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Quasi-state of emergency: assessing the constitutionality of Ghana's legislative response to Covid-19

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ABSTRACT

On 15 March 2020, the President of the Republic of Ghana addressed the nation on anti-coronavirus measures which took effect immediately. He directed the Attorney-General to submit an emergency legislation to Parliament and the Minister for Health to issue an immediate Executive Instrument to regulate the relevant measures. Five days later, Parliament passed the Imposition of Restrictions Act, 2020 (IRA) after a voice count in its favour. A few days, thereafter, the President issued an Executive Instrument (E.I. 64) pursuant to the IRA. The minority members of Parliament, some legal scholars and interested Ghanaians expressed their disapproval of the procedures leading to the enactment of the IRA as well as its nature, form and content. The contentions cover multiple constitutional and legal grounds including the procedural propriety of using a voice vote in Parliament for emergency legislation, the necessity of a new emergency legislation and the time limit for the new emergency legislation. Essentially, these issues point to assessing the overall constitutionality of the law-making procedures and legislative provisions of the IRA. This is the focus of this paper. The paper argues that the IRA stands unconstitutional from the very beginning of its intended existence. The paper concludes that while the IRA is currently operational, its continued existence is challengeable under the 1992 Constitution of Ghana, thus, there is a window of opportunity to right the wrong.

KEYWORDS Constitutionality; coronavirus; emergency legislation; emergency powers; Ghana; state of emergency

1. Introduction

Ghana confirmed its first two cases of the coronavirus disease (Covid-19) on 12 March 2020.¹ Three days later on 15 March 2020, the President of Ghana, Nana Addo Dankwa Akufo-Addo, addressed the nation on the measures taken against the spread of the coronavirus. In his address, the President

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¹Kwaku Agyeman-Manu, 'For Immediate Release: Ghana Confirms Two Cases of Covid-19' (Ministry of Health Press Release, 12 March 2020) <https://ghanahealthservice.org/covid19/downloads/covid_19_first_confirmed_GH.pdf> accessed 2 April 2020.

directed the Attorney-General to submit, immediately, to Parliament emergency legislation in accordance with article 21(4) (c), (d) & (e) of the 1992 Constitution of Ghana. He also directed the Minister for Health to declare a public health emergency pursuant to section 169 of the Public Health Act, 2012 (Act 851) to govern the relevant measures.² Within five days of this address, the Attorney-General had drafted and presented the Imposition of Restrictions Bill, 2020 to Parliament under a certificate of urgency. Parliament passed the bill into law after the third reading of the bill and a voice count in favour of the bill.³ The President assented to the bill and the following day the Imposition of Restrictions Act, 2020 (Act 1012) (hereafter referred to as IRA) was published in the gazette and entered into force. Two days later on 23 March 2020, the Imposition of Restrictions (Coronavirus Disease (Covid-19) Pandemic) Instrument, 2020 (E.I. 64) was also published in the gazette and entered into force.

From the outset, Ghana's legislative response to the Covid-19 pandemic was heavily censured by interested parties. For example, the minority members of Parliament opposed the IRA on the grounds that the Act proved inadequate to merit an urgent law-making process. The minority in Parliament also challenged the validity of using a voice count to decide on the urgent nature of the bill and consequently expressed their intention to file an action in the Supreme Court to seek the interpretation of the constitutional provision⁴ on voting in parliament.⁵ Other legal scholars and interested Ghanaians expressed their disapproval of the nature and content of the IRA and E.I. 64 as well as the processes leading to their enactment on various media platforms.⁶ The arguments raise multiple constitutional and

²Communications Bureau, 'President Akufo-Addo Addresses Nation on Measures Taken by Gov't to Combat the Coronavirus Pandemic' (Speech, 15 March 2020) <<http://presidency.gov.gh/index.php/briefing-room/speeches/1535-president-akufo-addo-addresses-nation-on-measures-taken-by-gov-t-to-combat-the-coronavirus-pandemic>> accessed 2 April 2020.

³Faustina Akwa, 'Parliament Passes Imposition of Restrictions Bill' (*MyJoyonline*, 21 March 2020) <<https://www.google.com/amp/s/www.myjoyonline.com/news/politics/parliament-passes-imposition-of-restrictions-bill/amp/>> accessed 1 April 2020.

⁴That is article 104 of the 1992 Constitution which deals with voting in parliament.

⁵Jerry Tsatro Mordy, 'Minority Signals Supreme Court action after rushed Restriction Bill Approval' (*MyJoyonline*, 20 March 2020) <https://www.myjoyonline.com/news/national/minority-signals-supreme-court-action-after-rushed-restriction-bill-approval/?_gl=1*1k959zr*_ga*S25zZUsw50ctNWxXbGZVUVJXWlpJYlRtRmFvbVpRbE0xekNJTGtVdm9YTHRidEtuQ19tbmt0ell2VGxOVWdOVA> accessed 2 April 2020.

