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DEATH PENALTY DAY IN COURT IN GHANA

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I. Introduction

The jurisprudential question of whether the death penalty should be abolished in Ghana has been a polarizing one among students of law and scholars alike. This debate is, however, arguably surpassed in its obvious importance by the question of whether the exercise of this punishment is compatible with the spirit, if not the letter, of the Constitution 1992 of Ghana. Notably, the latter question was seemingly put to rest by the Supreme Court in the case of *Dexter Johnson v The Republic*.[1] Seemingly because the Court was called upon to decide whether the mandatory imposition of the death penalty for murder was constitutional. The Court, in a 4-1-majority decision, answered the question in the negative, to the disappointment of many, stating emphatically that death penalty in Ghana was, in fact, consistent with the letter and spirit of the Constitution 1992 as well as its mandatory imposition.

That decision notwithstanding, this paper will, among other things, seek to assess the merits of the arguments, practical and theoretical, on both sides of the divide. Cognizance will therefore have to be taken of the origins of the death penalty. On this point, it has been submitted by Schabas that the death penalty has existed in positive law not later than 1750 BC.[2] This view is likely to have taken into account the religious underpinnings of the death penalty. Other sources, favouring a more modern viewpoint, have put its date of nascence somewhere during the early days of the English common law, when all felonies were originally punishable by death.[3]

That the death penalty has been the subject of most legal and socio-political debates in the 21st century is certainly in no doubt. Alston and Goodman state that '*for centuries, law enforcement agencies, defence counsel, criminologists, philosophers, religious figures and the general public have argued about [the] issue [of whether or not to abolish the death penalty] from many perspectives*.'[4] Thus, it is predictable that in spite of the belief held by a large number of legal pundits in support of the abolishing of the death penalty, there would be those who still advance arguments in support of its continuous existence and application. Schabas argues, 'Many people still accept the

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1 [2011] 2 SCGLR 601.

2 William Schabas '*The Abolition of the Death Penalty in International Law*' (3rd ed. Cambridge University Press 2002).

3 Tennessee v Garner 471 US I (Justice White); 'Punishments at the Old Bailey: Late 17th Century to the Early 20thCentury' <https://www.oldbaileyonline.org/static/Punishment.jsp> last accessed 20/7/2018.

4 Philip Alston and Ryan Goodman, *International Human Rights; Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford University Press 2013) 22.

principle of "an eye for an eye, a tooth for a tooth", particularly when atrocious crimes are involved'.[5]

Needless to say, this argument has been met with stern opposition from death penalty abolitionists. One such abolitionist is South Africa's Justice Chaskalson[6], who asserted in the celebrated case of *State v. Makwanyane and Mchunu*[7] that:

> *'Retribution is one of the objects of punishment, but it carries less weight than deterrence. The righteous anger of family and friends of the murder victim reinforced by the public abhorrence of vile crimes is easily translated into a call for vengeance. But capital punishment is not the only way that society has of expressing moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of 'an eye for an eye, and a tooth for a tooth'.*

The global trend towards the abolition of the death penalty preceded Justice Chaskalson, however. It arguably began, in fact, with the adoption of the Universal Declaration on Human Rights in 1948. Since then, the argument put forward has consistently been that the death penalty breaches the right to life[8] guaranteed under the Universal Declaration on Human Rights.

Furthermore, it is significant to note that the silence of the International Covenant on Civil and Political Rights (ICCPR) 1966 on the issue of abolition has not prevented the emergence of a slew of international treaties explicitly requiring state parties to abolish the death penalty. These include the Second Optional Protocol to the International Covenant on Civil and Political Rights 1989[9], the Protocol to the American Convention on Human Rights to Abolish Death Penalty 1990[10], Protocol No. 6 to the European Convention on Human Rights 1983[11], and Protocol No. 13 to the European Convention on Human Rights 2002[12].

The importance of judicial activism and case law as a major alternative to legislation vis-à-vis the abolition of the death penalty cannot be discounted either. As far back as in 1995, for example, South Africa's Constitutional Court abolished the death

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[5] *ibid* at Note 3.

[6] Justice Arthur Chaskalson was the President of the South African Constitutional Court from 1994-2001 and Chief Justice of South Africa from 2001-2005.

[7] 1995(3) SA 391 (CC).

[8] *See* Bernard McCloskey, The Death Penalty and the Right to Life, Commonwealth Law Bulletin, volume 38, 2013, Issue 3

[9] Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989. See Articles 1 and 2

[10] See Preamble. The convention requires states to abolish the death penalty and the rationale for this can be found in the Preamble.

[11] Article 1 abolishes the death penalty. Article 2 however makes an exception where the death penalty can be used in times of war.

[12] See Preamble and Article 1

penalty by declaring it unconstitutional in *State v. Makwanyane and Mchunu*[13]. While the Court conceded that the Constitution of South Africa 1996 did not expressly disallow the death penalty, it nevertheless held that because it was undoubtedly a cruel, inhuman and degrading form of punishment, it could not be compatible with some of the core values of the Constitution.[14]

By way of comparison, it is observed that the death penalty has been provided for in Ghanaian statute books since the reception of the English common law in 1871.[15] Our Constitutions and subsequent Penal Codes have retained it religiously.[16] The current 1992 Constitution and the Criminal Offences Act 1960 (Act 29) have provisions that make the death penalty legitimate in Ghana. Although the right to life is guaranteed under the Article 13(1) of the Constitution,[17] an exception is created for a person to be deprived of life 'in the exercise of the execution of a sentence of a Court in respect of a criminal offence under the laws of Ghana of which he has been convicted.' The offences that warrant the imposition of the death penalty are provided for in Act 29 as, Murder;[18] Attempt to commit murder by a convict;[19] Genocide;[20] and Treason and High Treason.[21]

The case-law, per the *Dexter Johnson Case* has, as already stated, toed the line of the existing legislation.[22] Thus, the primary goal of this paper is to, *inter alia,* submit a critical analysis of the Supreme Court's decision, against the belief that a golden opportunity to abolish the death penalty in Ghana was missed. This critique of the Court's decision takes into consideration the fact that Ghana is, on the evidence available, already a de-facto non-death penalty state.[23]

This paper proceeds in four parts. First, attention is paid to the worldwide debate on the death penalty, with emphasis on abolitionist arguments. Next, the death penalty within the Ghanaian context is considered, paying due heed to the historical antecedents and current legislations on the death penalty in Ghana. Third, the spotlight is shone on the

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[13] 1995(3) SA 391 (CC).

[14] See Mahomed J. at 262 to 270 in *State v. Makwanyane*. He gives a lengthy yet enlightening discussion on the core values of the South African Constitution in a bid to justify why the death penalty should be unconstitutional.

[15] The British Settlements Act was passed in 1871. This was followed by the Supreme Court Ordinance 1853 which created a common law court for Ghana. See Sections 1 and 2 of the Supreme Court Ordinance 1853.

[16]The Criminal Offences Act 1960(Act 29) sanctions the death penalty in Section 46. Subsequent constitutions have given constitutional backing to this position.

[17]1992 Constitution of Ghana. *See also Article 3 of the Constitution which says a person convicted of High Treason should suffer death.*

[18] Section 46 of the Criminal Offences Act 1960(Act 29).

[19] Section 49 of the Criminal Offences Act 1960(Act 29).

[20] Section 49A of the Criminal Offences Act 1960(Act 29).

[21] Article 3(3) (b) of the 1992 Constitution of Ghana; Section 180(1) of the Criminal Offences Act 1960 (Act 29)

[22] 2011 (2) SCGLR 601.

[23] Chapter 11 of the Constitution Review Commission Report is relied on in this part on its findings and observations.

judgment of the Supreme Court in the *Dexter Johnson Case*[24], giving prominence to the argument of lone dissenting voice of Justice Date-Bah, with which he maintained the unconstitutionality of the 'mandatory death penalty'.[25] An analytical discussion will proceed to assess the interpretative options that were available to the Supreme Court in the case. The discussion is concluded by affirming the view that a great setback was done to our constitutional jurisprudence when the Supreme Court refused the invitation to proscribe the application of death penalty in Ghana.

II. The Worldwide Debate on Death Penalty

Kai remarks that the controversy surrounding the death penalty is as old as the legal systems that have, at one point or the other, positivized it, in their statute books.[26] Yet, for many scholars, the debate on the death penalty is not one that can be conclusively decided in favour of either camp, because at its core, both sets of arguments are influenced by moral and emotional considerations, rather than legal ones.

Still, as is to be expected of a debate this old, compelling arguments both for and against the existence of the death penalty have always existed. Moreover, the justifications for both sides of the arguments are ever expanding. For example, although this debate is several centuries old, arguments based specifically on the right to life are concomitants of the United Nations Declaration of Human Rights, a document which was adopted less than seventy years ago. Consequently, abolitionists submit, relying on the Declaration, that the death penalty is barbaric, and its exercise an appalling indicator of the lack of respect for human life. On the other hand, retentionists argue strongly that quashing the death penalty debases the value of life. The argument proceeds thus; only a life is fair payment for a life wrongly taken.

In the paragraphs that follow, there will be an in-depth discussion on the vexed question of whether or not the death penalty should be abolished in Ghana and an examination of the various arguments advanced to support each stance.

II.1 The Case against Abolition

A. Religious Grounds

It has been noted that many of the arguments submitted by death penalty retentionists tend to be supported by religious underpinnings. Popular among these, indeed, is the biblical injunction of "an eye for an eye, a tooth for a tooth". Crucially for retentionists, however, that injunction is not the only time the death penalty is validated,

[24]2011 (2) SCGLR 601.

[25] Interestingly, Novak seems to share Dr Date-Bah's view when he asserts that there's an emerging international consensus that not all murders are deserving of death and that a discretionary death penalty better protects human rights. See Andrew Novak 'The Mandatory Death Penalty in Ghana: A Comparative Constitutional Perspective on Dexter Johnson v Republic' (2013) http://works.bepress.com/andrew_novak/2 accessed 6 August 2016

[26] MahWeng Kai, 'Should the death penalty be abolished*?'* [1981] 1 CLJ 25

advocated for, or exercised within the pages of the Bible.[27] Indeed, Jesus Christ himself was a victim of the death penalty, having been crucified for the crime of blasphemy.[28]

For Islamic States that retain the death penalty, the argument has always been that the death penalty is a non-derogable requirement of Islamic law.[29] Nevertheless, the Islamic position on the death penalty is not unified by any means.[30] Still, it is interesting that only thirty-two out of the fifty states that have a Muslim majority retain and impose the death penalty.[31] Thus in practice, the pattern shows that it tends to be the least democratic and most repressive states that retain and use the death penalty.[32]

B. Deterrence

Deterrence is one of the fundamental reasons for punishment of any kind. Since death is the harshest punishment available under the law, it follows that it must also be the most effective deterrent to crime.[33] In the words of Sir James Stephen, 'No other punishment deters men so effectually from committing crimes as the punishment of death. In any secondary punishment, however terrible, there is hope; but death is death; its terror cannot be described more forcibly.'[34]

The argument on deterrence was raised and discussed in the South African case of *State v Makwanyane and Mchunu*[35]. The Attorney-General argued that the death penalty is recognised as a legitimate form of punishment in many parts of the world which acts as a deterrent to violent crime and meets society's need for adequate retribution for heinous offences, and that it was regarded by South Africa society as an acceptable form of punishment.

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[27] See *Leviticus 24:17-21; Genesis 9:6; Exodus 21:12-14; Numbers 35:30-31; Matthew 26: 52; Revelation 13: 10. In the Good News Bible, Revelation 13:10 suggests that whoever is meant to be killed by the sword will surely be killed by the sword.*

[28] See *John 19:7 Good News Bible.*

[29] See Quaran3:90; Quaran4:91; Quaran16:106. These verses are often used to justify why punishment by death is intrinsic in Sharia Law.

[30] Muslim clerics argue against the death penalty using provisions of the Quran and Hadith for their justification. Within Islam, Hadith is a source for religious law and moral guidance ranking second only to the Quran.

[31] International Bar Association *'The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty'.* Available at https://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/death_penalty_resolution.aspx (last accessed 22/7/2018).

[32] Franck, H. G., Nyman, K., & Schabas, W. '*The Barbaric punishment: Abolishing the death penalty*.' (2003) The Hague: Kluwer Law International.

[33]MahWeng Kai 'Should the death penalty be abolished?' [1981] 1 CLJ 25

[34] *"Capital Punishments"* in Fraser's Magazine, Vol. LXIX, June 1864, p. 753 cited in MahWeng, *ibid*.

[35] 1995(3) SA 391(CC).

C. Proportionality of punishment to the Crime

Many also hold the view that punishment for any crime must be commensurate with the crime.[36] Thus, following this line of logic, not only would it be irrational, it would also constitute a grave injustice for a person to be sentenced to death for a crime as trivial as unlawfully cutting down trees or killing a deer without authorisation.[37] In other words, in deciding whether a specific form of punishment is cruel, inhuman or degrading, the ingredient of proportionality would have to be taken into account.[38]

Accordingly, for a person who wilfully takes an innocent life, there would have to be a severe penalty that is proportionate to the crime. No other penalty would be more appropriate than the death penalty in such a circumstance. In effect, it would seem that the argument on the death penalty being appropriate in proportion for some crimes is influenced by subjective views on what justice should entail. Justice here is interpreted to mean a consideration of fairness or fitness of the death penalty for certain kinds of crimes.

Further, the view that the supreme penalty of death is the only appropriate response to the supreme crime of homicide is an argument for death penalty on grounds of justice.[39] Closely related to this is the long-held view that the value of human life is cheapened if an innocent victim dies while his murderer lives.[40]

D. Human Rights

There is a glaring worldwide trend towards the abolition of the death penalty.[41] Most abolitionists rely on human rights as the basis of their arguments. The right to life, the right to dignity and the right to be protected from cruel, inhuman or degrading treatment or punishment are three of the rights used to bolster these arguments.[42]

First, it is argued strongly that since human life is sacred, no one, not even the State should ever be given the power to take it deliberately. Further, it is indeed true that the respect for human dignity requires that cruel, inhuman or degrading treatment or punishment of whatever form is prohibited. '*Flowing from this, it is argued that the State cannot turn the offender into an object of crime prevention to the detriment of his*

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[36] See Headnotes of *Dabla v. Republic* 1980 GLR 501 at 504. A number of other Ghanaian criminal cases reason that punishment must commensurate the offence.

[37] It is interesting to note that the offence of cutting down trees and killing of deer warranted the death penalty in England in the 18th century.

[38] Michael S. Moore, *Justifying Retributivism,* 27 Isr. L. Rev. 15 (1993).

[39] *ibid* at Note 38.

[40] MahWeng Kai 'Should the death penalty be abolished?' [1981] 1 CLJ 25

[41] According to the United Kingdom government, between 1993 and 2012, the number of countries that abolished the death penalty by law for all crimes, grew from 55 to 97. As of December 2012, 140 countries - more than 2/3 of the countries of the world - were abolitionist in law or practice. https://www.gov.uk/government/news/bhc-banjul-recognises-world-day-against-the-death-penalty (Last accessed 22/7/18).

[42] See for instance, the preamble to Protocol to the American Convention on Human Rights to Abolish Death Penalty 1990, Protocol No. 6 to the European Convention on Human Rights 1983, and Protocol No. 13 to the European Convention on Human Rights 2002.

constitutionally protected right to social worth and respect'.[43] On this point, we find the judgment of the Canadian Supreme Court in *Kindler v. Canada*[44] most appropriate. The Court stated emphatically in its judgment, that it considered the death penalty to be the ultimate violation of human dignity.[45]

A summary of the human right basis for advocating the abolition of the death penalty was made by counsel for the accused in the case of *State v. Makwanyane and Mchunu*[46]. It was contended that the imposition of the death penalty is a 'cruel, inhuman or degrading punishment' on grounds that:

a. It is an affront to human dignity;
b. it is inconsistent with the unqualified right to life entrenched by the Constitution;
c. it cannot be corrected in case of error or enforced in a manner that is not arbitrary; and that
d. it negates the essential content of the right to life and the other rights that flow from it.

