certain narrow restrictions, specifically on free movement of persons or residence within Ghana or entry into Ghana and on freedom of speech or expression, that may be imposed, pursuant to legislation, in normal, "non-state of emergency" times. There are many such laws on the books already. The Public Health Act, the Public Order Act, the Immigration Act, and various other laws permit the Executive branch to impose some narrow or targeted restrictions
in particular individual or selected cases in the interest of public safety, public order, public health and the preservation of social cohesion (e.g. against hateful propaganda, etc).

The President may determine, even in the face of this pandemic, that the current situation is of a kind or scale that does not rise to the level of, and therefore does not warrant declaration of, a state of emergency. That's his prerogative; he cannot be forced to declare a state of emergency if he does not wish to do so. If the people believe that his failure to do so is reckless, their remedy is a political one.

But that is not to say that the President lacks the power to respond to exceptional but "non-state of emergency" situations. In those circumstances, where he chooses not to invoke the Emergency Powers Act and Article 31, he can still fall on laws like the Public Health Act (Act 851), which allow him, acting through his responsible Minister, to take certain relatively limited, targeted and incremental measures, including more narrowly limited restrictions of certain rights of affected persons, in response to the situation. What the Constitution does not countenance is for the President to impose by executive Instrument in a "non-state of emergency" situation, restrictions of the kind and scale that would be expected in a state of emergency. That would amount to giving the President--ANY President, now or in the future--license to assume de facto emergency powers and thus rule by decree without subjecting himself to the framework and limits set forth in Article 31.

Thanks to the Constitution, not even Parliament can authorize such a displacement or circumvention of Article 31. If a President wants sweeping "emergency powers" under any law whatsoever, he and Parliament must simply follow the processes, including the timelines, stipulated in Article 31, beginning with the declaration by Proclamation of a state of emergency. In my view, that relatively easy first step, given the present circumstances, is long overdue.

In the present situation, the Government could simply have invoked the Public Health Act once a pandemic was declared by the World Health Organization, then escalated it to a state of emergency by invoking the Emergency Powers Act and Article 31 of the Constitution once we recorded one or a few cases of the pandemic or crossed a certain threshold along the path. These, of course, are political determinations to be made by the President and his advisers. However, not having taken either step, we are now faced with a situation where the emergency measures already taken and implemented are, strangely, without firm constitutional basis.

So what is the purpose and intent behind the Imposition of Restrictions Act? It is not clear to me. Both the Public Health Act and the Emergency Powers Act, if deemed inadequate, could be amended to deal with any perceived gap in the existing legislative regime for dealing with epidemics. However, that path has not been chosen. If the idea of this new bill is that Parliament, through this one-off legislation, would divest itself of the constitutional role and responsibility imposed on it by Article 31 and allow the President a free hand to rule by decree (via sweeping emergency powers) in an emergency, then, clearly, the bill or law cannot stand.

Even if the Imposition of Restrictions bill were to pass, as it most likely will, it cannot free Parliament or the President from the constitutional obligation to abide by Article 31, insofar as the law has the purpose or effect of allowing the President to assume emergency powers. Parliament cannot
outsource or abdicate its constitutionally assigned task. It can choose to be a rubber stamp, but it cannot give away to the President, Parliament’s non-delegable constitutional duty. Thus, if the idea here is to create an alternative path for the Executive to assume emergency powers without invoking a state of emergency, that unconstitutional agenda, too, must fail.

In short, given the tools that are now already available in the President’s constitutional tool kit, including the ability to amend existing legislation to accommodate any present challenges, it is hard to see any good faith or lawful warrant for passage of the so-called Imposition of Restrictions Act.

Like most Ghanaians, I support swift and radical action by the Government to wrestle down this epidemic before it wreaks havoc on our society and economy. But what is worth doing is worth doing right. Let’s focus on what matters and not get distracted and sidetracked from what needs to be done. Let us also not forget that the legislation Parliament is being asked to enact is not just a statute for this occasion or for this President only. It is designed for unknown contingencies and unknown future Presidents.

As the Americans like to say, if it ain’t broke, don’t fix it. The constitutional and legislative framework for a President of Ghana to respond decisively in an emergency is not broken. There is no point trying to fix that which is not broken.

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