⁶Kwadwo Appiagyei-Atua, 'Emergency without a State of Emergency: Effect of Imposition of Restrictions Act, 2020 on Rights of Ghanaians' (*MyJoyonline*, 2 April 2020) <<https://www.myjoyonline.com/opinion/emergency-without-a-state-of-emergency-effect-of-imposition-of-restrictions-act-2020-on-rights-of-ghanaians/>> accessed 2 April 2020. See H. Kwasi Prempeh, 'Executive Powers and Domestic Response to Coronavirus Pandemic: Is the Imposition of Restrictions Bill Necessary?' (*Ghana Law Hub*, 23 March 2020) <https://ghanalawhub.com/executive-powers-and-domestic-responses-to-the-coronavirus-pandemic-is-the-imposition-of-restrictions-bill-necessary/?fbclid=IwAR1PUbdGj0q0QmU11E8UElbi_1_aV_EG7vP_qfEJwFHe0gVqhQ779YMWWea0> accessed 1 April 2020. See also Joseph Opoku Gakpo, 'Imposition of Restriction Bill 2020 worse than State of Emergency-Muntaka' (*MyJoyonline*, 19 March 2020) <<https://www.myjoyonline.com/news/imposition-of-restriction-bill-2020-worse-than-state-of-emergency->

legal issues which include (i) the procedural propriety of a voice vote in Parliament for emergency legislation; (ii) the necessity of the new legislation and (iii) the time limit for the new emergency legislation. Essentially, these issues point to assessing the overall constitutionality of the law-making procedures and legislative provisions of the IRA. This is the focus of this paper.

The paper addresses the issues mentioned in four sections. Section two focuses on the existing legal framework governing emergencies in Ghana before the IRA. It also examines the extent to which the existing framework fit the purpose of addressing the coronavirus pandemic in Ghana. Section three examines the IRA's nature, form and content. Section four critically analyses the constitutionality of the IRA and argues that the IRA is unconstitutional in terms of the procedural propriety of its making and its content. The section also assesses the implications of the IRA on Ghana's constitutional order during the Covid-19 pandemic and its aftermath. The final section concludes on the way forward by making a call to straighten things up using the available constitutional devices.

2. Existing laws on state of emergency in Ghana before the IRA

Laws governing state of emergency in Ghana have existed long before the IRA was passed. They are found in the 1992 Constitution and other statutes. The constitutional provisions on state of emergency are found in articles 31 and 32 of the 1992 Constitution. The Emergency Powers Act 1994 (Act 472) (hereafter referred to as the EPA) is the main statute of general application regulating state of emergency although there are other emergency provisions in various specialised statutes which may be triggered by emergency situations specific to their subject matter. This section delves into what constitutes a state of emergency as explained in the existing laws prior to the IRA as well as the procedures for handling emergencies. The section also explores the legitimacy of Covid-19 pandemic as a trigger for a state of emergency under the pre-IRA laws. The section then winds up by appraising the efficacy of pre-IRA laws to handle the Covid-19 pandemic.

2.1 State of emergency: nature and procedures

While the 1992 Constitution and the EPA do not expressly define 'state of emergency' they provide for the circumstances which may give rise to one. The circumstances that could prompt a state of emergency which,

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.⁷

It is worth noting that in laying out the circumstances that could trigger a state of emergency both the Constitution, 1992 and the EPA use open ended language. The use of the word 'include' widens the pool of possible circumstances that could lead to a state of emergency such as a global health pandemic. Any interpretation of this 'circumstances' clause that is so restrictive as to exclude all other circumstances not expressly mentioned would be against the nature of the Constitution as a living organism capable of growth and development.⁸

The President acting in consultation with the Council of State may declare a state of emergency covering a part of Ghana or the whole Ghana by publishing a Proclamation to that effect in the gazette.⁹ After the declaration, the President is required to immediately present the facts and circumstances leading to the declaration of emergency to Parliament for approval or otherwise.¹⁰ The emergency proclamation has a seven-day life span pending parliamentary approval.¹¹ Parliament has 72 hours within which to approve or revoke the emergency proclamation by a resolution passed by a majority of all members of Parliament for that purpose.¹² If the emergency proclamation is approved, the state of emergency will remain in force for three months or such earlier date that may be specified in the Parliamentary resolution.¹³ If the proclamation is revoked, Parliament could specify in the revoking resolution that the emergency proclamation is revoked immediately, or that the proclamation may expire automatically after its seventh day of existence whichever is earlier. An approved emergency proclamation may be further extended by Parliament for a period of not more than one month at a time.¹⁴ Parliament may also revoke an emergency proclamation at any time.¹⁵

A state of emergency confers consequential powers on the President. The President is empowered to take measures which the President may consider as 'reasonably justifiable' for dealing with the emergency situation within the period that the state of emergency is in force.¹⁶ The EPA goes a step

⁷1992 Constitution of the Republic of Ghana, art 31(9). Emergency Powers Act, 1994 (Act 472), s. 1(2).

⁸See *Tuffuor v. Attorney General* [1980] GLR 637, C.A. sitting as S.C. where Sowah JSC described a constitution as a living organism capable of growth and development.

⁹1992 Constitution, art 31(1). EPA, s. 1(1).

¹⁰1992 Constitution, art 31(2). EPA, s. 2(a).

¹¹1992 Constitution, art 31(4). EPA, s. 3(1).

¹²1992 Constitution, art 31(3). EPA, s. 2(b).

¹³1992 Constitution, art 31(5). EPA, s. 3(2).

¹⁴1992 Constitution, art 31(6). EPA, s. 4(a).

¹⁵1992 Constitution, art 31(7). EPA, s. 4(b).