In agreeing with the arguments of the accused, Justice Chaskalson observed:

> *'The carrying out of the death sentence destroys life, which is protected without reservation under Section 9 of our Constitution, it annihilates human dignity which is protected under Section 10, elements of arbitrariness are present in its enforcement and it is irredeemable*.'[47]

E. Conclusion

Schabas once said, 'If there is no universal agreement on the most fundamental of human rights, the right to life, how can anything more be expected in the rest of the catalogue of human rights?'[48]

Until the advent of the 21st century, there was an assertion that no innocent person had ever been executed still held sway since there had not been any evidence to the contrary. Justice Antonin Scalia, one of the leading voices against the abolition of the death penalty had once boldly declared that there had never been 'a single case – not one – in which it is clear that a person was executed for a crime he did not commit.'[49] This is no

[43] *S v. Makwanyane*1995 (3) SA 391 (CC) per Justice Chaskalson.
[44] [1992] 2 SCR 779
[45] *Kindler v. Canada* [1992] 2 SCR 779
[46] 1995 (3) SA 391 (CC).
[47] ibid (n 46) 65.
[48] William Schabas, *The Abolition of the Death Penalty in International Law* (3rd ed. Cambridge University Press 2002).
[49] Ed Pilkington *'The Wrong Carlos: How Texas Sent an Innocent Man to His Death'* (The Guardian, 15 May 2012) <https://www.theguardian.com/world/2012/may/15/carlos-texas-innocent-man-death> (last accessed 19/7/18)

longer tenable. There is now ample evidence that several innocent persons have been executed.[50]

Further, it is rightly, but tentatively, conceded that punishment must, to some extent, be commensurate with the offence. However, it need not be equivalent or identical to it. If the desire for retribution or vengeance were to be accepted, hypothetically speaking, as reasonable justification for the maintenance of the death penalty, it is one that could easily be countered with evidence showing that other forms of punishment could satisfy this desire just as well, if not better. It is the position of the authors that, an extremely long prison sentence, for example, can sate this desire just as effectively, with better prospects for reversal, and more positive moral and institutional implications for society than an outright execution.

Remarkably also, for all of its claims to legitimacy, claims that the death penalty has deterrent effect are not supported by recognised studies. Countries that adopted a moratorium prior to the abolition of the death penalty found that there was no increase in the commission of horrendous crimes within that period.[51]

The foregoing discussion point, in the considered opinion of the writer, must surely lead to the inescapable conclusion that the death penalty indeed should have no place in this century.

III. The Death Penalty in Ghana: Its Inception to Date

The death penalty has been in Ghana's statute books since the inception of English common law in the country in 1874. In spite of many calls for its abolition, Ghana has retained the death penalty. In 2012 for instance, there were 27 death sentences. In 2013, 14 people - all males - were sentenced to death.[52] The most recent imposition of the death penalty in Ghana was in a case decided on 4 July 2016 where the High Court sentenced a 22-year old trader to death by hanging for murder.[53]

Curiously, however, there have been no executions since July 1993, when 12 prisoners convicted of robbery and murder were executed by firing squad.[54] There also seems to have been a steady decline in the number of prisoners on death row as well. For instance, as at 13 January 2014, 'A total of 148 people, including four women and two foreigners, were on death row.'[55] As of 2 September 2016, there were 137 inmates on

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[50] National Coalition to Abolish the Death Penalty *'Executed and Innocent: Four Chapters in the Life of America's Death Penalty'* http://www.ncadp.org/blog/entry/innocent-and-executed*(last assessed 22/7/18)*

[51] ibid, Note 31.

[52] *Ghana- Abolitionist de Facto (Hands off Cain against Death Penalty in the World, 2016)* <www.handsofcain.info/bancadati/schedastato.php?idcontinente=13&nome=ghana> *accessed 17/06/18*

[53] *'Woman, 22, to die by hanging' (GraphicOnline, 4 July 2016)* <www.graphic.com.gh/news/general-news/woman-22-to-die-by-hanging.html> *accessed 17/06/18.*

[54] *Amnesty International, 'Ghana: Briefing on the Death Penalty'* <https://www.amnesty.org/download/Documents/132000/afr280012000en.pdf> *accessed 17/06/18*

[55] *'Ghana – Abolitionist de Facto (n 1).*

death row.[56] The principal reason for this decline is that most prisoners on death row have had their death sentences commuted to life imprisonment whilst others are granted amnesty, and therefore released.

III.1 Historical Antecedents and Legislation

There isn't much information on the application of the death penalty in pre-Independence Ghana. What is known is that in 1874 when the English common law was introduced into the then Gold Coast, the offences that attracted the death penalty were murder, treason, piracy and arson in naval dockyards.[57] Since then, there have been numerous developments on the use of the death penalty in the United Kingdom. In 1957, for example, the Homicide Act was passed in the United Kingdom. This Act suspended the use of the death penalty in murder cases.[58] The Human Rights Act 1998 finally abolished the use of the death penalty for all crimes. In 2004, the United Kingdom became a signatory to the 13th Protocol of the European Convention on Human Rights. This Protocol prohibited the exercise of the death penalty in any circumstance and made it impossible for any State Party to reinstate the death penalty, until a formal withdrawal from the Convention has been filed.[59]

The extent to which these developments could apply to Ghana was determined by the Criminal Offences Act 1960 (Act 29). The passing of the Act simply meant that offences under the English common law could no longer be punishable in Ghana. Section 8 of Act 29 specifically excludes the application of common law offences in Ghana. Thus, the progress made, culminating in the consequent abolition of the death penalty in the United Kingdom, has had no direct impact on the criminal jurisprudence of Ghana.

To drive home the point, the Criminal Offences Act 1960 reinforced the legality of the imposition of the death penalty by Ghanaian Courts. The offences that are punishable by death under the Act are:

1. Murder;[60]
2. Attempt to commit murder by a convict;[61]
3. Genocide;[62] and
4. Treason and High Treason;[63]

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[56] *'Ghana has 137 death row inmates – Amnesty International' (Ghana Business News, 2 September 2016)* <https://www.ghanabusinessnews.com/2016/09/02/ghana-has-137-death-row-inmates-amnesty-international/> *accessed 20/07/2018*

[57] *'History of Capital Punishment' (English Legal History, August 2013)* <http://englishlegalhistory.wordpress.com/2013/06/01history-of-capital-punishment/> *accessed 20/07/18.*

[58] ibid.

[59] *'Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances' (Council of Europe, 3 May 2002)* <http://www.refworld.org/docid/3ddd0e4c4.html> *accessed 20/07/18.*

[60] Section 46 of the Criminal Offences Act, 1960 (Act 29).

[61] ibid Section 49.

[62] ibid Section 49A.

[63] ibid Section 180(1).

5. Smuggling of Gold, Diamond[64]

The Criminal Offences Act was passed under the First Republic, when the 1960 Republican Constitution[65] was silent on the death penalty. That Constitution was abrogated by a coup on 24 February 1966. In 1969, Ghana returned to constitutional rule. The 1969 Constitution entrenched the death penalty, yet, Article 14 of the Constitution guaranteed the right to life. This right to life was however not absolute but subject to the power of the Court to impose a death sentence for the commission of a criminal offence.[66] This provision which entrenched the death penalty was repeated in the 1979 Constitution under Article 20.

Under both the 1969 and 1979 Constitutions, a number of death sentences were imposed. Two death sentences were recorded to have been imposed by the High Court between September 1979 and December 1981 on two persons convicted of murder.[67]

The emergence of the various military regimes saw a sharp, even if predictable, increase in the meting out of the death penalty. This is arguably because many coup makers saw it as the best way to get rid of their opponents. For instance, when the Armed Forces Revolutionary Council (AFRC) led by Flt. Lt. Jerry John Rawlings seized power on 4 June 1979 through a military coup, it established special courts under the AFRC (Special Courts) Decree 1979 (AFRCD 3) as amended by the AFRC (Special Courts) (Amendment) Decree 1979 (AFRCD 19). These special courts tried and sentenced many persons to death.[68] There were also reports that a number of persons were sentenced to death *in absentia* by AFRC Special Courts, mostly for alleged economic crimes.[69]

When the PNDC took charge of the governance of the country[70], it also established special courts called Public Tribunals in 1982.[71] These Public Tribunals had the power to impose the death penalty for a wide range of offences.[72]

The PNDC also passed the Special Military Tribunal Law 1982 (PNDCL 19) in August 1982.[73] This law established a tribunal with power to try officers of the Armed

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[64] ibid Section 317(A).

[65] Came into force on 1st July 1960.

[66] Article 14(1) of the 1969 Constitution states: 'No person shall be deprived of his life intentionally save in the execution of the sentence of a Court in respect of a criminal offence under the law of Ghana of which he has been convicted.'

[67] Amnesty International, 'Ghana: Briefing on the Death Penalty' (n 3 above).

[68] Examples of senior officers of the armed forces who were executed include Colonel Roger Joseph Atogetipoli Felli, Air Vice Marshall Boakye, Major General R.E.A. Kotei, Rear Admiral Joy Amedume and Major General E. K. Utuka. Also, three former military heads of state suffered the same faith. They were General Ignatius Acheampong, Brigadier Akwasi Amankwaa Afrifa and Lt. General Frederick Akuffo**.**

[69] *Amnesty International, 'Ghana: Briefing on the Death Penalty'* <https://www.amnesty.org/download/Documents/132000/afr280012000en.pdf> *accessed 17/06/18*

[70] 31st December 1981.

[71] ibid.

[72] ibid.

[73] PNDCL 19 was amended first by the Special Military Tribunal (Amendment) Law 1984 (PNDCL 77) and later by the Special Military Tribunal (Amendment) (No.2) Law 1984 (PNDCL

Forces and also civilians for certain offences. Key among the named offences were those listed under Section 1(1). Under this subsection, it was an offence to assist or incite or procure another person to attack or invade any part of Ghana or to prepare or to attempt in any manner to overthrow the Government. Additionally, any person who had knowledge of any of the above-mentioned activities and failed to make a report also committed an offence.[74] Under Section 2(1), the death penalty was the punishment for persons found liable of any of these offences. It reads: 'Any person who commits an offence under subsection (1) of Section 1 of this Law shall on conviction be liable to suffer death by shooting by firing squad.'

From 1982 till Ghana returned to constitutional rule in 1992, a total of 400 death sentences were passed; 118 of these were *in absentia* and at least 77 executions were carried out. At least 20 of these prisoners were executed for political offences or after politically-motivated trials by Public Tribunals. A further 24 were known to have been sentenced to death after political trials in their absence by Public Tribunals and a Special Military Tribunal.[75]

III.2 Current Legislation and Emerging Trends

The 1992 Constitution which is currently in force saved the provision on the death penalty found in the 1969 and 1979 Constitutions. Under Article 13(1), it is lawful for a person to be intentionally deprived of his right to life 'in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted.'[76] Article 3(3) further makes the offence of high treason punishable by death. As earlier mentioned, the offences of murder, attempt to commit murder by convict, genocide, high treason and smuggling of gold and diamond are all punishable by death under the Criminal Offences Act 1960.[77]

Despite the fact that under current constitutional era the Courts have the power, and have indeed not been shy, to impose the death penalty, successive Presidents have demonstrated their unwillingness to sign the death warrant for the execution of persons sentenced to death. Over the years, acting in accordance with the power given them under

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100). These amendments allowed the trial of certain cases *in camera* and also made it legal for persons to be tried in absentia. It is reported that nine former officers of the Ghana Armed Forces were tried in absentia for an alleged coup.

[74] Section 1(1) of the Special Military Tribunal Law 1982(PNDCL 19).

[75] Three notable persons among these were Joachim Amartey Kwei, Captain Edward Ampofo Adjei and Sergeant Oduro Frimpong. Joachim Amartey Kwei was a former member of the PNDC who was tried and sentenced to death for his role in the abduction and murder of three High Court Judges and a retired army officer. He was executed together with three other military officers right after the death penalty was imposed on them. Captain Edward Ampofo Adjei was convicted in absentia for his involvement in an attempted coup in 1983. He was arrested in 1986. Sergeant Oduro Frimpong was sentenced to death in 1985 after a trial-in-camera for his involvement in an alleged coup plot in 1984.

[76] See Article 13(1) of the 1992 Constitution.

[77] ibid note 60-64.

Article 72 of the 1992 Constitution[78], numerous prisoners on death row have either had their death penalty commuted to life imprisonment or have been granted amnesty after having served some years in prison. In June 2003 for instance, President John Agyekum Kufuor granted amnesty to 179 prisoners who had served at least 10 years on death row.[79] Also, on 6 March 2007, as part of activities commemorating the 50th Anniversary of Ghana's Independence, President Kufuor commuted 36 death sentences to life imprisonment. On his last day in office, all convicts sentenced to death had their terms commuted to life and anyone on death row who had already served 10 years had their sentence reduced to 20 years.[80]

The Republic Day, celebrated on the 1st of July each year has in recent years become an important day in the movement towards the abolition of the death penalty in Ghana. On 1 July 2007, President Kufuor commuted the death sentences of seven convicts to life imprisonment.[81] To commemorate the 53rd Republic Anniversary on 1 July 2013, 33 prisoners who had been on the death row and had served not less than 10 years had their sentences commuted to life imprisonment by President Mahama. Similarly, in July 2014, 21 prisoners who had been sentenced to death had their sentences commuted to the life imprisonment.

The foregoing shows a trend towards the abolition of the death penalty in Ghana. It does seem odd then that attempts by the United Nations to get Ghana to completely abolish the death penalty have not yielded positive results. For example, on 14 March 2013, recommendations from the office of the UN that Ghana abolish the death penalty were rejected on grounds that 'the death penalty was an entrenched provision in the Constitution and could only be changed by the people of Ghana, and the Government

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[78] Article 72 of the 1992 Constitution of Ghana states:
'(1) The President may, acting in consultation with the Council of State-
(a) grant to a person convicted of an offence a pardon either free or subject to lawful conditions; or
(b) grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him for an offence; or
(c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or
(d) remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account on any offence.
(2) Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the President.
(3) For the avoidance of doubt, it is hereby declared that a reference in this Article to a conviction or the imposition of a punishment, penalty, sentence or forfeiture includes a conviction or the imposition of a punishment, penalty, sentence or forfeiture by a court-marital or other military tribunal.'

[79] See https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Ghana (last assessed 22/7/18)

[80] https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Ghana last accessed 20/7/2018

[81] https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Ghana last accessed 20/7/2018

could not impose an official moratorium prior to a referendum'.[82] Also, according to a UN report, during the vote on the Resolution on a Moratorium on the Use of the Death Penalty at the UN General Assembly in 2007, 2008 and 2010, Ghana abstained. The report further indicates that in December 2012, Ghana was absent.[83]

Perhaps the most progressive step towards the abolition of the death penalty in Ghana has been the setting up of the Constitution Review Commission (CRC). This CRC was set up on the 11th of January 2010 under the Constitution Review Commission of Inquiry Instrument 2010, CI 64, with the mandate:

a) To ascertain from the people of Ghana, their views on the operation of the 1992 Fourth Republican Constitution and, in particular, the strengths and weaknesses of the Constitution;
b) To articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution; and
c) To make recommendations to the Government for consideration and provide a draft Bill for possible amendments to the 1992 Constitution.

On 20 December 2011, the committee submitted its report to the President. In accordance with Article 280(3) of the 1992 Constitution, the Government published a White Paper on 15 June 2012. In this White Paper, the Government among other things indicated its acceptance of the recommendation by the CRC that the death penalty enshrined under Article 13 of the Constitution is abolished. In accepting this recommendation, it was observed that '[t]he sanctity of life is a value so much engrained in the Ghanaian social psyche that it cannot be gambled away with judicial uncertainties'.[84]

In October 2012, the Government set up yet another body, a five-member Constitution Review and Implementation Committee (CRIC), 'with the mandate to implement, in strict compliance with Chapter 25 of the Constitution on "Amendments to the Constitution," the recommendations that have been accepted by Government'.[85]

The activities of this CRIC were brought to a halt when in July 2014, a suit was filed at the Supreme Court challenging the legality of the CRC and subsequently the CRIC

[82]; It is worthy of note that Article 13 of the 1992 Constitution which validates the death penalty is found in chapter 5 of the Constitution captioned 'Fundamental Human Rights and Freedoms'. Under Article 290, all the provisions of this chapter are entrenched. For an entrenched provision to be amended, in accordance with the dictates of Article 290(4), a referendum must be held throughout the country. At this referendum, 40% of those entitled to vote must cast their ballot and at least 75% of the valid votes cast must be in favour of the amendment.

[83] https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Ghana last accessed 20/7/2018

[84] See page 44 of the White Paper on the Report of the Constitution Review Commission of Inquiry, June 2012 WP.no1/2012

[85] Government of Ghana 'White Paper on the Report of the Constitution Review Commission (CRC) Presented to the President' (Ghana.gov.gh, June 2012) <http://ghana.gov.gh/index.php/media-center/reoprts/653-white-paper-on-the-report-of-the-constitution-review-commission-presented-to-the-president> accessed 17 September 2016.

set up by the President with the prime aim of initiating the process leading to the review of the Constitution.[86] The plaintiff alleged among others that the President had usurped the powers of Parliament under Article 289(1) of the 1992 Constitution.[87] This case was, however, dismissed by a 5-2 majority on 15 October 2015.

Even though the hurdle of the suit has been overcome, it is still not very clear the extent of progress made in the process leading to the review of the 1992 Constitution, which would or may have eventually led to among other things, the abolition of the death penalty in Ghana.

IV. Re-Visiting the Dexter-Johnson Encounter with Death Penalty

This section of the paper delves into the legal issue decided on by the Supreme Court of Ghana, which is whether mandatory death sentence for murder is constitutional under the Constitution 1992. In the ensuing paragraphs, there is a thorough assessment of the decision in the *Dexter Johnson v. The Republic* case. Secondly, we discuss the concept of constitutional interpretation in adherence with the letter and spirit of the Constitution. In concluding, we will discuss the deficiencies of the judgment of the court in the *Dexter-Johnson* case and suggest an interpretative remedy that would adhere more to the spirit of the Constitution and the present needs of the people of Ghana.