¹⁶1992 Constitution, art 31(10). EPA, s. 5(1).

further than the 1992 Constitution to list some of the measures that the President may take during an emergency. The President may order the: (i) detention of persons or the restriction of movement of persons; (ii) deportation and expulsion from the Republic of a person who is not a citizen; (iii) taking possession or control of a property on behalf of the Republic; (iv) acquisition of property; (v) searching of premises without a warrant; (vi) payment of compensation to a person affected by an action taken under the emergency; (vii) arrest, trial and punishment of a person for breach of an instrument, order or a declaration related to the state of emergency; and (viii) suspension of the operation of law.¹⁷ Where the emergency covers only a part of Ghana the President may also order the removal of a person from the emergency area.¹⁸ The President also has the power to prevent assistance to an enemy in case of war, although this preventive power can only be exercised when the emergency affects the whole Ghana.¹⁹ The listed emergency measures are not exhaustive. In fact, they exist without prejudice to the wide-ranging powers of the President to take measures considered 'reasonably justifiable'.²⁰

The President may exercise emergency powers by issuing executive instruments, orders or declarations published in the Gazette.²¹ The President may use these instruments, declarations or orders to empower other persons or authorities to take the steps or actions specified in them. These emergency instruments may also contain incidental and supplementary provisions which the President considers to be necessary or expedient for dealing with the emergency situation.²²

As a final point, the constitutional provisions on state of emergency contain a derogation clause which allows for actions or steps taken in pursuance of a declaration of state of emergency to derogate from the fundamental human rights obligations under articles 12–30 of the 1992 Constitution.²³ With this understanding of the nature of a state of emergency, this paper proceeds to look at the prospect of Covid-19 as a trigger for a declaration of state of emergency in Ghana.

2.2 Covid-19 and state of emergency

This subsection revolves around the question: does Covid-19 justify a declaration of state of emergency in Ghana? The response is, yes it does. As mentioned earlier, the open-ended language of the 'circumstances' clause in the Constitution, 1992 and the EPA make room for a global pandemic such as

¹⁷EPA, s. 5(2)(b).

¹⁸EPA, s. 5(2)(b)(ix).

¹⁹EPA, s. 5(2)(a).

²⁰EPA, s. 5(2).

²¹EPA, s. 5(3).

²²EPA, s. 5(4).

²³1992 Constitution, art 31(10). EPA, s. 6.

Covid-19 to be included in the list of possible circumstances that could trigger a state of emergency.

Additionally, the nature of the spread of Covid-19 satisfies the conditions for a declaration of a public health emergency under s. 169 of the Public Health Act, 2012 (Act 851). Under s. 169 of the Public Health Act (PHA), the Minister is empowered to declare a public health emergency by an Executive Instrument where there is a situation that poses an immediate risk to health, life, property or the environment. The PHA provides the litmus test for declaring a public health emergency which is that the incident should: (i) immediately threaten life, health, property or the environment; (ii) have already caused loss of life, health detriments, property damage or environmental damage; or (iii) have a high probability of escalating to cause immediate danger to life, health, property and the environment.²⁴ The import of this test is that at least one of the three criteria must be met for a public health emergency to be declared. On 12 March 2020 when Ghana confirmed its first two Covid-19 cases, there was a high probability of the virus escalating to cause immediate danger to life and health considering the rate of spread and death in other parts of the world.²⁵ Thus, Covid-19 satisfied at least one of the criteria for declaring a public health emergency.²⁶ This is against the background that the World Health Organisation (WHO) had earlier declared the coronavirus outbreak as a public health emergency of international concern on 30 January 2020,²⁷ and had also declared the outbreak as a global pandemic on 11 March 2020,²⁸ just a day before Ghana confirmed its first two cases. The PHA under s. 168 incorporates the WHO International Health Regulations, 2005 in the seventh schedule. Article 1 of the WHO Regulations defines a public health emergency of international

²⁴Public Health Act, 2012 (Act 851), s. 169(2).

²⁵As of 12 March 2020, there were 125,260 confirmed cases and 4613 death worldwide. The WHO's risk assessment of the pandemic at the global level was 'very high'. World Health Organisation, 'Coronavirus disease 2019 (covid-19): Situation report – 52' (World Health Organisation, 12 March 2020) <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200312-sitrep-52-covid-19.pdf?sfvrsn=e2bfc9c0_4> accessed 28 May 2020.

²⁶That the confirmation of the first two cases of covid-19 in Ghana could also satisfy the first two criteria is likely but contentious. This is because while two persons have been infected, the virus did not immediately pose a threat to life and health of the Ghanaian populace, rather the virus posed an impending threat to life and health. Also, while covid-19 may have already caused loss of life or health detriment in other nations around the world, that was not the state of affairs in Ghana when the first two cases were confirmed. The PHA is a domestic legislation intended to be construed domestically and so it will be ill-advised to invoke its powers domestically based on international happenings. Thus, during the initial stages of the pandemic in Ghana, the third criteria would have been the most appropriate one to invoke.

²⁷World Health Organisation, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (Speech, 11 March 2020) <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>> accessed 4 April 2020.

²⁸World Health Organisation, 'WHO Director-General's Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)' (Speech, 11 March 2020) <[https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihc-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihc-emergency-committee-on-novel-coronavirus-(2019-ncov))> accessed 4 April 2020.

concern as ‘an extraordinary event which is determined ... (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a co-ordinated international response’. Accordingly, on 30 January 2020 when WHO declared the coronavirus outbreak as a public health emergency of international concern, Ghana was put on notice of an imminent public health emergency.

Without a doubt, the discussion in this subsection demonstrates that the initial confirmation of Covid-19 cases in Ghana could have triggered a declaration of emergency on all levels constitutional and statutory. That is under the authority of the Constitution, 1992, the EPA and the PHA. The final part of this section now considers how effective the existing emergency laws are to deal with an emergency prompted by Covid-19.

2.3 Efficacy of existing emergency laws to deal with Covid-19 pandemic

Are the existing laws on emergencies fit for the purpose of dealing with Covid-19 as to render a new legislation unnecessary? Absolutely! In fact, none of the red tape associated with the passing of the IRA would have occurred had the President chosen to work with the existing emergency laws. The existing laws present two alternatives. The first is that, on Sunday, 15 March 2020 when the President addressed the nation on the measures put in place to prevent the spread of Covid-19, those measures could have simply been framed as a Proclamation of a state of emergency under article 31 of the 1992 Constitution. Of course, prior to doing so he would have consulted with the Council of State seeing as there was three-day gap between the date of the first confirmed cases and the date of his address. Then, the President would submit the Proclamation to Parliament for approval on the following day, Monday, 16 March 2020. Parliament would then deliberate on the Proclamation and once they approve within 72 hours, a state of emergency would be in effect for at most three months with the option of monthly renewals. All things being equal, it would have taken approximately four days (that is by Thursday, 19 March 2020) to regularise a state of emergency.

The second alternative would be that on Thursday, 12 March 2020 when the Minister for Health confirmed the first two Covid-19 cases in Ghana, the Minister could have immediately followed it up with a declaration of a public health emergency which allows him to direct public health officials to respond immediately by taking preventive measures.²⁹ This would have snowballed the urgency of the situation and would also serve as an invitation

²⁹PHA, s. 170.

to the President to declare a state of emergency by going through the procedure described in the preceding paragraph.³⁰

Considering that the majority of the members of Parliament owe allegiance to the same political party as the President, the likelihood of a Proclamation of state of emergency being rejected was slim. Especially since parliamentary approval for a state of emergency is by a simple majority. Also, one can infer from the haste with which Parliament approved the IRA under a certificate of urgency that, the President had nothing to lose by taking the state of emergency route. The President declaring a state of emergency would have saved time, legislative and executive resources especially because with managing the Covid-19 pandemic, time was of essence, every second mattered. What's more, the emergency powers created under the IRA, are comparatively similar to the emergency powers under the existing laws, except that while the former is permanent and barely subject to accountability, the latter is transient and subject to regular and periodic accountability. The next section takes a look at the nature of the IRA and its supplementary executive instruments.

3. Imposition of restriction act: Ghana's legislative response to Covid-19

What is the nature of the IRA? What is the place of the IRA in Ghana's emergency regime? These are the questions this section addresses. The IRA is a terse enactment of seven sections intended to impose restrictions on persons 'in the event or imminence of an emergency, disaster, or similar circumstance to ensure public safety, public health and protection'.³¹

The President is vested with power to impose restrictions by an Executive Instrument³² with the advice of a 'relevant person or body'. The IRA is however silent on the meaning of and the composition of 'relevant person or body'. The implication is that the President may opt out of the advice aspect of the Act and would not likely be questioned as there is no strong

³⁰The reverse happened in practice. The Minister of Health only issued an Executive Instrument, the Public Health Emergency (Coronavirus (COVID-19) Pandemic) Instrument, 2020 (E.I. 61), after the President had given instructions to do so in the 15 March address to the nation. See 'Coronavirus: Health Minister Issues Executive Instrument Today' (*Ghanaweb*, 16 March 2020) <<https://mobile.ghanaweb.com/GhanaHomePage/NewsArchive/Coronavirus-Health-Minister-issues-Executive-Instrument-today-895483>> accessed 5 April 2020. See also Communications Bureau (n 2).

³¹Imposition of Restrictions Act, 2020 (Act 1012), s. 1 & 3.

³²An Executive Instrument (EI) is an instrument specified by an Act of Parliament as an executive instrument; or a statutory instrument which is of an administrative character or of an executive character and is not an instrument of a judicial character, or a legislative character.: Interpretation Act, 2009 (Act 792), s.1; Statutory Instruments Act 1959 (Act 52) as amended, s.5. See *Baffour Osei-Akoto v. The Attorney General Supreme Court Civil Appeal No. J1/16/202* where the Supreme Court held that although an EI is a statutory instrument, it is not an order as in commands issues by members of the executive and not an order in the form of order, rule or regulation under article 11(7) of the 1992 Constitution.

basis for doing so.³³ Even if the President were to be questioned, there will be no known and definite standard to measure the relevance of the advisors and authenticity of the advisory process. This structure is in direct contrast with the 1992 Constitution and the EPA which direct the President to consult with an identified body of professionals, experts and experienced persons – the council of state – during emergencies. Whether the President consults the council of state can be easily verified because it is constitutional requirement. The lack of similar transparency surrounding who the President consults and whether the President consulted during emergencies under the IRA is disconcerting.