IV.1 Death Penalty Day in Court

The facts of the Dexter Johnson case are thus set out. The appellant was arrested and charged for the offence of conspiracy to commit murder, and murder of one John Kragness. The murder was committed at Sallem, near old Ningo, in the Greater Accra Region of Ghana, on 27 May 2004. On the 18th of June 2008, the appellant was convicted of murder by a jury at the Fast Track High Court, Accra. In his appeal to the Supreme Court, he filed supplementary grounds of appeal, contending that the mandatory death sentence imposed on him violated the prohibition of inhuman and degrading treatment under Articles 15(2), and the injunction to protect life from arbitrary deprivation under Article 13(1)[88], as well as the right to fair trial under Article 19(1) of the Constitution 1992. By a 4-1 majority decision: R.C. Owusu (MS) JSC, J. Dotse JSC, Anin-Yeboah JSC, B.T. Aryeetey JSC in the majority and S.K. Date-Bah JSC dissenting, the Supreme Court held that the mandatory imposition of the death sentence under Section 46 of the Criminal and other Offences Act (Act 29) was constitutional as it was in perfect conformity with Article 13(1) of the Constitution 1992.[89]

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[86] See the case of *Asare v Attorney-General* (2015) (SC) (14 October 2015).

[87] Article 289(1) provides: 'Subject to the provisions of this Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution.'

[88] Article 13(1) provides that 'No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted.'

[89] See the case of *Dexter Eddie Johnson v. The Republic* 2011 (2) SCGLR 601.

The Lordships sought to distinguish the appellant's challenge of the 'mandatory imposition of the death sentence' for murder[90]**,** from a challenge of the 'constitutionality of the death sentence'. A decision on the former however answers the latter challenge. This is because a sentence cannot be imposed mandatorily or in any other form, unless it is legal to even impose such a sentence in the first place. The Supreme Court declaring that the mandatory imposition of the death sentence is legal only means that they indirectly decided that the death sentence whether imposed mandatorily or not is constitutional.

The attempt of the Court to circumscribe the effect of their ruling to just the mandatory imposition of the death sentence is seen where Date Bah JSC said;

> *The Statement of Case of the Respondent thus signally fails to address the crucial issue in this case, which is whether the mandatory sentence of death for the crime of murder is compatible with the constitutional provisions referred to by the appellant.* ***It is also worth pointing out that what the appellant is seeking to do is not to "abolish the death penalty" as claimed in the Respondent's Statement of Case. His attack is on only the mandatory death penalty for murder****. Since his challenge is not to the death penalty in general under our Constitution,* ***this opinion should not be considered as expressing a view on that issue****. It is important that the narrow constitutional issue under consideration in this case is not confused with the wider question of the constitutionality of the death penalty in general, which is not an issue in this case.*[91]

Relieving, Owusu JSC before addressing the issue in contention gladly accepted the invitation to opine on the question of the constitutionality of the death penalty. Her Ladyship stated that*;*

> *The Criminal Offences Act being an existing law before the coming into force of the Constitution, must be construed with any modification, adaptations, qualification and exceptions necessary to bring it into conformity with Article 13 (1) of the Constitution.*[92]
>
> *Under this Article, a person shall be deprived of his life intentionally in the exercise of the execution of a sentence of a court in respect of a criminal offence of which he has been committed. The Appellant is therefore not challenging the constitutionality of death penalty per se but the mandatory death penalty. I have already stated that Section 47 of the Criminal Code does not admit of different categories of murder. In my opinion therefore it must be construed with qualifications and exceptions necessary to bring it into conformity with Article 13 (1).*
>
> *If the death penalty itself is constitutional, then I do not appreciate how under some circumstances it can be said to be violating some provisions of the same*

[90] under Section 46 of Act 29.
[91] 2011 (2) SCGLR 601 at 623.
[92]Article 13 (1) of the Constitution 1992.

Constitution. Consequently, this court in my view cannot strike Section 46 of the Criminal Code down as Legislation which offends against the Constitution.
Parliament has the primary duty to make laws and this duty can be interfered with only when the law so made is inconsistent with the Constitution which is the supreme law of the land. The court's duty is to apply and interpret the laws so made. It must refrain from making laws under the cloak of interpreting them…The Appellant in this case is not challenging the constitutionality of the death penalty itself as indeed any such challenge would have failed. What he is doing to me is throwing the challenge through the back door. With regard to violation of his right to fair hearing which extends to sentencing, my answer is that it is not true that after conviction the accused was denied the right to say anything in mitigation. [93]

Dotse JSC also added;

…. This is very significant because the Constitution 1992, despite the fact that it contains several provisions on the protection and enjoyment of fundamental human rights such as are provided for in Article's 13, 15(2), 19 including all its sub-clauses, just to mention a few, nonetheless provides death as punishment for the offence of High Treason. Once the Constitution 1992 contains provisions mandatorily imposing the death sentence on any person who has been convicted of the offence of high treason as spelt out under the Constitution itself, it means that the Constitution 1992 does not directly or indirectly abhor or frown upon the imposition of the death sentence on the class of cases where the law provides for it. Furthermore, Article 13 (1) which is a provision in the same chapter five of the Constitution dealing with the Fundamental Human Rights and Freedoms enshrined in the Constitution 1992, states as follows: —

"No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted."

This means that any person who has been charged before a duly constituted court where due process has been followed and is convicted, if the sentence for the offence for which he has been convicted is one of death, then the intentional deprivation of the life of such a person is consistent not only with this Constitution but also the criminal jurisprudence of this country. In view of the fact that the Constitution 1992 is in the scheme of Sources of law of Ghana, the Grundnorm, or the Basic law of the country, followed in that order by the laws passed by Parliament, which in this instance includes the Criminal and other offences Act, 1960 Act 29, which provides for the death penalty, I am of the considered view that the mandatory imposition of the death sentence by Section 46 of Act 29 does not in any way violate Article 15 (2) of the Constitution 1992 as has been forcefully contended by learned counsel for the appellant.[94]

[93] 2011 (2) SCGLR 601 at 656 – 657.
[94] 2011 (2) SCGLR 601 at 687-688.

Anin Yeboah JSC in support of the constitutionality of the death penalty stated that*;*

> *However, I am compelled to state my personal opinion as regards the submission made by learned counsel for the appellant on the grounds that the death penalty imposed on persons convicted of murder as the sole punishment is unconstitutional. I have considered the cases from other jurisdictions cited in support of his submissions in which the learned counsel for the appellant put in a lot on industry. I am aware that the death penalty has been abolished in other jurisdictions, especially in the commonwealth countries. I will advocate for statutory intervention like other jurisdictions where they have degrees of murder instead of judicial intervention by way of interpretation. I therefore agree with my brother Dotse JSC.*[95]

The above quotes may be considered technically as the *obiter* of the court. Should the issue of the constitutionality of the death sentence find its way back there, we may take a cue accordingly. It is, however, the position of the writers that the substance of the appellant's case challenged the constitutional root of death penalty and our Supreme Court missed an opportunity.

IV.2 Interpretation of the Constitution 1992 and fidelity to its spirit

Per Articles 130(1) and 2(1), the Supreme Court of Ghana possesses original jurisdiction in all matters regarding constitutional interpretation. In the *Dexter Johnson* case, the Supreme Court held that issues of law concerning the constitutionality of acts, or instruments *etcetera* could be raised at any point during a trial. More significantly, where the relevant issue of law raised concerned an interpretation of the Constitution, the Court hearing that matter would be required to stay proceedings and refer the matter to the Supreme Court for an interpretation accordingly.[96]

Our Courts have long adhered to a tradition of interpreting the Constitution in accordance with its letter and its spirit. This approach involves taking into consideration our experiences both sour and sweet, our hopes as a people and our aspirations. Sowah JSC (as he then was) noted in the landmark case of *Tuffour v. Attorney-General* [97]*;*

> *A written Constitution such as ours is not an ordinary Act of Parliament.* ***It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress.*** *It contains within it their aspirations and their hopes for a better and fuller life. The*

[95] ibid at 703.

[96] See the Headnotes of Dexter Johnson v Republic 2011 (2) SCGLR 601. In the case, the appellant at the Court of Appeal argued that the mandatory imposition of the death sentence was in contravention with the provisions of Article 13(1) and 15(2) of the constitution. the court of appeal held that, their appellate jurisdiction was strictly to hear matters of law that were pleaded before the trial court hence since the plaintiff did not plead the unconstitutionality of the mandatory imposition of the death sentence, that issue could not be entertained by the court. The Supreme Court overturned the decision.

[97] [1980] GLR 647 - 648;

Constitution has its letter of the law. Equally, the Constitution has its spirit. Its language must be considered as if it were a living organism capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.

Remarking on the spirit of the Constitution, Francois JSC, after citing the enlightened words of Sowah JSC, stated in the *New Patriotic Party v Attorney-General*[98], that *"…a Constitution is the out-pouring of the soul of a nation and its precious life-blood is its spirit."* Also, Apaloo JA (as he then was) in the Supreme Court case of *Sallah v. Attorney-General*[99], said*;*

...the Constitution 1969, schedule 1, Section 9 (1), not in accordance with its letter we shall fail in our duty to effectuate the will of the Constituent Assembly if we interpreted and spirit but in accordance with some doctrinaire juristic theory.

The question thus is, in light of a clear evolution of the Ghanaian criminal jurisprudence concerning the death sentence, what interpretation best meets the spirit of the Constitution today? As already stated, this approach to constitutional interpretation is carefully applied by judges so as to ensure that they do not become legislators under the guise of interpretation.

IV.3 Death Sentence at the Discretion of the Judge?

In critiquing the decision arrived at by the Supreme Court, the arguments made by counsel on behalf of the appellant ought to be considered. Counsel argued for a discretionary approach to sentencing for the offence of murder, citing a number of well-researched foreign authorities to persuade the courts. Of particular importance to this section is the decision in the Kenyan case of *Mutiso v. the Republic*[100]. The appellant in this case argued that although the death penalty was constitutional, not every person convicted of murder deserved to die. Therefore, a sentencing regime under the Penal Code[101] that imposed a mandatory sentence of death on all proven murder cases, or on all murderers, without an opportunity to plead for a mitigation of their sentence was inhuman and degrading. Counsel in the current case argued that mandatory imposition has neither been authorized nor prohibited under the Constitution. For this reason, counsel argued that

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[98] New Patriotic Party v Attorney-General [1993-94] 2 GLR 49; see also Ghana Lotto Operators Association and others v. National Lottery Authority Unreported; REF. No. J6/1/2008.

[99] (1970) CC 55.

[100] [2010] eKlr.

[101] The penal code of Kenya, Section 203 reads as follows:

"Any person who of malice aforethought caused death of another person by an unlawful act or omission is guilty of murder." Section 204 of the Penal Code of Kenya similar to Section 46 of the Ghana Criminal code states that "any person who is convicted of murder shall be sentenced to death"

71 (1) provides for protection of "right to life" as follows:

a convicted person ought to be given the opportunity to show why the death penalty should not be meted out to him. The basis of this argument was the assertion that not all murders are the same, some are gruesome but others are less comparatively. The very logic underpinning this argument can be discerned in Date-Bah's dissenting judgment, in favour of the appellant on the issue of constitutionality of the mandatory death sentence. Owusu JSC responded to this argument by saying;

> *"With regard to violation of his right to fair hearing which extends to sentencing, my answer is that it is not true that after conviction the accused was denied the right to say anything in mitigation. Under Section 288 of Act 30*[102]*, the accused is asked whether he has anything to say why sentence should not be passed according to law. Whatever he says will be recorded and transmitted, as part of the record of proceedings with a report in writing signed by the Justice containing the recommendations or observations on the case which the Judge thinks fit to make. It is upon this report that a decision will be taken by the president whether the sentence is to be carried out."*

Because the above argument has been accepted by the Supreme Courts of a number of countries, one must be meticulous in any attempt to criticize it and in doing so, draw a distinction between Ghana's legal system and others. Arguably, the offence of murder is mandatory in Act 29 for three reasons;[103]

1. Because the framers of the provision way back in 1960 reasoned that death was a punishment proportionate to the offence of murder and nothing else, not even life imprisonment.
2. Because the framers sought to create a distinction between the offence of manslaughter and that of murder. Under both offences, a person's life is taken away unjustifiably but under distinct circumstances. In the former, there is no intent to kill, whereas in the latter there is. [104]Because murder is committed with an intent to kill, the accused ought not to be given the benefit of life imprisonment as this is the maximum punishment we give to persons who cause the death of others without an intention to do so.
3. The law does not categorize different circumstances under which a person can commit murder, unlike under manslaughter.

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[102] Criminal procedure code, 1960 (ACT 30). Section 288 provides that the jury find the accused guilty or if the Judge sitting with assessors convicts the accused, or if the accused pleads guilty, it shall be the duty of the Registrar or other officer of the Court to ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings.

[103] These propositions are mere assumptions as to the possible reasons for the mandatory nature of the death sentence under Act 29.

[104] Under Section 47 of the Criminal and Other Offences Act, the elements required for a prosecutor to establish a case of murder is that the accused must have caused the death of another with the intention to kill that person. Unlike murder, manslaughter is established where death is caused by an unlawful harm without an intention to kill. Under Section 50, it is punishable as a first-degree felony, with the maximum punishment permitted by law being life imprisonment.

The argument against a discretionary approach to meting out the death sentence can best be made by a juxtaposition between the offence of murder and that of manslaughter. Manslaughter is a first degree felony with the maximum punishment being life imprisonment. The Judge has judicial discretion arguably to determine a sentence that best meets the circumstances of the facts before him. The law categorizes a number of circumstances under which a person shall be liable for manslaughter. For example, if a man catches his wife in bed with another and kills the other, the sentence for manslaughter may differ from that which the same judge would give if the accused caused the death of another in an unlawful fight and pleads provocation. The law categorizes different circumstances under which a person shall be liable for manslaughter hence the sentencing regime provides a range from which a judge can choose the most appropriate sentence for each circumstance; be it life imprisonment or less.[105]

Although facts of murder cases differ, there cannot exist varying intentions to kill. The law does not categorize different circumstances under which an intent to kill can be established. As a matter of fact, intent to kill cannot be further broken down into categories of gravity. Our criminal jurisprudence does not provide for a range within which judges can determine whether a person deserves death or life imprisonment for the offence of murder. Neither is it sound an argument, that a suitable range can be determined depending on how horrible or atrocious the murder was executed. It is the intent as well as the execution of the intent that the law seeks to punish; and not how the execution was done.

IV.4 Criticism 1: Not a Matter Requiring Judicial Intervention Even if Times have Changed

In light of all the cases under which the Constitution has been interpreted as *a living organism that evolves*, our Supreme Court perhaps failed to do justice in this matter. This matter as aforementioned and analyzed was placed in a background of a global trend toward the abolition of the death sentence. Moreover, in Ghana, the death sentences as it exists under our statutes are only *dejure* and not *defacto.*[106] This country has not executed a criminal since the coming into force of the Constitution 1992.

It is in the opinion of the writers that, Ghana's jurisprudence would benefit largely from enthusiasm and activism of the Court. JSC Anin-Yeboah stated that the Court had taken judicial recognition of the worldwide trend towards abolition of the death sentence however it is his opinion that it is a matter that can best be resolved by legislative intervention.

[105] See Sections 51, 52. 54 and 54 of Act 29.

[106] It is conceded that there is no clear-cut link between the refusal of the executive to sign the death warrant and the assumption that the people no longer want the death penalty. The Former does not clearly prove the latter. A counter intuitive argument however is that the content of the people with the de facto abolishment is an indication that they no longer desire for the death penalty to be meted out and subsequently executed.

In the matter of *Quartson v. Quartson*[107], the Supreme Court saw the need to intervene where Parliament has failed to legislate. The court in spite of Parliament's inactivity, protected the rights of spouses upon the dissolution of marriage. It held that, the inaction of Parliament to enact laws to regulate the distribution of property jointly acquired during marriage in accordance with Article 22(2) of the Constitution 1992 did not bar the Court from seeking the ends of justice.[108]Ansah JSC stated that;

> *In view of the changing times, it would defy common sense for this court to attempt to wait for Parliament to awaken from its slumber and pass a law regulating the sharing of joint property. As society evolves, a country's democratic development and the realization of the rights of the citizenry cannot be stunted by the inaction of Parliament.* ***We do not think that this court is usurping the role of Parliament****, especially in cases where the inaction of Parliament results in the denial of justice and delay in the realization of constitutional rights.*[109]

The Parliament of the fourth Republic, has been lackadaisical about legislation on, the distribution of property upon the dissolution of marriage. As a result, the Courts have, over the years, applied the principle of substantial contribution as the metric for determining whether or not a case can be made for joint ownership of property. The Courts have therefore held in several cases that substantial financial contribution of a spouse to the acquisition of property during the subsistence of the marriage would entitle that spouse to a share in the property. [110],[111]

It is our position that judicial intervention was necessary in *Dexter-Johnson*. It's rather unfortunate that the Supreme Court failed to seize this opportunity. JSC Dotse sought to argue that the Constitution cannot be said to abhor the death penalty because it mentions it as a valid form of punishment under Article 19(1) and Article 3(1). Contrary to his argument, the Constitution does not expressly prescribe the death sentence for the offence of murder, so if the Court really wanted to embark on some activism, it certainly could have. Since the Constitution does not prescribe the death sentence for the offence of murder, the Courts ought to have abolished Section 46 of Act 29 that sought to impose the death penalty. The justification for such a decision should have been that, in light of the apparent evolution of the Ghanaian society[112], as well as the existence of fundamental human rights and the directive principles of state responsibility, the Court was under an obligation to expunge the death sentence for every offence but for high treason.[113]

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[107] [2012] 2 SCGLR 1077.

[108]Under the provision, Parliament, after the coming into force of this Constitution is required to enact legislation regulating the property rights of spouses.

[109] See [2012] 2 SCGLR 1089.

[110] See Yeboah v. Yeboah (1974) 2 GLR 114, H.C.

[111] See Mensah v. Mensah, Unreported Suit No: J4/20/2011, dated 15th February 2012.

[112] This conclusion is made because Ghana is now an abolitionist-state *de facto*.

[113] Which is expressly stated in the constitution as punishable by death.

We expect fierce arguments in opposition in the sense that a Constitutional Right is a right granted upon a person by a Constitution. These Constitutional Rights however have exceptions and the death penalty is one of such exceptions. The question then follows, wherein then lies the problem if the constitution is explicit in allowing for the death penalty? How then can we render the Death Penalty unconstitutional based on the interpretation of the spirit of a document that in fact, contemplates the death penalty? This concern is addressed below under a somewhat unpopular and controversial argument as to how the Courts could have, by the tools of interpretation arrive at a meaningful decision.

IV.5 Criticism 2: Is the Floodgate Opened, or Parliament would always be Rational?

Article 19 of the Constitution provides that;

> *"No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted*."

The decision of the Court implies that any criminal offence under the laws of Ghana, which prescribe death as a penalty must be enforced accordingly by the Courts[114]. In light of this declaration, is it suggested that the Courts would enforce the death sentence if Parliament decides to make stealing an offence punishable by death? Or will the Court then see the need to be active and prevent injustice? Or it is perhaps presumed, that Parliament comprises of rational representatives of the people thus they would not attempt to embark on a jolly ride with Article 19(1)?[115]

The Criminal and Other Offences Act, being an existing law, must be interpreted to conform to the letter and spirit of the Constitution. It seems that a possible floodgate has been opened. Through this gate, any category of offences can be attached with the death sentence.

The harms and atrocities of too much discretion afforded state agencies, as experienced in *Re Akoto*[116] cannot be re-lived by the Ghanaian people. If Article 19(1) is

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[114] It is accepted that this may not necessarily be so. But it can be implied from the decision and that is why it is argued that a possible floodgate has been opened.

[115] This argument is inspired by an article we are working on which supports judicial activism and law making by judges.

[116]In the case of *Re: Akoto and 7 others [1961] GLR 523-535 SC*, the arrest and detention of the applicants under an order in pursuant preventive detention act was. The order was challenged to be in excess of powers conferred on Parliament by the Constitution of the Republic of Ghana with respect to Article 13 (1) of the Constitution, 1960, and contrary to the solemn declaration of fundamental principles made by the President on assumption of office. The court denied the application. KORSAH JSC delivered the judgment of the said, '' *The Habeas Corpus Act, 1816, is a statute of general application it does not apply in this case because the Preventive Detention Act under which the appellants are detained vests plenary discretion in the Governor-General, (now the President), if satisfied that such order is necessary. The court could not therefore enquire into the truth of the facts set forth in the grounds on which each appellant has been detained…We do not accept the view that Parliament is competent to pass a Preventive Detention Act in war time only and not in time of peace. The authority of Parliament to pass laws is derived from the same*

deemed to endorse the death sentence for any criminal law under the laws of Ghana save High Treason (which is expressly provided for), it puts the protection of the right to life under the Constitution in jeopardy. It is for this reason that we believe the Court ought to have been more definite in their approach.

IV.6 To be Fair, what was the Challenge Faced by the Court in Dexter-Johnson?

As Dotse JSC rightly identified in his judgment, the Constitution expressly mentions the death sentence in Articles 19(1) and 3(3) therefore it cannot be said that the Constitution abhors the sentence.[117] How then can a Court declare the mandatory imposition of the death sentence as unconstitutional, let alone the death sentence entirely whether mandatory or not.[118] The Supreme Court in recent times has been criticized for legislating rather than interpreting the Constitution. In controversial cases such as *Agyei-Twum v. Attorney General*[119] the Court is accused of re-writing the Constitution 1992 by adding words that were not expressly provided for by the framers.[120]

An interpretation that limits the application of Article 19(1) to High Treason[121] does not amount to a re-write of the Constitution. The text "*laws of Ghana*" found in Article 19, semantically can be interpreted to mean all laws of Ghana. Such an interpretation however is suicidal. A cautious definition of the phrase "laws of Ghana" under Article 19, should limit the text to laws relating to the criminalization of High Treason only.

Article 19(1) should be interpreted in the context of the Constitution as a whole document. An appropriate interpretation hence of Article 19(1) would be, that **No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a Court in respect of the criminal offence of High Treason.** This interpretation takes into consideration Article 3(3) and all the human rights provisions

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source, the Constitution, and if by it, Parliament can pass laws to detain persons in war time there is no reason why the same Parliament cannot exercise the same powers to enact laws to prevent any person from acting in a manner prejudicial to the security of the State in peace time.

[117] Article 19 of the Constitution provides that "No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted". Article 3 (3) also provides that any person who -

"(a) by himself or in concert with others by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act; or

(b) aids and abets in any manner any person referred to in paragraph (a) of this clause; commits the offence of high treason and shall, upon conviction, be sentenced to suffer death."

[118] Maame AS Mensa-Bonsu, *Wings in Need of Clipping- Of the Judicial Supremacy Emerging in Ghana*

[119] [2005–2006] SCGLR 732

[120] Maame A.S. Mensa-Bonsu, 'Wings in Need of Clipping – of the Judicial Supremacy Emerging in Ghana, (2015) 1 LUGLJ.

[121] the only crime expressly provided under Article 3 of the constitution which carries the death sentence

under Chapter 5.[122] This would mean that the right to life, dignity and protection from cruel and inhumane punishment can only be curtailed or extinguished, by the death sentence, if a Court convicts a person of high treason and not any other offence. An interpretation which restricts Article 19 to circumstances under Article 3(3) realizes and formalizes the change in Ghana's criminal jurisprudence. That change which has long abolished the death sentence defacto.

The current sentencing regime which makes death the mandatory punishment for murder is arbitrary. This is because, the life of a murderer regardless of his crime must still be protected. The question then is, "What is the scope of arbitrariness and why is it not arbitrary and cruel to kill persons who commit High Treason?" It is a fundamental principle of criminal law that the punishment must fit the crime. Our Constitution, in letter and spirit, hates its past horrors of military coups with a passion. The fear of, hatred for and sentimental attitude towards high treason cannot be compared to any other offence. The death sentence for high treason arguably is not arbitrary. Even if it is, our Constitution reserves the power to curtail rights explicitly.

It is true that the Constitution does not want human life to be cheapened that is why it provides in Article 19 that no person shall lose his life unless under certain circumstances. Article 13 however does not prescribe death for a convicted murderer. Although the Constitution abhors murder, murder under no circumstances is comparable to the offence of high treason. This is why death is expressly provided for as a consequence of High treason but not murder[123]. It is arbitrary to sentence persons to death for the much less grievous offence of murder.

One must note that, High Treason is an offence of which the rule against double jeopardy does not affect.[124] This shows that, the offence is so grievous that the Constitution does not want any culprit to claim that he has already been tried and acquitted thus he can never be tried again even if there is a discovery of new implicating evidence proving his guilt.

The non-availability of the defence of double jeopardy to persons accused of High Treason shows how heinous the crime with and justifies why death is an appropriate sentence. Can this analysis and conclusion be made of the offence of murder?

V. Argument Against Death Penalty in Light of Ghana's Human Rights Regime

The Constitution 1992 guarantees Fundamental Human Rights and Freedoms more than any of its predecessors. Article 12(2) of the Constitution provides that;

> *Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human*

[122] It is a standard principle of Constitutional interpretation that the Constitution must be read as a whole. See Agyei-Twum v AG & Akwetey [2005-2006] SCGLR 732.

[123] It is noted that section 46 has been interpreted for a long time and death sentence has been mandatory for murder. However, the paper is challenging the existing judicial narrative and interpretation.

[124] See Articles 19(7) and 19(8 of the 1992 Constitution of Ghana.

rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.

This suggests that the Constitution only anticipates two instances where the above rights are limited; subject to the rights and freedoms of others and in the public interest. As analyzed above, the offence of high treason is the greatest fear of the Constitution, hence the reason why the right to life and dignity is taken away from a convict in the interest of the public. Secondly, the rights and freedoms of persons in Ghana collectively is jeopardized greatly if there is an abrogation, suspension or removal of the Constitution.

The other offences under Act 29 which are punishable by death must also meet that standard to be constitutional. There is no doubt that the victims of such crimes have their rights and freedoms disrespected and denied of them but is it really in the interest of the public to kill persons convicted for murder? Although such acts constitute atrocities that affect the Ghanaian public, there is no utility in passing the death sentence for murder. It's actually an affront to the right to human dignity, if persons convicted of the lesser offence of murder are punished the same way that a person who commits the higher offence of high treason will be. The death penalty meted out to persons for non-High Treason offences is degrading and contrary to their right to live a dignified life (note that this argument is made only because the Constitution expressly prescribes that whoever commits High Treason upon conviction shall suffer death). This is because the notion of discontent that society associates with high treason is being transferred to a much lesser offence of murder. Equating society's malevolence towards high treason with that of murder, questions the fundamental principle of proportionality of sentence in criminal justice.

The right to life, the right to dignity and the right to be protected from cruel, inhuman or degrading treatment or punishment are core principles and values enshrined under the Constitution. They constitute the bedrock of the spirit of our Constitution. The protection of these rights are the most visible features that differentiate the current constitutional regime from the past horrors of dictatorial and totalitarian regimes where the death sentence was meted out and executed with the aid of special military tribunals. A too broad and permissive interpretation of Article 13(1) suggests that Parliament possesses the power and tool to return the country into the dark decades.

VI. Conclusion

Debates on capital punishments are made with great force and appeal, but most are not supported by substantial empirical evidence revolving round moral, religious and philosophical reasoning. Abolitionists worldwide advocate for the replacement of the death sentence with long sentencing because it is deemed inhumane, ineffective; and an unacceptable weapon of punishment for an enlightened state to maintain. As a law professor said, "the death penalty is the violent response of a violent society to violence it both fears and is fascinated by".[125]

[125]Sue Titus Reid, *Criminal Justice* (4th edn, Brown & Benchmark 1996) 292

On consideration of the facts and relevant arguments, it is time for unity among legal scholars and the authorities on the abolition of the death penalty. At the international level, an important treaty provision relating to death penalty is Article 6 of the International Covenant on Civil and Political Rights (ICCPR). It prescribes clear limitations of the death penalty to ensure that it's only meted out to the most serious crimes among other requirements considered to protect the dignity of persons on death row.[126]

Ghana is currently described as only a de facto abolitionist state because only policy attempts have been made for the legal abolition of the death penalty. Our Supreme Court decided on the constitutionality of the mandatory death sentence imposed for murder under Section 46 of the Criminal and Other Offences Act but could not entirely resist the attractive appeal to comment on the constitutionality of the death penalty in itself, and thus, by implication held that the death sentence was constitutional.[127]

Courts in Ghana have been handing out the death sentence in accordance with the provisions of the Criminal and Other Offences Act which constitutes an existing law of Ghana. The continuous perpetuation of unconstitutionality however does not metamorphose an act into a constitutional one. In *Dexter-Johnson*, the Supreme Court through Anin-Yeboah JSC stated, that judges ought not to be invited to make laws under the cloak of interpretation. This call on the contrary was and remains the call for an interpretation that reflects the true spirit of the Constitution which has done away with arbitrary death sentencing even if it's by the state.

[126]International Covenant on Civil and Political Rights (ICCPR), Article 6.

[127]See the case of *Dexter Eddie Johnson v. The Republic* 2011 (2) SCGLR 601.

IS CONSENT *A SINE-QUA* NON IN SEEKING MEDICAL TREATMENT?

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Abstract

The question of whether consent is a sine-qua non in seeking medical treatment is an important and practical one for patients, their loved ones, and the courts. Where consent is necessary, but has not been validly obtained, a medical practitioner may incur civil and criminal liability for his failure to obtain consent. However, the answer to this important question in Ghana is not entirely straightforward and cannot be discerned from a single law. Different aspects of the answer may be found in the common law, enactments, and the 1992 Constitution of Ghana. Consent developed from common law and at common law there were categories of persons whose consent was not required before providing them with medical treatment. An adult is generally free to refuse medical treatment even though this refusal may result in his death. Doctors, herbalists, and other persons may, therefore, not impose medical treatment on the adult, and they will be liable in battery and criminal assault if they do. However, this general principle is not wholly applicable to children, the insane, immature, intoxicated, and unconscious persons. Traditionally, parents could withhold consent for their children on the basis of religious, traditional or other beliefs. However, the position has changed as the 1992 Constitution and the Children's Act, 1998 (Act 560) seek to promote decisions that will serve the best interest of a child. Additionally, consent need not be obtained where a patient is seriously sick and in an unconscious state even though a relative or a spouse may be willing to give or withhold consent. There are also instances where, in the interest of public health, medical treatment may be provided against the will of a person. The article will examine the scope of medical consent with particular reference to the regulated and unregulated aspects of medical treatment. The article draws a distinction between persons whose consent is not required for medical treatment and discusses the circumstances that inform decisions on whether or not consent is a sine-qua non in seeking medical treatment.

I. Introduction

For most people, it is inevitable that at some point in their lives they will be in need of medical treatment. Indeed, access to health care is so fundamental that it is considered to be an integral part of the right to life[1] which is a fundamental human right recognized by the 1992 Constitution.[2] The right to health is also specifically recognized by the 1992 Constitution of Ghana.[3] The Constitution further seeks to protect persons who for

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[1] Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, 30 October 2018, CCPR/C/GC/36.

[2] 1992 Constitution, art. 13.

[3] 1992 Constitution, art. 34 (2).

any reason are unable to consent to medical treatment,[4] children,[5] and workers[6] as they are particularly vulnerable.

Whilst medical treatment is essential to the life of human beings, it generally cannot be imposed on patients by medical practitioners. Medical treatment very often involves some physical contact with the patient. This includes acts done in the process of the examination of the patient, the taking of samples from the patient's body, and the administering of medication to the patient. The integrity of the body of a person is protected by law and, therefore, where a person's body is touched, there must be justification for the touching in law. One such justification is the consent of the patient or a person authorized to give consent for and on behalf of the patient.

Generally, where valid consent is lacking, the medical practitioner opens himself up to civil and criminal liability. The patient may sue the medical practitioner in the tort of battery.[7] The Republic may also prosecute the medical practitioner for one of the offence of causing harm[8] or the offence of assault and battery.[9] Furthermore, even though a patient consents to medical treatment, the nature of the information given to the patient prior to obtaining his consent is very relevant in determining whether or not the medical practitioner acted negligently. Where the information is not sufficient, the medical practitioner will be unable to rely on the consent of the party as a shield to an action against him in negligence.[10]

The question as to whether consent *is a sine qua non* in seeking medical treatment is a practical one and of importance to all sorts of practitioners who provide medical treatment to persons in Ghana. However, the laws of Ghana on this very important question are not entirely clear. Answers to parts of this question are scattered in the various sources of law in Ghana and may thus be found in the common law, statutes, and the 1992 Constitution of Ghana. Consequently, it can neither be said that obtaining valid consent is always a necessary condition nor is it the case that it is always not necessary to seek consent before providing medical treatment in Ghana.

The law generally answers this question by considering the circumstances under which the medical treatment is sought and the classification within which the patient falls.[11] Generally, it is necessary to obtain the consent of an adult before providing medical treatment to him. However, in both the civil and criminal laws of Ghana there are exceptions to this general rule based on considerations such as the outbreak of infectious or contagious diseases, insanity, intoxication, or other inability of the adult.[12] These considerations generally apply to all persons including infants. However, there are special

[4] 1992 Constitution, art. 30.
[5] 1992 Constitution, art. 28(2) & (4).
[6] 1992 Constitution art. 36 (10).
[7] *Chatterton v Gerson* [1981] 1 ALL ER 257; *F v West Berkshire Health Authority* [1989] 2 All ER 545.
[8] Criminal Offences Act, 1960 (Act 29) s 69.
[9] Act 29, s 86.
[10] *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118; *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] 2 All ER 1031.
[11] 1992 Constitution art 14(1)(d); Act 29, s 14(a) & 42(d) & (e); Public Health Act 2012 (Act 851), s 10(1), 23, 24.
[12] 1992 Constitution, art 14(1)(d); Act 851; Act 29, ss 14 and 42.

rules for persons which the law does not consider as adults and thus, the general principle requiring that the consent of an adult must be sought before giving him treatment is not entirely applicable to them.