The restrictions imposed by the President under the IRA may last for a maximum of three months at a time.³⁴ The President may shorten or extend the duration of the restriction for not more than one month at a time where the exigencies of the circumstances so require.³⁵ Unlike the Constitution, 1992 and the EPA which sanction Parliament to shorten or extend the duration of an emergency, the IRA gives that power to the President without any checks. The President is made the sole decider of shortening or extending the duration of restrictions. Under the IRA, Parliament has ceded its oversight authority and given the President unbridled powers to impose restrictions for so long as he deems fit. Emergencies are not a license to unleash executive powers, if it were so, the constitutional provisions on emergencies would have stated it. Rather we see the 1992 Constitution subjecting executive powers to parliamentary checks during emergencies. And so, to enact an emergency legislation that gives the President unrestrained powers is threatening to Ghana's democracy as this extraordinary power given to the President under the IRA is susceptible to abuse by future presidents.

Also, an Executive Instrument made under the IRA should contain the specific restriction to be imposed, the duration of the restriction, the person to whom the restriction applies, the geographic areas to which the restriction applies, the facts and circumstances for the restriction and any other incidental matters.³⁶ At the time of writing this paper, the President had issued three Executive Instruments pursuant to the IRA namely E.I. 64,³⁷ E.I. 65³⁸ and E.I.

³³The provision directing the President to seek the advice of a relevant person or body uses the expression 'may' which is to be construed as permissive and empowering according to s. 42 of the Interpretation Act, 2009 (Act 792).

³⁴IRA, s. 4(1).

³⁵IRA, s. 4(2).

³⁶IRA, s. 2(2).

³⁷Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) Instrument 2020. E.I. 64 came into force on 23 March 2020. E.I. 64 gave effect to the initial restrictions by the President in his address on 15 March 2020. These were basically social distancing restrictions.

³⁸Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 2) Instrument 2020. E.I. 65 came into force on 30 March 2020. E.I. 65 imposed a partial lockdown in specified areas considered as coronavirus epicentres.

66.³⁹ The IRA makes a breach of the restrictions imposed under the Executive Instruments an offence. A person who is convicted of this offence is liable to a fine of not less than one thousand penalty units and not more than five thousand penalty units⁴⁰ or to a term of imprisonment of not less than four years and not more than ten years or to both.⁴¹

At first glance, the IRA appears to create a model similar to that of the United Kingdom's response to the coronavirus pandemic, that is, passing a special Covid-19 legislation which grants emergency powers without declaring a state of emergency. Except that, in U.K.'s case the special legislation actually mentions Covid-19, is tailor-made for Covid-19, and has an expiration date⁴² but Ghana's IRA has none of these features. Although induced by the Covid-19 pandemic, the IRA is silent on the pandemic itself and instead puts on a generic ensemble to cater for all emergencies. It is rather the ephemeral Executive Instruments issued pursuant to the IRA that mention and address coronavirus restrictions. Clearly, the IRA is intended to survive the aftermath of the Covid-19 crisis.⁴³ Combined with the unbridled executive powers, the absence of a time limit on the IRA puts Ghana's democracy at the risk of a future president who may abuse the Act and its powers.

Finally, the IRA derives its authority from article 21(4)(c) (d) & (e) of the 1992 Constitution. Article 21(4)(c) (d) & (e) of the 1992 Constitution permits imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or running of essential services on the freedom of movement within Ghana and to Ghana and for the purpose of safeguarding Ghanaians against the teaching and propagation of doctrine which encourage disrespect for the nation. The restriction powers under article 21(4)(c) (d) & (e) are what is often referred to as 'ordinary' limitations on the exercise of human rights since they can be imposed permanently and

³⁹Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 3) Instrument 2020. E.I. 66 came into force on 3 April 2020. E.I. 66 extended the restriction on travel to Ghana by air, land and sea by two weeks.

⁴⁰A penalty unit is currently GHS 12.00 (approximately \$ 2.00 USD) under the Fines (Penalty Units) (Amendments) Instrument, 2005 (LI 1813). Therefore, the fine under the IRA ranges from GHS 12,000.00 (approximately \$ 2080.00 USD) to GHS 60,000.00 (\$ 10,400.00 USD)

⁴¹IRA, s. 6.

⁴²Coronavirus Act 2020 (c.7). The Act expires at the end of the period of 2 years from the day on which it was passed subject to certain altering conditions: C.7, ss 89 & 90.

⁴³The Attorney-General, Ms. Gloria Akuffo, explained on the floor of Parliament that while she understood the concerns about the IRA's lack of reference to coronavirus, putting those concerns in the bill was not what the bill was about. 'The emphasis is creating a Bill for legislation that will deal not only with the risk that our country has been exposed to presently but also in the future': Nana Konadu Agyeman, 'Parliament Passes the Imposition of Restrictions Bill, 2020' (*GraphicOnline*, 21 March 2020) <<https://www.graphic.com.gh/news/politics/ghana-news-parliament-passes-the-imposition-of-restrictions-bill-2020.html>> accessed 5 April 2020. See also records of parliamentary proceedings which show that all suggestions to include reference to coronavirus in the IRA were rejected: 'Votes and Proceedings: Minutes of the Thirty-Second Sitting of the First Meeting of Parliament' (Minutes, 20 March 2020) <<https://www.parliament.gh/epanel/docs/pb/VOTES-Friday,%2020th%20March%202020.pdf#viewer.action=download>> accessed 5 April 2020.