The article shall briefly discuss the regulated and unregulated aspects of the health professions in Ghana with a view to providing the appropriate context within which the subject of discussion operates. Thereafter, the article shall discuss consent as a justification for medical treatment in the common law torts of battery and negligence. Also, the rules applicable to minors shall be discussed. It will include the old common law position, the modern common law position and the statutory and constitutional inroads on the requirement of consent in providing medical treatment to minors.

The article shall also discuss the requirement of consent where the patient is unable to give consent. It shall include a discussion of the law applicable to insane, intoxicated, and seriously sick persons. The article shall further discuss the legal and public health justification for involuntary medical treatment for persons suffering from infectious diseases.

II. Medical Treatment in Ghana

Besides medical doctors, there are several professionals that provide treatment and advice to the sick, disabled and other persons in Ghana. They include traditional birth attendants, herbalists, nurses, pharmacists, midwives, and allied health professionals. Like medical doctors, these persons assume certain obligations when they undertake to provide treatment to those in need of it and are subject to liabilities imposed on them by law. In the social and cultural context of Ghana, it would, therefore, be thoroughly unrealistic to fail to take cognizance of these other professionals.

It is noteworthy that the law regulates some health professions. These include medical doctors, dentists, nurses, midwives, pharmacists, and allied health professionals. The law regulating these professions is the Health Professions Regulatory Bodies Act, 2013 (Act 857). This law has, thus, set up four regulatory bodies to regulate these professions. They are the Allied Health Professions Council, the Medical and Dental Council, the Nursing and Midwifery Council, and the Pharmacy Council.

The state has an undoubted right to regulate professions.[13] Where a profession is regulated a person cannot practice within that profession unless he complies with the law regulating the profession. Regulation affords the state the opportunity to set, monitor, and enforce standards for the public benefit. An important development resulting from the Health Professions Regulatory Bodies Act is the regulation of allied health professionals. The Allied Health Professionals include professionals in the fields of medical laboratory science, physiotherapy, medical radiation technology, dietherapy and nutrition, dental health, occupational therapy, speech therapy, medical physics, prosthetics and orthotics, health information and record management, sanitarian, and optometry.[14]

Nothing makes the use of the services of unregulated professionals unlawful whether the patient is an adult or a child. It is, however, important that where a child is

[13] Ghana Lotto Operators Association v National Lottery Authority [2007-2008] 2 SCGLR 1088.
[14] Act 857, s 5 & Schedule.

concerned, the best interest of the child should inform the kind of health professional from whom medical treatment is sought. Indeed, long before the emergence of the modern medical doctors in Ghana, the sick were taken care of through the use of traditional herbal medicine. There is also biblical support for the use of herbs for medicinal purposes. For example, Ezekiel 47:12 states:

> "Fruit trees will grow all along this river and produce fresh fruit every month. The leaves will never dry out, because they will always have water from the stream that will be used for healing people."[15]

The practice of traditional medicine is a recognized and regulated practice in Ghana. The Traditional Medicine Practice Act, 2000 (Act 575) was passed to regulate the practice of traditional medicine and a persons who practices without a license commits an offence.[16] Traditional medicine has been defined as "practices based on beliefs and ideas recognized by the community to provide health care by using herbs and any other naturally occurring substances."[17]

It is necessary that the practice of traditional medicine is regulated as herbalists remain as important in some Ghanaian communities today as they were in the past. For example, herbalists in Nintin, near Asante Mampong are the preferred healthcare providers for many people down with stroke in the Ashanti Region and its environs in spite of the availability of modern hospitals. Indeed, since 2001, the Kwame Nkrumah University of Science and Technology, Kumasi, has run a Bachelor of Science programme in Herbal Medicine with a view to improving the quality of the practice of herbal medicine in Ghana.

Religious bodies also purport to provide medical assistance to the sick among their members. It is important to take note of these bodies because Ghanaians, like most Africans, are predominantly religious people and much of their health-related decisions are influenced by the practices and views of the religion they profess. The influence religious groups have over the health choices of their members is clear from the case of Nyameneba and Others v State.[18] In this case, the appellants belonged to a religious sect which taught that Indian hemp was the herb of life. As a result of this belief, members used Indian hemp as food and medicine. The appellants were charged under section 49 of the Pharmacy and Drugs Act, 1961 with possession of Indian hemp and were convicted. However, on appeal, the Supreme Court found that the appellants genuinely believed that Indian hemp was actually the herb of life. Consequently, the Court held that the defence of ignorance or mistake of fact had been established and, thus, allowed the appeal.

The sincere belief of the appellants in the case of Nyameneba and Others v State[19] demonstrates the gullible nature of many Ghanaians as far as religion is concerned. It also raises concerns about the propriety of permitting religious groups to provide health-related advice or assistance beyond assisting members to access the services of health

[15] *The Poverty and Justice Bible: Contemporary English Version* (Bible Society 2008).
[16] Traditional Medicine Practice Act 2000 (Act 575), s 39.
[17] Act 575, s 42.
[18] [1965] GLR 723.
[19] [1965] GLR 723.

professionals. In many cases, the dignity of the members of these religious groups are violated. For example, Bishop Daniel Obinim, the Head Pastor of International Godsway Ministries, is reported to have repeatedly stepped on the belly of a woman believed to be pregnant in order to heal her.[20] In another case, a pastor, claiming a congregant was a witch, whipped her until she collapsed and later died.[21] These practices are, however, not unique to Ghana. In South Africa a pastor is reported to have given rat poison to his congregants stating that it could heal the sick[22]. In Ghana, the consent given by these victims is invalid as it amounts to a violation of their fundamental human rights to dignity and protection from cruel, inhuman and degrading treatment.[23]

The various health professionals provide medical advice, treatment or assistance to the Ghanaian public. The average Ghanaian, for example, may first resort to a pharmacist or a chemist when he feels unwell and will only consult a doctor if his condition does not improve. Indeed, it is not uncommon to find nurses and midwifes in Ghana performing functions traditionally carried out by doctors.[24] It must be noted, that the requirement of consent that applies to medical doctors and other regulated health professionals is also applicable to unregulated medical practitioners and any other person providing medical or health-related assistance. Consequently, the discussion that follows will generally be applicable to all persons providing health-related services.

III. The English Common Law and the Requirement of Consent Prior to Medical Treatment.

It is important to consider the common law position on whether consent is a necessary condition to the provision of medical treatment. The received principles of the common law of England remain a part of the common law of Ghana[25], and thus are a source of law in Ghana.[26] At common law consent is important to a medical practitioner as a defence to the torts of battery and negligence.[27] It is, therefore, useful to consider briefly the relevant principles of law governing these common law actions.

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[20] 'Ghanaian Pastor Kicks And Steps On The Stomach Of A Pregnant Woman' (*Sahara Reporters*, 5 December 2014) < http://saharareporters.com/2014/12/05/video-ghanaian-pastor-kicks-and-steps-stomach-pregnant-woman> accessed 17 April 2019.

[21] 'Pastor Whips Church Members to Death' (Ghanaweb, 14 August 2009) < https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Pastor-Whips-Church-Member-To-Death-166843 > accessed 17 April 2019.

[22] Hannah Al-Othman, 'Christian pastor tells South African congregation to drink RAT POISON to 'show forth their faith' (Mail Online, 10 February 2017 < https://www.dailymail.co.uk/news/article-4211320/Christian-pastor-tells-congregation-drink-RAT-POISON.html> accessed 17 April 2019.

[23] 1992 Constitution, art. 15(1) & (2).

[24] *Gyan v Ashanti Goldfields Corporation* [1991] 1GLR 466.

[25] 1992 Constitution, art 11(2).

[26] 1992 Constitution, art 11(1)(e).

[27] *Chatterton* (n 7).

III.1 Battery

The tort of battery is one of the forms of trespass to the person. The writ of trespass existed as far back as the thirteenth century in England.[28] At that time civil and criminal liabilities were imposed on the tortfeasor once the elements of the torts were established against him. Thus, when convicted, the defendant was liable to pay damages to the plaintiff in addition to paying a fine or being imprisoned.[29]

The tort of battery protects the bodily integrity of a person. It prohibits the direct and intentional touching of the body of a person by another without any legal justification for doing so. As far as medical treatment is concerned, the touching is invariably direct and intentional and, therefore, a medical practitioner may open himself up for liability in the tort of battery.[30] Therefore, the medical practitioner must establish that he is justified in touching the body of the person. One major way of justifying the touching of a person's body for the purposes of medical treatment is the consent of that person or the consent of another person authorized to give consent for the person.

Challenges to medical treatment on the basis of the lack of consent have long been part of the English Common law[31] and the situation still persists today. In the case of Chatterton v Gerson[32], the patient had undergone an operation and suffered chronic pain as a result. She was, therefore, referred to the defendant who was a specialist in the treatment of chronic pain. The patient stated that she consented to the treatment proposed by the defendant. The patient further stated that prior to the treatment, the defendant had only informed her of the method of the treatment but not the possible consequences of same. As a result of the treatment by the defendant, the patient suffered numbness and loss of muscle power in her legs. The plaintiff sued the defendant in both battery and negligence. Her argument in support of the claim in battery was that her consent to the treatment was vitiated by the lack of prior explanation of the implications of the treatment. The Court held that for consent to be valid it must be real and where the patient gives consent after being informed in broad terms of the treatment, the consent is real and valid as a defence in the tort of the battery. Thus, the alleged failure to inform the plaintiff of the possible consequences of the treatment did not invalidate her consent to the treatment.

Adult Patients

The common law principle is that an adult patient has the right to give or refuse consent for medical treatment even if the refusal may result in the death of the patient.[33] An adult may for whatever reason refuse to give consent to medical treatment, but it is important that the adult has the capacity to consent at the time of consent or its refusal. This position was taken in the case of *Re T (adult patient)*[34]. In this case an adult who had

[28] Mullis & Oliphant, *Torts*, The Macmillan Press Ltd, 2017 p 215
[29] ibid.
[30] *Chatterton* (n 7).
[31] *Beatty v Cullingworth* (1896) 60 JP 740.
[32] *Chatterton* (n 7).
[33] *Chatterton* (n 7); Re *AK (adult patient) (medical treatment: consent)* [2001] 1 FLR 129; *Airedale NHS Trust v Bland* [1993] 1 All ER 821; Re *B (adult: refusal of medical treatment)* [2002] 2 All ER 449.
[34] [1992] 4 All ER 649.

been involved in a car crash refused to consent to blood transfusion though it was necessary for her treatment. The court found that prior to taking this decision she had spoken to her mother who was a Jehovah's witness who had influenced her decision. The Court further found that she was incapable of making a choice as a result of the deterioration of her mental condition. The court, in light of its findings, held that she was incapable of refusing consent and, therefore, her purported refusal was invalid. Nonetheless, the Court noted that an adult Jehovah's witness is entitled to refuse medical treatment even if it results in the loss of her life.

The are some challenges that arise when dealing with pregnant women. The law generally has to balance the interest of the mother and the unborn child. In the case of *Re S (adult: refusal of medical treatment)*[35] the English Court of Appeal gave priority to the interest of the unborn baby over that of the mother. However, in *Re MB (medical treatment)*[36] the English Court of Appeal noted the right of a pregnant woman to refuse medical treatment irrespective of the effect it will have over a child. However, in that case the court held that pregnant woman's fear of needles had affected her capacity to refuse consent and, thus, her refusal was ineffective.

In Ghana, it is likely that the courts will give priority to the unborn child. This may be discerned from the special treatment given to pregnant women in the interest of the unborn child. For example, where a pregnant woman is convicted of a capital offence, she may be imprisoned but the death penalty may not be imposed.[37] Also, where a pregnant woman is convicted of a non-capital offence the sentence may be suspended for a period of time or a non-custodial sentence may be imposed.[38] Furthermore, Article 27(1) of the 1992 Constitution provides that mothers are given special care during a reasonable period before child birth. In light of the benefits conferred on women by law on account of their pregnancy, it is likely the Ghanaian courts will prioritise the interest of the unborn child over the decision of his mother.

It must be emphasized, that the test of the capacity of an adult patient to refuse or give consent is whether or not the patient could understand and appreciate the information requesting for the consent and make a decision on it.[39]

III.2 The Negligence Action

In some cases, even after consent has been obtained for the purpose of medical treatment, a medical practitioner may still be liable in negligence. In these cases, patients usually rely on the inadequacy of the information given to them by the medical practitioner. It may be recalled that in Chatterton v Gerson[40] discussed above, the plaintiff not only sued in battery but also in negligence. It was her case that she had not been given enough explanation of the treatment by the doctor. It was held that a doctor owed a duty to his patient requiring him to explain what treatment he proposes to give and the implication

[35] [1992] 4 All ER 671.
[36] [1997] 2 FLR 426.
[37] Criminal and Other Offences (Procedure) Act, 1960 (Act 30), s 312.
[38] Act 30, s 313A.
[39] *Re JT (adult: refusal of medical treatment*) [1998] 1 FLR 48.
[40] *Chatterton* (n 7).

of the treatment in the way a careful and responsible doctor would have done. The court found that she had been told of the nature of the treatment and the numbness that was likely to follow consequently the doctor had not acted negligently.

The "Bolam test" formulated in Bolam v Friern Hospital Management Committee[41] was applied by the Court in Chatterton v Gershon[42]. The Bolam test is the applicable test in determining whether professionals have acted negligently. The test is whether the professional acted in accordance with a respectable body of opinion of that profession. In *Bolam v Friern Hospital Management Committee*,[43] the plaintiff underwent electro convulsive therapy and signed a consent form for the purposes of the therapy. The treatment had a very small risk of causing a fracture. Relaxant drugs could, however, have eliminated this risk, but none was administered. As a result of the treatment, the plaintiff suffered severe injuries and fractured his pelvis on each side.

The plaintiff sued the defendant contending, among other thing, that he was negligent in failing to inform him of the risks involved in the treatment and for failing to use relaxant drugs or manual control to prevent the injury. However, there were divergent medical opinions on whether it was proper to act in either way. Consequently, McNaire J in directing the jury stated that the doctor was not to be found to have acted negligently if he acted as a doctor of ordinary skill ought to have acted or, if their views diverge, in accordance with a respectable body of medical opinion. The import of the direction, for our purposes, is that for consent to medical treatment to serve as a defence in negligence the information given to the patient must be in accordance with what a doctor of ordinary skill would have given. The Bolam test was again applied in the case of *Sidaway v Board of Governors of the Bethlem Royal Hospital*.[44] However, it must be noted that the medical opinion must be logical and reasonable otherwise it will be disregarded[45].

Consent or Informed Consent

The Bolam test has, however, been subject to criticism as far as it is applicable to the duty of the doctor to inform the patient of the nature of the proposed treatment and the risk involved in the treatment.[46] The contrary position is that the doctor has to obtain informed consent to avoid liability in negligence.

[41] *Bolam* (n 10).
[42] *Chatterton* (n 7).
[43] [1957] 2 All ER 118.
[44] [1985] AC 871.
[45] Bolitho v City and Hackney Health Authority [1997] 3 WLR 1151
[46] *Reibl v Hughes* [1980] 2 SCR 880; *Rogers v Whitaker* (1992) 16 BMLR 148; *Wyatt v Curtis* [2003] EWCA Civ 1779.

This position requires that the doctor informs the patient of the nature of the proposed treatment, the risks involved in the treatment and alternative treatments available to the patient before proceeding to give the treatment. The distinction between the informed consent requirement and the requirement under the Bolam test is that the doctor under the Bolam test is shielded from liability if he can show that an ordinarily skilled doctor would have given the information about the treatment that he had given. However, the requirement of informed consent is not concerned with what an ordinarily skilled doctor would have done but that the doctor gives what a reasonable patient would have expected or what the patient to the knowledge of the doctor actually requested.[47]

The English Supreme Court in the case of *Montgomery v Lanarkshire Health Board (General Medical Council intervening)*[48] declined to apply the Bolam test in determining whether a medical doctor acted negligently in failing to alert her pregnant patient about the risk of a vaginal birth to her child. The plaintiff was a diabetic pregnant woman and it was estimated that if she had a vaginal birth there was a 9-10% risk of shoulder dystocia. Her unborn child was larger than usual, and she raised concerns to the doctor about vaginal delivery. The doctor failed to tell her of the risk of shoulder dystocia or advise her on the suitability of a caesarean section as she thought the risks were little and the caesarean section was not in the best interest of the plaintiff. The plaintiff sued partly on the basis that the doctor was negligent in not advising her of the risks of shoulder dystocia. At the courts below, the Bolam test was applied and the doctor was not held liable. The omission to inform her about those risks were taken to be supported by a responsible body of medical opinion.

However, the Supreme Court held that the doctor breached her duties to the plaintiff. It was held that the doctor had a duty to explain to the patient the material risks involved in the proposed and alternative treatment. The test of whether information was material was based on the perspective of the patient and not the clinical judgment of the doctor. Information must be disclosed if a reasonable person would regard a risk as significant or if the doctor was actually aware or was reasonably expected to be aware that the patient was likely to attach significance to the risk.

Furthermore, provision of information about risks arising from the treatment was no longer a matter of the clinical judgment of the doctor. Also, alternative treatments must be brought to the patient's attention, so the patient makes an informed choice. The only exception to the rule were instances where the information was seriously detrimental to the health of the patient. Based on the newly formulated principle, the court held that the medical doctor was negligent

[47] *Montgomery* (n 10).
[48] *Montgomery* (n 10).

since she failed to inform the plaintiff of the option of caesarean section and the risks of vaginal birth. Consequently, the position in England is that the informed consent of the patient must be sought to avoid liability to the patient in negligence.

In Ghana, the Court of Appeal per Essiem JA in the case of *Gyan v Ashanti Goldfields Corporation*[49] held that the Bolam test is the applicable test in determining whether or not a medical practitioner acted negligently. However, the Public Health Act, 2012 (Act 851) seems to be in support of the informed consent approach. The Public Health Act has incorporated the Patient's Charter in its Sixth Schedule and provides that the principles stated in the Charter shall apply to all persons who relate to patients or clients[50]. The Patient's Charter in particular provides:

> "The patient is entitled to full information on the patient's condition and management and the possible risks involved except in emergency situations when the patient is unable to make a decision and the need for treatment is urgent.
>
> The patient is entitled to know of the alternative treatments and other health care providers within the Service if these may contribute to improved outcomes.[51]"

It must be noted that the Schedule is part of the statute.[52] The principle of law is that where a judgment is inconsistent with a statute the statute prevails over the judgment.[53] Consequently, as the informed consent approach has been adopted by the Patient's Charter, it prevails in Ghana. Indeed, even applying the Bolam test no respectable body of medical opinion would sanction the breach of statute. It has thus been argued that the present practice in Ghana basing consent on the mere signing of a consent form fails to pass the test for informed consent.[54] Doctors, therefore, have a duty to obtain the informed consent of patients in accordance with the Patients Charter.

IV. Minors

[49] *Gyan* (n 24).
[50] Act 851, s 167.
[51] Act 851, Sixth Schedule.
[52] *Kuenyehia and Others v Archer and Others* [1993-94] 2 GLR 525.
[53] *Tetteh v Republic* [2003-2004] SCGLR 140.
[54] Divine Ndonbi Banyubala, 'A Form of Consent but Not Informed Consent: Why the Current Ghana Health Service Consent Form Is Unsatisfactory' (2011-2012) 25 UGLJ 68.

IV.1 The Old Common Law

As discussed above, a medical practitioner can rely on the consent of an adult as justification in a battery action. However, the question of whether a doctor is required to obtain consent before providing a minor medical treatment is not one which is straightforward to answer. It brings into question the nature and scope of parental rights and duties over the child. It provokes questions on the ability of minors to understand the proposed medical treatment and make a firm decision on same. If the minor has the capacity to consent to medical treatment what conditions must be satisfied? Must the parents be informed, or must their consent be sought? Can the parent override the consent of the child? Does the parent cease to be able to consent for the child once the child can consent? Can the child override the consent by the parent?

At common law, a person ceases to be an infant when he attains the age of twenty-one.[55] Till he attains this age, he is considered a minor. However, the age of majority in England was reduced to eighteen years by section 1 of the Family Law Reform Act, 1969. Nonetheless, the age of majority in Ghana remains the common law position. However, in Ghana there is a distinction between a child and a minor. Whilst a minor is a person below twenty-one years, a child is a person below eighteen years.[56]

At common law, the father or guardian wielded powers over the minor as a result of his duty to maintain, protect, and educate the minor.[57] These powers were absolute. The absolute nature of the powers of the father is clear from the case of In *Re Agar-Ellis*.[58] In that case, a father prevented a mother from speaking with her daughter without impeaching the character of the mother of the child. The mother and daughter then made an application for access. The court however treated the authority of the father as sacrosanct and refused to interfere with it.

The common law made an exception to this rule in custody cases. In such cases, the age of discretion rather than the age of majority was applied. The age of discretion was fourteen for boys and sixteen for girls. Thus, in *Reg. v. Howes*,[59] it was stated that a father was entitled to the custody of a child until the age of twenty-one but where the child reaches the age of discretion, the courts will not grant custody to the father against the will of the child. It was also noted that under the strict common law, a father had control until the age of discretion though the control of a father had at the time been extended to the age of majority. Nonetheless, in this case, the courts still strictly enforced the paternal jurisdiction and held that even if a minor's intelligence exceeded his actual age the courts will still apply the age of discretion.

The point to be noted about the common law position discussed above was that the father of a child had such authority and control over the minor, even contrary to the wishes of the minor that the capacity of the minor at common law to act autonomously of the parent was in great doubt. It was thus doubtful if a minor could validly give consent contrary to the wishes of the father.

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[55] *In Re Agar-Ellis* (1883) 24 Ch.D. 317.
[56] Children's Act 1998 (Act 560), s 1; 1992 Constitution art 28(5).
[57] Blackstone's Commentaries, 17th ed. (1830), vol. 1, chs. 16 and 17
[58] *Agar-Ellis* (n 55).
[59] (1860) 3 E & E 332.

IV.2 The Modern Common Law Position

The old common law position on medical consent in the case of minors came under attack in the twentieth century as it was considered to be out of date.[60] Notable amongst these criticisms is that of Lord Denning in *Hewer v Bryant*[61] where he stated:

"I would get rid of the rule in *In re Agar-Ellis*, 24 Ch.D. 317 and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with a shilling. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent Report of the Committee on the Age of Majority [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."[62]

The view that the parent's right to the custody of the child is a dwindling right accords with commonsense and reality. It is difficult to justify any legal proposition that treats a twenty-year-old person the same as a newly born baby in light of the fact that the justification for the parental powers are the parental duties. Generally, as a child increases in age his mental capacity and physical strength increases. The child gradually becomes more capable of making some choices and it is unclear why the law ought not to take cognizance of this fact.

In 1986, the House of Lords in the case of *Gillick v West Norfolk & Wisbech Area Health Authority*[63] addressed the extent and duration of parental rights and duties over a minor under the age of sixteen at common law for the purposes of consent to medical treatment. Minors who were not under the age of sixteen were empowered by statute to consent to medical treatment, but the statute did not change the common law position for persons under the age of sixteen[64]. It was, therefore, necessary to determine the common law position on a minor's right to consent to medical treatment.

In *Gillick*, the Secretary of State was authorized by statute[65] to make arrangements for the provision of advice on contraception, the medical examination of persons seeking such advice, and the supply of contraceptives. After the Secretary of State made those arrangements, the Department of Health and Social Security issued an explanatory circular explaining the arrangements and attached a Memorandum of Guidance to it. The

[60] *See J v C* [1970] AC. 688; *Reg v D* [1984] AC 778; *Hewer v Bryant* [1970] 1 QB 357, 369.
[61] *Hewer* (n 60)
[62] *Hewer* (n 60), 369.
[63] [1986] AC 112.
[64] Family Law Reform Act 1969, s 8.
[65] National Health Service Act 1977, s 5(1)(b).

Memorandum stated that there were 1490 births and 2804 induced abortions among girls under 16 years of age and highlighted the need for contraceptive advice for such persons despite their age. It recommended that doctors do not contact the parents of the minor without the minor's permission to ensure that minors are not discouraged from seeking medical advice and treatment to their detriment. It further recommended that the doctor attempts to persuade the minor to consent to the parents being informed that the minor was seeking medical advice or treatment. The Memorandum also stated that the doctor had the discretion to decide whether or not to give such advice or treatment.

Mrs. Gillick, the plaintiff, was a Roman Catholic. At the time of the issue of the circular, she had four daughters. She wrote to the Department of Health and Social Security seeking a written assurance that her four daughters, whilst under sixteen years, would not be given such medical treatment without reference to her. She received a response to the effect that the guidelines in the Memorandum gave the doctor the discretion to determine whether or not to give contraceptive advice or treatment. She then wrote a letter to "formally forbid" Norfolk Area Health Authority from giving contraception or medical advice to her daughters but she did not receive a favourable response. She then sued the Norfolk Area Health Authority and the Department of Health and Social Security challenging the lawfulness of the guidelines authorizing the provision of contraceptive advice to children under the age of sixteen without the prior consent or knowledge of the parent or guardian of these children.

Her action was dismissed at the Queen's Bench division and she appealed to the Court of Appeal. At the Court of Appeal, the position taken was that a doctor could not provide medical treatment to a person under the age of sixteen without the consent of the parent. Also, persons under the age of sixteen could not give consent to medical treatment or override the consent of the parent. The Court nonetheless noted that the best interest of the child was fundamental, and the court could override the decision of the parent when it was exercised contrary to the best interest of the child.[66]

On a further appeal to the House of Lords, a different conclusion was reached. The majority held that a child under the age of sixteen was capable of giving consent to medical treatment oonce the child was capable of expressing his own wishes and understood what was proposed to him. The majority rejected the old common law view discussed earlier and endorsed other cases supporting the capacity of a child to make informed decisions.[67]

Lord Scarman noted that the parental right to give or refuse consent in respect of a minor terminates when the minor is of sufficient understanding and intelligence to fully comprehend the treatment proposed.[68] Until then, the parental right continues. However, in exceptional circumstances such as emergencies, parental neglect, parental abandonment, and the inability to find the parent, then consent of the parent of an incompetent minor is not necessary.[69]

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[66]See *In re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185.
[67] Reg v D [1984] A.C. 778; *Hewer* (n 60).
[68] *Gillick* (n 63) 189.
[69] ibid.

The position of the House of Lords, it may be argued, is a better one. It accords with reality and gives to the child a say over his health subject to the understanding and intelligence of the child. However, the test does not produce the certainty that a fixed age limit does. There is much sense in the proposition that medical practitioners should always be certain as to the lawfulness of the treatment they provide.

The English Court of Appeal in Re R (a minor)[70] upheld an order that medication be given to a child who had refused treatment while lucid as the medication was necessary to prevent her from lapsing into a psychotic state. The Court of Appeal held that the Courts have the right to override the refusal of treatment by a child where it is in the welfare of the child even though the competent child refuses treatment.

The English common law position therefore is that a minor can give consent to medical treatment once the minor is able to express his wishes and comprehend the proposed treatment. Once the test explained above is satisfied, it is not necessary to seek the consent of the parents of the minor. In exceptional situations, such as emergencies, treatment may be given without the parent's consent. Overall, the doctor ought to strive to ensure that he persuades the child to inform their parents where appropriate. Also, where a child refuses medical treatment, the courts may still override the decision of the child.[71]

It must be noted that the received English common law (and doctrines of equity) are part of the laws of Ghana because they form part of the Common law of Ghana.[72] However, they are only applicable as part of the Common law of Ghana if they existed by 24th July 1874 in England.[73] Nonetheless, it may be argued that the received English common law and doctrines of equity are not binding on the Courts in Ghana, especially the Superior Courts of Ghana, namely, the Supreme Court, Court of Appeal, and High Court.[74] This is because Ghanaian Courts have held that they are not bound by the decisions of any foreign Court.[75] The law in Ghana is that the decision (*ratio decidendi*) of a Superior Court is binding on all Courts below it.[76] Thus, the decisions of the High Court are binding on all lower courts and lower adjudication authorities.[77] Also, the Constitution provides that the Court of Appeal is bound by the decisions of the Supreme Court and its own decisions.[78] Furthermore, the Supreme Court, the apex court in Ghana, is not bound to follow the decisions of any other Court,[79] and it may even depart from its own decisions.[80]

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[70] [1991] 4 All ER 177; Re W (a minor) [1992] 4 All ER 627.
[71] *Re R* (n 70).
[72] 1992 Constitution, art 11(2).
[73] Supreme Court Ordinance 1876, ss 14 & 18; Courts Ordinance Cap 4 (1951 Rev) s 83; *Fosuhene v Pomaa* [1987-88] 2 GLR 105; *Gwira v State Insurance Company* [1991] 1 GLR 398; *Amaning Alias Angu v Angu II* [1984-86] 1 GLR 309.
[74] 1992 Constitution, art 126(1)(a).
[75] *Gwira* (n 73); *Pokua* v. State Insurance Corporation [1973] 1 GLR 335.
[76] Hansen v. Ankrah [1987-88] 1 GLR 639.
[77] Fosuhene vs. Akore II [1992-1993] 1 GBR 181; Abrahams vs. Akwei [1961] GLR 676
[78] 1992 Constitution art 135(5).
[79] 1992 Constitution art 129(4).
[80] 1992 Constitution art 129(3).

The Courts in Ghana, though not bound by decisions of foreign courts, treat those decisions with respect. Justice Amua-Sakyi expressed this view in the case of *Amponsah v. Appiagyei and Others*; *Amoah v. Anthony and Others*; *Boakye and Another v. Effah and Another*; *Boateng and others v. Boahen and another (Consolidated)*[81] as follows:

> "Decisions of the Court of England are not binding on us, but we cannot shut our eyes to the fact that in many spheres our laws are modelled on those of England. Let us bear in mind the wise counsel of Sowah J.A. (as he then was) in Pokua v. State Insurance Corporation (supra) on the attitude we should adopt towards decisions of the English courts. After pointing out that our Act of 1958 is almost a verbatim reproduction of English statutes, he said at p. 386, C.A:
> "It is of course correct that our courts are not bound to follow decisions of foreign courts and are free to chart their own course; and so be it; but where the foreign piece of legislation is in pari materia with a similar enactment in our laws and where the words used are similar, it does seem prudent to have regard to the experience of those who have chartered the same course before and to observe in what manner we are in agreement with them or otherwise; and it is in this spirit that our courts should examine foreign decisions bearing upon the Act now under consideration. I do not consider that English words must necessarily alter their meaning simply because the countries using the language might have different social and economic circumstances."[82]

IV.3 The Criminal Offences Act, 1960 (Act 29)

It is important to note that both the old and new English common law positions are not entirely applicable in Ghana with respect to criminal offences. The Criminal Offences Act, 1960 (Act 29) contains elaborate provisions on consent and thus the common law position applies subject to it. One important provision to be considered is section 14(a) of Act 29 which provides:

> "a consent is void if the person giving the consent is under twelve years of age, or in the case of an act involving a sexual offence, sixteen years, or is, by reason of insanity or of immaturity, or of any other permanent or temporary incapability whether from intoxication or any other cause, unable to understand the nature or consequences of the act to which the consent is given;"

This means that consent of a patient is void and thus not a justification for the use of force on that person where the person is:

1. Under twelve years of age;
2. Under sixteen years of age in an act involving a sexual offence; or
3. Unable to understand the nature or consequences of the act to which the consent is given whether or not this state is caused by the patient's insanity, immaturity, temporary or permanent incapability, intoxication or any other cause.

[81] [1982-83] GLR 96.
[82] ibid 110-111.

Consequently, the consent of a person under the age of twelve will not serve as a justification for the use of force against the person for the purpose of medical treatment. The reason being that a person under twelve years is an infant for the purposes of the criminal law and lacks capacity to commit an offence[83] and in the same breadth cannot give consent for an act to be meted out to him. Also, where the person is above the age of twelve, whether or not the person is an adult, the patient must be a person who is able to understand the nature or consequences of the act for which the consent is given.

However, with these persons, medical treatment may be given without their consent pursuant to section 42(e) of the Criminal Offences Act which provides:

> "where a person is intoxicated or insensible, or is from a cause unable to give or withhold consent, force is justifiable which is used, in good faith and without negligence, for the purposes of medical or surgical treatment or otherwise for the benefit of that person, unless a person authorised by that person or by law to give or refuse consent dissents from the use of that force"

The law, therefore, dispenses with the requirement of consent for such persons. Since under section 14(a) of Act 29, infants cannot validly give consent to medical treatment, their infancy may be considered as a cause for which reason they cannot give consent within the contemplation of section 42(e) of Act 29. Thus, where a child under the age of twelve is unable to give consent because of his age, a doctor may nonetheless provide medical treatment to the child without any criminal sanction. The doctor must act in good faith and for the benefit of the child. However, any person authorized by law to give or refuse consent may dissent and in such cases the doctor ought not to proceed.