only in normal times but not in emergency times. ‘Ordinary’ restrictions are characteristic of modern constitutions. These limitations are either built-in the ‘formulation of a right itself’ or portrayed in the form of exceptions expressly stating the instances where the rights are not covered as in article 21(4)(c) (d) & (e) of the 1992 Constitution.⁴⁴ ‘Derogations’, also known as ‘extraordinary’ restrictions on the exercise of human rights, are what have been designed for emergency situations.⁴⁵

Although the notion of ordinary limitation of human rights and derogation from human rights may lead to the same conclusion, that is restriction of rights, the two are different. Derogation has been explained to mean the legal authority of states bound by treaty and constitutional obligations to ‘suspend certain civil and political liberties – in response to crisis’.⁴⁶ The sole justification for derogation is the concern to return to normalcy, which was the status quo.⁴⁷ In order to keep this intent to return to normalcy alive, derogation is characterised by certain compliance features including mandatory ‘notification of derogation to specified individuals or groups’ such as Parliament and adherence to procedures such as parliamentary oversight and review.⁴⁸ Derogations by their nature are time bound because emergency situations do not exist in perpetuity. On the other hand, ordinary limitation of rights is not necessarily time bound and may exist at all times. Therefore, by expressly mentioning that the IRA’s object is to restrict persons ‘in the event or imminence of an emergency’⁴⁹ it was impracticable to draw the IRA’s authority from constitutional provisions intended to be used in normal times and not emergency times. The IRA as it stands now, therefore, has no legitimate constitutional blessing. Consequently, the place of the IRA in Ghana’s emergency regime is unprecedented and puzzling. It creates what we may call a ‘quasi-state of emergency’. The IRA authorises the President to exercise extraordinary powers in emergency situations without declaring a state of emergency at the same time as it draws the authority for those extraordinary powers from ‘state of normalcy’ provisions under

⁴⁴Viktor Mavi, ‘Limitations of and Derogations from Human Rights in International Human Rights Instruments’ (1997) 38 *Acta Juridica Hungarica* 107.

⁴⁵See more on the differences between ‘ordinary’ restrictions and ‘extraordinary’ restrictions of human rights in Office of the High Commissioner for Human Rights & International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer* (Professional Training Series No. 9, United Nations Publications 2002).

⁴⁶Oren Gross and Fionnuala Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006). Viktor Mavi (n 44).

⁴⁷Gross and Ni Aoláin (n 46).

⁴⁸Paige Tapp, ‘To Derogate or not to Derogate, that is the Question: A Comparison of Derogation Provisions, Alternative Mechanism and Their Implications for Human Rights’ (2019) International Immersion Program Papers, University of Chicago Law School <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1116&context=international_immersion_program_papers> accessed 28 May 2020.

⁴⁹IRA, s.1.

article 21(4)(c) (d) & (e) of the Constitution, 1992. These complexities together with other emerging issues are unpacked in the next section.

4. Constitutionality of the IRA and its implications for Ghana's constitutional order

The path leading to the IRA is spotted with constitutional discrepancies and grey areas. This section addresses some of them. It provides systematic assessment of the overall constitutionality of the law-making procedures and the relevant legislative provisions of the IRA while examining its implications for Ghana's constitutional order.

First of all, the minority in Parliament contended the use of voice vote in two instances of the law-making process leading to the IRA. The first instance was that a voice vote was allegedly used by the Parliamentary committee on Constitutional and Legal Affairs to decide whether to pass the IRA under a certificate of urgency.⁵⁰ The second instance was that a voice vote was used to pass the bill into law after the third reading.⁵¹ The minority in Parliament have indicated their intention to seek an interpretation on the conduct of votes in Parliament under article 104 of the Constitution in the Supreme Court.⁵² Considering the unique circumstances leading to the IRA and other constitutional provisions, it is likely that Parliament's use of voice vote may be justified. To begin with, article 115 of the 1992 Constitution guarantees freedom of parliamentary proceedings and prohibits that freedom from being impeached or questioned in any court of place out of Parliament. In both instances of parliamentary voice vote therefore, article 115 could potentially prevent the court from inquiring into it. In relation to the second instance of voice vote, article 106 (13) of the Constitution, 1992 adds an extra layer of immunity from judicial intervention. Article 106(13) dispenses with the standard law-making process in Parliament, including voting by a resolution of not at least two-thirds of all members of Parliament, where a committee of Parliament determines that a bill is of an urgent nature. Since the IRA was of an 'urgent nature' its law-making process is arguably covered by article 106(13). Also, depending on how the minority in Parliament frames its reliefs, if the Supreme Court finds that by interpreting article 104 of the Constitution, there is a possible consequence of pronouncing on proceedings in parliament, which are immune from judicial intervention, the Supreme court may refrain from looking into the matter altogether.⁵³

⁵⁰Akwa (n 3). See also Ernest Kofi Adu, 'Drama with Restriction Bill in Parliament' (*ModernGhana*, 21 March 2020) <<https://www.google.com/amp/s/www.modernghana.com/amp/news/990721/drama-with-restriction-bill-in-parliament.html>> 5 April 2020.

⁵¹*ibid.*

⁵²Akwa (n 3).