The general principle in respect of consent as a justification for the use of force is that, it is the person against whom the force is used who may give valid consent to the use of force against him.[84] However, the law permits parents, guardians, or persons acting as guardians to give consent for medical treatment of minors under the age of eighteen pursuant to section 42(d) of the Criminal Offences Act, 1960 (Act 29). Thus, under Ghanaian law the power to consent to medical treatment by a parent or guardian has been limited to persons under the age of eighteen. Section 42(d) of the Criminal Offences Act, 1960 (Act 29) provides:

> "consent to the use of force against a person for purposes of medical or surgical treatment, or otherwise for the benefit of that person may be given against the will of that person by the father or mother or guardian or a person acting as the guardian, if that person is under eighteen years of age, or by a person lawfully having the custody of that person if that person is insane or is a prisoner in a prison or reformatory, and, when so given, cannot be revoked by that person;"

[83] Act 29, s 26.
[84] Act 29, s 31(j).

It is important to note that if the consent is not given in good faith and for the benefit of the child, the consent is void[85]. Section 42(d) of the Criminal Offences Act, 1960 (Act 29) is, however, not to the effect that a person cannot receive medical treatment unless the parent consents. Section 14(a) of Act 29 discussed above empowers persons who are twelve years and above to give consent to medical treatment and such consent may be relied on by the medical practitioner as a justification for the use of force. The provision is particularly applicable in cases where the child refuses medical treatment. In such cases, the consent can be overridden by a person in *loco parentis.* However, parents only have the power to give valid consent on behalf of children and not person above eighteen years.

Parents and guardians have a duty under the section 79(1)(a) of Act 29 to provide access to "the necessaries of health and life" to their children who are under their control. Section 79(8) of the Act 29 states that "the necessaries of health and life" includes proper food, clothing, shelter, warmth, medical or surgical treatment, and any other matters which are reasonably necessary for the preservation of the health and life of a person. Since the duty to provide the necessaries of health and life includes the duty to provide medical and surgical treatment, it will be unlawful for a parent to unjustifiably refuse to consent to the treatment of a child. Such an objection will be thus be of no effect and may be ignored by a medical practitioner.

IV.4 The 1992 Constitution of Ghana

The 1992 Constitution of Ghana is the Supreme Law of Ghana.[86] It is, therefore, important to consider the provisions of the Constitution as far as the question of whether consent is a necessary precondition to obtaining medical treatment. Article 28 of the Constitution deals specifically with children. A child for the purposes of Article 28 of the Constitution is a person below the age of eighteen years.[87] Article 28(4) of the 1992 Constitution is particularly relevant, and it provides:

> "No child shall be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs."

This provision is further buttressed by section 8 of the Children's Act, 1993 (Act 560) which provides:

> "(1) A person shall not deprive a child of access to education, immunisation, adequate diet, clothing, shelter, medical attention or any other thing required for the child's development.
>
> (2) A person shall not deny a child medical treatment by reason of religious or any other beliefs."

[85] Act 29, s 14(d).
[86] 1992 Constitution, art 1(2)
[87] 1992 Constitution, art 28(5)

It is, therefore, clear that since the coming into force of the 1992 Constitution, it would be unconstitutional to deprive children of medical treatment by reason only of religious or other beliefs. The reasons may include sickness, unconsciousness, insanity, immaturity. Therefore, once these persons cannot give consent for themselves, they cannot be denied medical treatment on religious or other grounds.

One question that immediately arises is what constitutes the "other beliefs" on account of which a child should not be denied of medical treatment? It would seem that those beliefs, for the purposes of medical treatment, are beliefs which are not medically relevant, including beliefs of an ideological nature. In other words, the beliefs upon which a child should be denied medical treatment are beliefs that can be proven to worsen the medical health of the child such that it will be improper to proceed with the treatment. This provision applies to all stakeholders including the parent and the doctor.

Consequently, if a child is in need of blood transfusion it is irrelevant that blood transfusion is against the religious beliefs of the parent, doctor, hospital or even the child itself. Thus, any refusal to give consent in respect of such a child would be of no effect. In such a case the doctor may proceed to give the child the treatment. The position therefore is that where a parent refuses medical treatment for a child, having the parental right to do so at common law, the doctor must be satisfied that the refusal is not based on religious or other beliefs. Where the medical doctor is not satisfied that the basis for the refusal is medically relevant, he will also be in breach of the child's constitutionally guaranteed human rights if he fails to provide the medical treatment to the child.

In the Ghanaian context, the impact of this provision is far reaching. Where a child is in need of medical treatment, it appears that it will be wrong for a parent to fail to give the child access to the treatment by rather sending the child to a church, mosque, or a shrine. The policy objective is clear – the Constitution seeks to safeguard the physical well-being of the child in spite of any other interest or belief of any other person.

IV.5 The Children's Act

The 1992 Constitution of Ghana imposed on Parliament the duty to enact laws to safeguard the interest of children.[88] Parliament has, therefore, passed the Children's Act, 1998 (Act 560) which provides for the rights of the child and related matters. As stated earlier, a child for the purposes of the Children's Act, 1998 (Act 560) is a person below the age of eighteen years.[89] The welfare of the child is the overriding consideration in dealing with children in Ghana. Section 2 of the Children's Act provides:

> "(1) The best interest of the child shall be paramount in a matter concerning a child.
>
> (2) The best interest of the child shall be the primary consideration by a Court, person, an institution or any other body in a matter concerned with a child."

The requirement to ensure that a child's best interest is the primary consideration in any matter suggests that the Courts will only consider the interests of other person when

[88] 1992 Constitution, art 28(1).
[89] Act 560, s1.

such considerations inure to the benefit of the child. The best interest of a child is always a question of fact to be determined on a case by case basis. This approach is clear from the decision of the Court of Appeal in the case of *Nana Kwame Twumasi v. Naomi Osei*[90] where the Court in determining who was entitled to custody of a child applied the welfare principle as follows:

> "It is the case of the Appellant that the trial judge erred when she granted custody of the only issue of the marriage to the mother.
>
> But we do not agree with this proposition of the Appellant. This is because, it is in the best interest and welfare of the child that she should be with the mother. The Appellant is a chief and an aged person who cannot have time to take care of the child. He does not have strength at his age, which is eighty-nine (89) years to cater for the child. The Appellant also was not able to impeach the character of the Respondent to the effect that she is a person of straw (a destitute) and therefore cannot cater for the child, or that she is a woman of weak moral value in terms of infidelity or habitual drunkard or a thief, on which basis the Court may deny her custody. The child is also used to being with the mother and she will have a maternal sister (Ernestina Berkoe) to relate with."

The welfare principle is an important inroad in the law regarding children and is applicable despite anything to the contrary in the common law. A doctor acts unlawfully where he places any consideration, including the preferences of the parents of the child and the child itself, over the welfare of the child. A parent who has the right to give consent for and on behalf of the child is also required to make the best interest of the child the primary and paramount consideration when dealing with a child.

Consequently, both the parents of a child and the doctor must make the best interest of the child the paramount consideration in determining whether a child should receive medical treatment. It is important to note that where a person acts contrary to the best interest of the child that person commits an offence and is liable on summary conviction to a fine not exceeding two hundred and fifty penalty units or to a term of imprisonment not exceeding one year or to both the fine and the imprisonment.[91]

Refusal of consent by a parent which is not in the best interest of the child is, therefore, contrary to statute and is thus void. Furthermore, the parent may be charged with a criminal offence if that decision was not in the best interest of the child.[92] In the circumstances, the doctor or hospital has an enduring obligation to ensure that the best interest of the child is protected. Under the Children's Act,[93] the right of the child to life and health are firmly recognized and no one has the right to infringe upon the rights of the child. Furthermore, it must be emphasized that the violation of this right is a criminal offence irrespective of who violates this right.[94]

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[90] Suit No. H1/23/2018 Unreported Judgment of the Court of Appeal delivered on 26th June 2019.
[91] Act 560 s16.
[92] Act 560 s 16.
[93] Act 560 s 6(2).
[94] Act 560 s 15.

Parents are also under an obligation under the section 47 of the Children's Act to supply the necessaries of health and life to the child. This responsibility is important, and a parent cannot, under the guise of the right to consent or refuse consent to the treatment of the child, deny the child medical treatment. It is noteworthy that even if a child has the capacity to consent to his treatment the duty to maintain the child still persists. Furthermore, where a parent fails to provide the necessaries of health and life to the child a criminal offence is committed and the parent may pay a fine not exceeding one hundred penalty units or be sentenced to a term of imprisonment not exceeding six months or to both the fine and imprisonment.[95] The health of the child is a fundamental theme running through the Children's Act,[96] and whether a parent has the right to consent to medical treatment or not, the parent is responsible for providing medical treatment to the child. Additionally, section 8 of the Children's Act restates the constitutional prohibition on depriving a child of medical treatment on religious or other beliefs.

It may be concluded by stating that parents or guardians are only authorized to give consent to medical treatment for persons under the age of eighteen. The grounds for the refusal of consent must be medically relevant or else the refusal to give consent is of no effect. Children who are twelve years and above may also give consent to medical treatment and this may not be overridden by a parent for any reason.

V. Other Persons who are Incapable of Giving Consent

As discussed earlier, under the laws of Ghana adults have the capacity to give consent for the purposes of medical treatment. However, there may be instances where adults are incapable of giving consent to medical treatment. In some cases, the inability to give consent is because at the time the patient may be unconscious, perhaps in a coma, and, therefore, it will be impossible to give consent or obtain the consent of that person. In some other cases the inability to give consent may be as a result of the intoxication of the person. Intoxication can arise due to the use of alcohol or other narcotic drugs and in these situations medical treatment may be given notwithstanding the absence of consent.

Also, a person may be suffering from insanity such that he is incapable of giving consent to medical treatment. It is not sufficient to establish that the person is mentally disordered. It must be shown that as a result of the insanity the person was incapable of giving consent to medical treatment.[97] Furthermore, a person may be so sick that it renders the person incapable of giving consent for the purposes of medical treatment. In such a case the law allows for medical treatment in the person's interest without the consent of that person.

The common law, statutes, and the 1992 Constitution take the same attitude towards all categories of persons who are incapable of giving consent. At common law, necessity is one of the defences to battery. Thus, the necessity of the medical treatment may be a justification for the treatment in spite of the absence consent. It must be

[95] Act 560, s 59(b).
[96] Act 560, ss 87, 90(2), 99(d).
[97] *F* (n 7).

emphasized that consent is only one justification for battery and the law creates another in cases of necessity.[98]

Lord Goff in the case of *F v West Berkshire Health Authority*[99] stated that the defence of treatment is in the best interest of the patient. The requirement to act in the patient's best interest is satisfied if the medical practitioner acts in accordance with a responsible and competent body of medical opinion[100].

In *F v West Berkshire Health Authority*[101], an adult woman suffered a serious mental disability and had a mental capacity of a child of about five years. Her mother sought from the court a declaration to have her sterilized as she had entered into a relationship with another patient at the mental hospital and sterilization was considered in her best interests by the doctors. The court held that the procedure was justified on the grounds of necessity. The court further held that it had an inherent jurisdiction to make the declaration though it was not necessary for a doctor to seek a declaration before he acted in the best interest of his patient. The Court, however, noted that in practice a declaration should be sought so the court could determine if the proposed treatment was in the best interest of the patient.

Consequently, once a person is incapable of giving consent for medical treatment, whether as a result of sickness, insanity, intoxication or any other cause, a doctor is justified on the grounds of necessity in providing medical treatment to a patient.

Under section 14(a) of the Criminal Offences Act the consent of persons who are, for any reason, unable to understand the nature or consequences of the act consented to is void. Therefore, no reliance can be had to the consent of insane, unconscious, or intoxicated persons as a defence to criminal offences generally. In such cases section 42(e) of the Criminal Offences Act waives the requirement of consent for the purposes of medical or surgical treatment. The medical practitioner may therefore proceed to give medical treatment to such persons without consent and he will be shielded from liability once the medical treatment was given in good faith for the benefit of that person.

However, it is important to note that the law gives a person authorized by the patient or by law to give or refuse consent the power to oppose the treatment. A patient may authorize a friend or member of his family to give consent on his behalf. It is not unusual in such cases for the patient to indicate his wishes to that person. Where the patient whilst competent indicates his wishes against medical treatment, a doctor is not permitted to proceed with treatment contrary to the patients advance directives.[102]

With respect to adults the law does not generally give any person the authority to give or withdraw consent for the purposes of medical treatment. The powers of parents and guardians are limited to persons under the age of eighteen under section 42(d) of the Criminal Offences Act. However, where a person is insane or a prisoner and is, therefore, in a prison or reformatory, the person having lawful custody of the insane person or the prisoner is empowered to give consent for the purpose of medical treatment under section

[98] *F* (n 7).
[99] *F* (n 7).
[100] *Bolam* (n 10).
[101] *F* (n 7).
[102] *R (on the application of Burke) v General Medical Council* [2006] QB 273

42(d) of the Criminal Offences Act. Such person may, therefore, object to the treatment by the doctor. However, for this power to be validly exercised the decision must be made in good faith for the benefit of that person[103] and in accordance with article 30 of the 1992 Constitution discussed below.

It must be noted that special provision has been made for the treatment of mentally disordered persons under the Mental Health Act, 2012 (Act 846). Section 42 of the Mental Health Act, 2012 (Act 846) provides for the involuntary treatment of mentally disordered persons. Section 42(1) of the Mental Health Act 2012 (Act 846) provides:

> "A person may make an application to a court for the involuntary admission and treatment of a person believed to be suffering from severe mental disorder, where
> (a) the person named is at personal risk or a risk to other people, or
> (b) there is a substantial risk that the mental disorder will deteriorate seriously."

After the application is made, the court may then examine the facts or hold an enquiry[104]. If the court concludes that the prerequisites in section 42 have been complied with, an order will be made placing the person under care observation or treatment in a psychiatric hospital.[105]

Article 30 of 1992 Constitution also provides to persons who are unable to consent to medical treatment the same protection it affords to children. It provides:

> "A person who by reason of sickness or any other cause is unable to give his consent shall not be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs."

It must be stated once more that any belief which has no medical relevance cannot form the basis for the refusal of consent to medical treatment. The person refusing the consent can only lawfully refuse consent in accordance with article 30 if the refusal is not based on religious or other beliefs. That person must therefore give reasons to the medical doctor for the refusal which demonstrates that the basis of the refusal is medically relevant. Consequently, where, for example, there is an objection to blood transfusion, it is not enough object to the treatment. The reasons for the refusal to permit the treatment must be stated for the refusal to be valid. Where the doctor is satisfied that the refusal is not based on beliefs that have no relevance to the health of patient, the doctor may proceed. Indeed, medical practitioners are not under any obligation to seek the consent of any other person when confronted with persons who are unable to give consent. The medical practitioner must proceed to provide treatment that is considered to be in the best interest of the patient.

An adult may for whatever reason including religious beliefs refuse medical treatment when competent. It is, however, necessary to establish that the adult was not

[103] Act 29, s 14(d).
[104] Mental Health Act, 2012 (Act 846), s 43(1).
[105] Act 846, s 43(3).

influenced or pressured by any other person to refuse treatment.[106] In other words, the patient must have independently made the decision. It is typical in Ghana for church members or family members who are opposed to a particular treatment option to seek to influence the patient to withhold consent or even warn the medical doctor not to give treatment. In such cases the patient's refusal to give consent is not given independently and a doctor is free to ignore the refusal. Indeed, church and family members act contrary to article 30 of the 1992 Constitution where they try to persuade the patient to refuse consent because they will be denying the patient medical treatment by their action.

A medical doctor may also be confronted with do-not-resuscitate orders or advance directives which indicate the treatment preferences of the patient. These instructions are usually given at a time where the patient was able to give consent to medical treatment. As an adult may refuse medical treatment for any reason, it will appear that these directives must be complied with if they are independently made. Those directives are only relevant if they are brought to the attention of the medical practitioner. Where a medical practitioner is not aware of the directive or order, it is lawful for him to provide medical treatment. However, where he is aware of the directive or order, he must generally comply with it once the directive was independently made. Admittedly, there is a challenge for medical practitioners who may not be able to verify whether or not the directive was independently made. Where practicable, an order from the High Court should be sought if the doctor suspects that the patient was influenced by that decision.

Consequently, a doctor who was not aware of the wishes of a patient who at the time of seeking medical treatment was unable to give or withhold consent is not liable if he provides medical treatment to that person. Where the law or the patient authorizes another to give or withhold consent that person may only withhold consent on grounds which are medically relevant, and not on religious or other grounds. Where that person fails to provide reasons to the doctor which satisfies the doctor that the refusal is not based on religious or other grounds, the purported refusal to medical treatment is unconstitutional and invalid.

It is, therefore, important that, medical practitioners, when dealing with persons who are unable to give consent do not refuse to give treatment on the basis that consent has not been obtained from family members. Moreover, a refusal of consent on grounds which are not medically relevant are unconstitutional and therefore are not relevant although the patient when conscious could have refused medical treatment.

VI. Persons Suffering from Infectious Diseases

In cases where a person is suffering from an infectious disease, it is necessary that the law balances the interest of the infected person with the interests of the public as a whole. In such cases, it would be impractical to request for that person's consent before providing him with medical treatment. The capacity of the person to consent to medical treatment is irrelevant and his refusal to seek medical treatment is of no effect. Thus, even though the infected person may have the capacity to give or withdraw consent the health of the general public is sufficient to override whatever decision that person takes.