⁵³See *Bimpong Buta v. General Legal Council* [2003–2005] 1 GLR 738; *Yiadom I v. Amaniapong* [1981] GLR 3; *Edusei (No. 2) v. Attorney-General* [1998–99]; and *Aduamo II v. Twum II* [2000] SCGLR 165. In these

Notwithstanding all these possibilities the interpretation of the constitution and the determination of limitations, if any, on the parliamentary immunities discussed ultimately rest with the Supreme Court.

Secondly, the restrictions imposed by the President in his address on 15 March 2020 which took effect immediately did not have the backing of any law at the time. This is because, the IRA was passed six days after the President's address and the Executive Instrument, E.I.64, which gave effect those restrictions came into force eight days later. Two constitutional discrepancies arise here. The first is that between 15 March 2020 and 23 March 2020 when E.I. 64 came into force, any charges for breach of Presidential order were unconstitutional. The basis for this claim is found in article 19(5) of the 1992 Constitution which provides that a person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence. On 18 March 2020, the police arrested one Apostle Kofi Nkansah-Sarkodie of the Open Arms Ministries in Kumasi for breach of Presidential order by holding a church service.⁵⁴ The arrest and charge were both unconstitutional given that, the President had no legal authority to back his orders and so there was no offence created in law within that period. The mere words of the President, and nothing more is not and cannot be law. Such constitutional hitches would not have arisen in the first place had the President made a Proclamation of emergency on 15 March 2020 pursuant to article 31 of the 1992 Constitution. Had the President done so, his words and directives would have immediately had the force of law. The second discrepancy relates to the retrospective operation of the IRA and E.I. 64, in relation to the alleged breaches between 15 March 2020 and 23 March 2020, which goes against article 107(b) of the 1992 Constitution. Article 107(b) forbids retrospective operation of the law to impose limitations and so the IRA and E.I. 64 could not be used to regularise the initial presidential directives and penalise offenders of those directives.⁵⁵

Thirdly, the constitutional basis of IRA, article 21(4)(c)(d) &(e) is questionable. As mentioned earlier in section three, article 21(4)(c) (d) & (e) is meant to be used in ordinary times and create limitations that are usually permanent. In the coronavirus address delivered on 15 March 2020, President Akufo Addo acknowledged that 'these are not ordinary times'.⁵⁶ And so the

decided cases, the Supreme Court resisted invitations to pronounce on the meaning of constitutional provisions for various reasons including the fact that the issues to be determined were clothed as matters of interpretation when in fact those issues were not exclusively determinable by the Supreme Court but fell within a cause of action cognizable by any other court or tribunal of competent jurisdiction.

⁵⁴Pastor Arrested for Holding Church Service in Defiance of Government's Directives' (*Ghanaweb*, 19 March 2020) <<https://mobile.ghanaweb.com/GhanaHomePage/NewsArchive/Pastor-arrested-for-holding-church-service-in-defiance-of-government-s-directives-898180>> accessed 5 April 2020.

⁵⁵Appiagyei-Atua (n 6).

⁵⁶Communications Bureau (n 2).

proper course of action was to declare a state of emergency and not to invoke an 'ordinary time' provision to support emergency actions.

Away from that argument, I now turn to article 298 on the residual powers of Parliament which provides,

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 an Act of Parliament, not being inconsistent with any provision of this Constitution, provide for that matter to be dealt with.⁵⁷

The import of article 298 is that once the Constitution addresses a matter either expressly or impliedly, there is usually no need for Parliament to exercise its residual powers to enact an Act of Parliament on the matter unless it is absolutely necessary. Where Parliament enacts a law on matter already provided for by the Constitution, then the resultant legislation is intended to provide further details on the matter. For example, although emergency situations are expressly provided for in the 1992 Constitution, Parliament enacted the EPA to provide more details on states of emergencies. If additional gaps are identified in the EPA, the next logical step is to amend the EPA to address those gaps. Enacting an entirely different law to address emergencies which could have been addressed by the existing law information creates multiplicity of legislation on a single matter and is likely to lead to uncoordinated responses to similar emergencies future. Covid-19 pandemic as demonstrated earlier in this paper rightly triggers a state of emergency. Therefore, the Covid-19 crisis is impliedly addressed by the Constitution under article 31. For these reasons, there was no need for Parliament to enact the IRA.

Finally, officially declaring a state of emergency under article 31 of the Constitution as mentioned earlier allows emergency powers to be used only in emergency times and not in normal times. So far as the President has not declared a state of emergency, the 'emergency effect' of his extraordinary powers under the IRA remains unconstitutional. The IRA in effect serves as a smokescreen which displays the extraordinary powers invoked by the President as compatible with the emergency legal framework. In truth, the IRA scrapes off of all levels of accountability connected with declaring a state of emergency – first, consultation with the council of state,⁵⁸ second, approval of Parliament⁵⁹ and third, responsibility to the international community. The first two levels of accountability which have been discussed in section three are constitutionally mandated to ensure that even in emergency times there are checks and balances in place. At the international level, Ghana

⁵⁷Emphasis added.

⁵⁸1992 Constitution, art. 31(1).

⁵⁹1992 Constitution, art. 31(2), (4) & (5).

has obligations under international treaties that it has ratified such as the International Covenant on Civil and Political Rights (ICCPR).⁶⁰ The ICCPR addresses state conduct in emergency times under article 4. The ICCPR is annexed by the Siracusa Principles which further address derogation in a public emergency. By failing to declare a state of emergency therefore, Ghana evades accountability to the international community on how extraordinary powers are being used. By virtue of the IRA, Ghana is currently in a 'quasi-state of emergency' typified by a mishmash of extraordinary powers that are unconstitutional. The IRA makes the President a demi-god who wields powers with diminutive restraint. Consider how post-IRA, the President, without declaring a state of emergency has proceeded to issue an Executive Instrument on Emergency Communications System, 2020 (E.I. 63) to aid contact tracing in respect of the pandemic. Aside the fact that the provisions in this EI are intrusive and not time-bound, E.I. 63 has been wrongly invoked as the enabling Act of Parliament intended such E.I.s to be used only when a state of emergency has been declared under article 31 of the 1992 Constitution.⁶¹ Therefore, since no state of emergency has been officially declared, E.I. 63 is unconstitutional. Clearly, the unconstitutionality of the IRA does not affect the Act only but also the powers that flows from it.

The above constitutional inconsistencies put the nation on the pathway to tyranny and the longer we tread this path, the more difficult it will be to recover without damaging consequences. The next and final section provides some insight on the necessary next steps.

5. The way forward

This paper set out to examine the constitutionality of the IRA which is Ghana's legislative response to the global pandemic. In order to adequately address this core objective, the paper considered multiple facets of Ghana's legislative response and arrived at the following conclusions: (i) the pre-IRA legal framework was sufficient to deal with the Covid-19 pandemic and so the IRA was not necessary; (ii) Parliament's use of voice vote during the legislation process is arguably appropriate considering the urgency surrounding the process. Also, parliamentary immunity for in-house proceedings is likely to be a bar to any suit intended to question the voice vote; (iii) the IRA creates a 'quasi-state of emergency' which is alien to Ghana's constitutional framework; (iv) the IRA provides a leeway for the President to

⁶⁰Ghana ratified the ICCPR on 7 September 2000: United Nations Treaty Collection, 'International Covenant on Civil and Political Rights' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-4&chapter=4&clang=_en> accessed 2 April 2020.

⁶¹Electronic Communication Act, 2008 (Act 775), ss. 99 & 100. See Appiagyei-Atua (n 6). See also Samson Anyenini, 'Powers in Executive Instrument Unconstitutional, Illegal' (MyJoyOnline, 4 April 2020) <<https://www.myjoyonline.com/news/national/powers-in-executive-instrument-unconstitutional-illegal-samson-anyenini/>> accessed 6 April 2020.

exercise extraordinary powers without accountability both nationally and internationally; and (v) the IRA is susceptible to abuse by future Presidents. Subsequently, this paper concludes that the IRA does not have a valid constitutional basis and so every action or instrument flowing from it is unconstitutional.

What then should be the way forward? Eternal vigilance is the price we pay for liberty⁶² and so the people of Ghana in whom sovereignty resides and the courts which are the guardians of our constitutional liberties should rise to occasion to safeguard constitutionality and the rule of law. Article 2(1) of the 1992 Constitution allows a person to institute an action in the Supreme Court for a declaration that an enactment is inconsistent with the Constitution. Where the Supreme Court makes such a declaration, it is to make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given to the declaration made.⁶³ Any person or group of persons to whom the Supreme Court's order or direction is addressed is to obey and carry out the terms of the order or direction.⁶⁴ Any person or group of persons who disobey the order or direction commit a high crime and in the case of the President or Vice-President, such disobedience will constitute a ground for removal from office.⁶⁵ Accordingly, there is an opening through judicial review to fix the unconstitutionality that has been set in motion by the IRA. The Supreme Court per Acquah JSC in *Mensima v. Attorney General*⁶⁶ stated:

Article 1(2) of the 1992 Constitution is the bulwark which not only fortifies the supremacy of the Constitution but also makes it impossible for any law or provision inconsistent with the Constitution to be given effect to ... *For article 1(2) contains a built-in repealing mechanism which automatically comes into play whenever it is found that a law is inconsistent with the Constitution.* It therefore follows that the submission based on the fact that [a law has] not been specifically repealed, and therefore valid, misconceives the effect and potency of article 1(2), and thereby underrates the supremacy of the 1992 Constitution.⁶⁷

Therefore, a declaration of unconstitutionality by the Supreme Court is enough to turn things around by scrapping the IRA and redirecting us to what should have been, which is declaring a state of emergency. Of course, it goes without saying that as it stands the IRA ultimately leads the President to use Executive Instruments which is the same device available to the

⁶²This phrase is attributed to Thomas Jefferson: José Igreja Matos, 'Access to Justice in Times of Judicial Lockdown' (UNODC, 31 March 2020) <<https://www.unodc.org/dohadeclaration/en/news/2020/03/access-to-justice-in-times-of-judicial-lockdown>> accessed 6 April 2020.

⁶³1992 Constitution, art. 2(2).

⁶⁴1992 Constitution, art. 2(3).

⁶⁵1992 Constitution, art. 2(4).

⁶⁶[1997–98] 1 GLR 159.

⁶⁷*Ibid* 712–13. Emphasis added.

President under a state of emergency. In fact, the latter offers additional options – Presidential declarations and orders.⁶⁸ We must not standby and look on while the IRA nibbles away at the supremacy of the 1992 Constitution. We must put things in order so that in future, we will be proud as a nation about how we responded to the Covid-19 pandemic without compromising on constitutionality.

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⁶⁸EPA, s. 5(3).