[106] *Re T* (an adult) [1992] 4 All ER 649; *Re AK* (n 33).

There is constitutional justification for the protection of public health in this manner. Article 14(1)(d) of the 1992 Constitution provides:

> "(1) Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law -
> (d) in the case of a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol or a vagrant, for the purpose of his care or treatment or the protection of the community;"

The Public Health Act, 2012 (Act 851) has revised and consolidated the laws relating to public health which were previously scattered in various statutes such as the Infectious Diseases Act, 1908 (CAP 78), the Quarantine Act, 1915 (CAP 77) and the Vaccination Act, 1919 (CAP 76). Part One of the Public Health Act deals with communicable diseases. A person may be detained by a medical officer or authorized health officer until it is safe to discharge that person[107]. In such cases it will be unnecessary to seek the consent of the person suffering from the communicable disease.

Part Two of the Public Health Act deals with vaccination and provides, *inter alia*, for vaccination in Ghana. Pursuant to section 22 of the Public Health Act, a person may be vaccinated without his consent by a public vaccinator on the order of the Minister except where it is injurious to the health of that person. The Minister's order is applicable to all persons who are unable to produce satisfactory evidence of successful vaccination. Furthermore, Compulsory vaccination under the Public Health Act applies both to children and adults.[108] Part Three of the Public Health Act deals quarantine. Certain places may be declared as infected and persons found therein may be isolated in order to ensure that other parts of the Republic are not infected.[109] It is necessary that the State wields this power as without it the health of the community will be subject to the caprices of a single person. It must be emphasized that the enjoyment of rights and freedoms are inseparable from the performance of duties including the duty to respect the right of others.[110]

VII. Conclusion

From the foregoing discussion of the relevant principles governing consent to medical treatment, it is clear the answer to the question, "is consent a sine qua non in seeking medical treatment" is not a straight forward one. The applicable legal principles necessary to answer this question are not in a single legislation. Parts of the answer are found in the common law; others are found in various legislations; still, others are found in the 1992 Constitution of Ghana. A lot depends on the age of the person in question as the principles applicable to adults are not entirely applicable to minors. Also, the answer to the question varies depending on the current state of the patient. Intoxication, insanity,

[107] Act 851, s 10(1).
[108] Act 851, ss 23 & 24.
[109] Act 851, ss 34 & 38.
[110] 1992 Constitution, art. 41(d).

unconsciousness, and severe sickness are all relevant consideration in determining if consent is a sine qua non in seeking medical treatment.

The importance of the question cannot be over emphasized. It borders on the rights to life and health of the individual. It also raises issues of public health and the welfare of society. The individual needs to know the scope of his rights to give and withhold consent for the purposes of medical treatment. The parent or guardian must be aware on the scope of his powers to give or withhold consent and the liabilities for violating the right of the child. The medical practitioner also needs to know when it is permissible to provide treatment without obtaining consent lest he opens himself up to civil and criminal liabilities. It is hoped that this paper has clarified the law on this crucial question and would serve as a guide to all person in exercising their rights and performing their obligations as far as the provision of medical treatment is concerned.

THE ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT: CONSTITUTIONALITY OF ACCREDITATION AND THE SEARCH FOR MEDIA FREEDOM IN ZIMBABWE

William Adjei*

Abstract

On 31 January 2000, the "Access to Information and Protection of Privacy" Bill was passed by the Zimbabwe Parliament in spite of widespread criticism from both the Parliamentary Legal Committee, and a wide range of other local, as well as international bodies. This Article therefore, seeks to take a closer look at the Access to Information and Protection of Privacy Act (AIPPA) and interrogates its provisions and how these have either limited or repressed Media Freedom in Zimbabwe. It will also explore whether compulsory accreditation of media practitioners by a seemingly partisan and government-controlled Media Information Commission (MIC) violated the rights to access information in the context of Article 9 of the African Charter on Human and Peoples' Rights (ACHPR) and constitutional guarantees of freedom of expression. It is submitted that, taken as a whole, the licensing system for journalists envisioned by the Act is unconstitutional as well as contrary to international law. Zimbabwe not only has an obligation to the international community but more-so to Zimbabweans to implement national laws that conform to international best practices, regulations and framework and that best promote the rights enshrined therein.

I. Introduction

The right of access to information[1] is a hallmark of an effective constitutional democracy and political participation.[2] It has been argued that access is necessary for the realization of the basic rights to freedom of opinion and expression, due process and equal protection of the law[3] that are guaranteed in the United Nations Declaration on Human Rights,[4] subsequent human rights declarations, and many national constitutions. Openness and accessibility by the public to information about government activities is also a vital

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[1] T. Mendel, Freedom of Information: A Comparative Legal Survey (2008), available at: https://www.law.yale.edu/system/files/docume...ndel book %2528Eng%2529.pdf. Note: Freedom of information technically means and is "commonly understood as the right to access information held by public bodies". In this article, the "right to information" is used throughout except as otherwise indicated.

[2] J. Fitzpatrick, "Introduction" in S. Coliver & P. Hoffman (eds.)Security and Liberty: National Security, Freedom of Expression and Access to Information (1999). See also Aaron Olaniyi Salau, "The Right of Access to Information and National Security in the African Regional Human Rights System," (2017) African Human Rights Law Journal, Vol. 17 (2); Joseph Stiglitz, "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life," Oxford Amnesty Lecture, Oxford University, United Kingdom, January 27, 1999.

[3] See Articles 7, 10 and 12 of the United Nations Declaration of Human Rights.

[4] See Articles 19 and 21 of the United Nations Declaration of Human Rights.

component of any democracy and a positive aspect of good governance,[5] a point which will be elaborated further below. Zimbabwe's Constitution provides for the enjoyment of this right, and it is provided for in Section 20 (1) of the Constitution of Zimbabwe which guarantees freedom of expression in the following terms:

> *Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference and freedom from interference with his correspondence.* [6]

On 31 January 2000, the "Access to Information and Protection of Privacy" Bill was passed by the Zimbabwe Parliament under the majority – Patriotic Front (ZANU-PF) in spite of widespread criticism from both the Parliamentary Legal Committee, and a wide range of other local, as well as international bodies. The Bill was passed despite the objections of the opposition MDC party, and signed into law by President Robert Mugabe on 15 March 2002. In terms of its applicability, ARTICLE 19 has noted that the Act can be considered largely "illusory" due to the extensive list of exemptions as well as due to the fact that appeals against refusal procedure rely on the government dependent Media

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[5] Article 13 (1) American Convention on Human Rights, adopted at San Jose, Costa Rica, 22 November 1969, OAS Treaty Series 36, entered into force 18 July 1978; Article 10 (1) European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, adopted 4 November 1950, entered into force 3 September 1953; Article 9 African Charter on Human and Peoples' Rights, adopted at Nairobi, Kenya, 26 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982), entered into force 21 October 1986.

[6] Section 20(2) provides : Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –

(a) In the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) For the purpose of –
  (i) The protection of reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
  (ii) Preventing the disclosure of information received in confidence;
  (iii) Maintaining the authority and independence of the courts or tribunals or parliament;
  (iv) Regulating the technical administration, technical operation or general efficiency of telephony, telegraph, post wireless broadcasting or television or creating or regulating any monopoly in these fields;
  (v) In the case of correspondence, preventing the unlawful dispatch therewith of any other matter; or

(c) That imposes restrictions upon public officers;

Except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

and Information Commission.[7] Further, the outlined process of registering does not correspond to the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression as stated in a Declaration of 18/12/2003:[8]

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration (...) which are overseen by bodies which are not independent of government are particularly problematical.

Undoubtedly though, AIPPA gives access to information, this right is severely restricted in Part 3 of the Act. Provisions of the Act exclude enormous quantity of information from disclosure. Section 15 of the Act states that:

> *The head of a public body may not disclose to an applicant information relating to advice or recommendations given to the President, a Cabinet Minister or a public body.*

Zimbabwe Lawyers for Human Rights and The Legal Resources Foundation versus The President of the Republic of Zimbabwe and the Attorney-General case observes that the decision on whether to disclose publicly held information is rather a policy decision made by politicians and not by the courts and set a wrong precedent to those that might think of appealing against refusal by heads of public offices.[9] What is worrying is that much of this legislation is characterized by broad and unaccountable discretions afforded to public officials and political representatives.[10] As commentators have commented that the drafting of the Act is frequently loose and ambiguous, thus provides substantial scope for misuse of the legislation, including the illegitimate harassment and intimidation of the private print media.[11] Dr. Eddison Zvobgo, chairman

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[7] MISA-Zimbabwe and ARTICLE 19, "The Access to Information and Protection of Privacy Act: Two Years On" (www.article19.org, 2004), also available at: https://www.article19.org/data/files/pdfs/publications/zimbabwe-aippa-report.pdf [accessed 20 June 2017]. See also, Stakeholder Report Universal Periodic Review 26 Session: "The Right to Privacy in Zimbabwe", Submitted by the Zimbabwe Human Rights NGO Forum, the Digital Society of Zimbabwe, the International Human Rights Clinic at Harvard Law School and Privacy International, 2016.

[8] "Joint Declaration of the Representatives of Intergovernmental Bodies to Protect Free Media and Expression", available at: www.Osce.org, 2013); https://www.osce.org/fom/99558?download=true

[9] Zimbabwe Lawyers for Human Rights and the Legal Resources Foundation versus the President of the Republic of Zimbabwe and the Attorney-General [2003] Supreme Court of Zimbabwe, SC 12/03 (Supreme Court of Zimbabwe).

[10] BBC News, Zimbabwe's Controversial Legislation, 16 July 2002: available at http://news.bbc.co.uk/2/hi/africa/1748979.stm

[11] ARTICLE 19 (2011), Zimbabwe: Unlawful Detention and Harassment of Human Rights Defenders. Available at: http://ww.article19.org/resources.ph/resource/2889/en/zimbabwe:-unlawful-detention-and-harrasment-of-human-rights-defenders . See also I. Brownlie, Principles of Public International Law, 5th Ed. (Oxford: Oxford University Press, 1998).

of the Parliamentary Legal Committee, described the original version of the Bill as "the most calculated and determined assault on our (constitutional) liberties, in the 20 years I served as Cabinet Minister."[12]

Providing a few examples here is, however, necessary to demonstrate the extent of these restrictions on media freedom in Zimbabwe. An interesting, related case is that of Andrew Meldrum, correspondent for the UK-based *Guardian* newspaper, who was charged under section 80 of AIPPA on 20 June 2002 for abuse of journalistic privilege and, in particular, for publishing falsehoods, in relation to the same "beheading" story published in *The Daily News* on 23 April 2002. The story was later published in the Guardian, having been reported by Meldrum. The High Court found Meldrum not guilty of publishing falsehoods with the intention of tarnishing the image of Zimbabwe. The court found that he had taken reasonable steps to verify the facts by contacting the police spokesman, who declined to comment on the allegations. After being acquitted, Meldrum was immediately served with deportation orders by immigration authorities.

On 18 January 2006, journalist Sydney Saize was arrested and accused of writing a false story for the US government-funded *Voice of America*. He was released without charge after being held in police custody for three nights. Also in 2005, Zimbabwe's state security agency, the Central Intelligence Organisation (CIO), engaged in a takeover of the publications of the independent publishing house, *Zimbabwe Mirror Group Newspapers* (ZMGN), which publishes the *Daily Mirror*, *The Sunday Mirror* and *The Financial Gazette*.

Likewise, on 21 May 2004, Chakaodza, editor of *The Standard*, and Valentine Maponga, a reporter, were arrested over a story headlined "Family of slain boss blames government officials," which alleged that relatives of a slain mine boss accused government officials of involvement in the murder. In its case outline, the State argued that the two had published false news that was likely to cause public disorder, incite public violence and endanger public safety. The claim of falsity is based on the State claim that the relatives of the slain mine boss deny ever speaking to the paper. Abuse of journalistic privileges is further defined by intentional and unintentional false information or statements threatening the interests of defence, public safety, public morality or economic interests (Section 80).

In the light of the discussion above, which highlighted international human rights acknowledged goal, the following cases from Zimbabwe further provide a sense of how the Zimbabwean government has embarked on legal means and repressive tactics to silence journalists and the media: *Andrew Barclay Meldrum case*; *Mark Chavunduka and Ray Choto v. The Minister for Home Affairs & Attorney General of Zimbabwe*; *The Independent Journalists Association of Zimbabwe and Others v. The Minister of State for Information and Others; Capital Radio (Private) Ltd v. Minister for Information, Post and Telecommunications S.C 00/2000*; *Capital Radio (Private) Ltd v. The Broadcasting Authority of Zimbabwe and Others*; *Independent Journalists Association of Zimbabwe:*

[12] ARTICLE 19/MISA-ZIMBABWE, "The Access to Information and Protection of privacy Act: Two Years On" ARTICLE 19, London and MISA-ZIMBABWE, Harare, September 2004.

ZLHR & MISA-Zimbabwe v. The Republic of Zimbabwe;[13] *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe ("ANZ"); Zimbabwe Lawyers for Human Rights and The Legal Resources Foundation v. The President of the Republic of Zimbabwe and the Attorney-General, SC 12/03; Scanlen and Holderness v. Zimbabwe*;[14] and *Matabeleland Zambezi Water Trust v. Zimbabwe Newspapers (1980) Limited and The Editor of The Chronicle*, *SC3/03*.

Within these cases, we shall look at the constitutionality and legal implications of the various sections of the Access to Information and Protection of Privacy Act 2002 (AIPPA) that seemingly violated the right of freedom of expression and media freedom. The analysis is based on a survey of international and constitutional law and practice, including decisions and statements of international bodies and national appellate courts, as well as practice in national jurisdictions – relevant to the question of accrediting/licensing journalists. Basically, we will dwell on the impact of the Act, in relation to the situation of press freedom in Zimbabwe.

II. The AIPPA Accreditation/licensing System: Implications for Media Organisations and Journalism in Zimbabwe

This section will deal with the following issues: a) does the statutory licensing system for journalists under AIPPA meet the requirement that restrictions on freedom of expression be "provided for by law"? In particular, is the Media Commission provided with too much discretion both to establish a code of conduct and to set qualifications for the practice of journalism, as permitted by s. 79(5) of the Act? b) Does the licensing system serve one of the legitimate aims that may justify a restriction on freedom of expression under international law or the Constitution of Zimbabwe? c) Is the licensing system necessary or reasonably justifiable in a democratic society? In particular, is there a rational connection between the licensing system and the legitimate aim that the system purports to satisfy; does the system impair the right to freedom of expression as little as possible and is the harm to freedom of expression proportionate to the objective sought to be achieved? d) Can the lack of independence of the Media and Information Commission, which has powers over licensing of journalists, be justified as a legitimate restriction on freedom of expression? The intention here is to focus on the nature and operations of laws and regulations that were and are still being used to limit the freedom of the media in Zimbabwe.

In fact, AIPPA does establish some rights for journalist, mainly in relation to access to information and to report in a manner consistent with their conscience (section 78). However, it also requires journalists to obtain accreditation and prohibits mass media outlets from employing anyone as a journalist who is not accredited (sections 79 (1) and 83). Accreditation, once obtained, lasts for one year, but may be renewed (section 84). AIPPA requires all bodies which disseminate mass media products to obtain a certificate of registration (Section 66). The certificate of registration must be obtained from the

[13] ACHPR Case: 297/2005.
[14] Communication 284/2004

Media and Information Commission and renewed every two years (Section 66 (2) and (5)) The registration fee is set by the Minister, who is giving broad discretion to apply higher fees to certain types of media service (Section 70). Although the Act seeks to regulate the practice of journalism in Zimbabwe, Section 79 of the Act requires that only citizens and permanent residents may be accredited and, the Media Information Commission may refuse to accredit anyone who does not possess "the prescribed qualifications." Accreditation, once obtained, lasts for one year (Section 84). Pursuant to section 85, the MIC[15] shall develop and police a code of conduct for journalists; anyone who fails to observe the conditions of the code may have his/her accreditation revoked. However, the imposition of any mandatory licensing system constitutes an unjustifiable restriction on freedom of expression, in violation of the Constitution of Zimbabwe and Zimbabwe's international legal obligations.

Sections 79, 79(3), 80, 83 and 85 of the "Access to Information and Protection of Privacy Act" 2002 (AIPPA)[16] are relevant in this discussion since they represent a substantial limitation on press freedom and the right to freedom of expression. This is compounded by the lack of independence of the Commission responsible for administering this system. These aforementioned sections are the only sections of the Act that the applicants seek to have set aside as unconstitutional.[17]

Section 79[18] deals with the compulsory accreditation of journalist and the optional accreditation of part-time or freelance journalists who wish to practice in Zimbabwe.[19] The Media and Information Commission is responsible for overseeing the process of accreditation. No one may be accredited as a journalist who does not possess the "prescribed qualifications" or who is not a resident citizen of Zimbabwe, although representatives of foreign mass media may be accredited for a limited periods (section 79). Individuals must apply to the Commission for a licence which may be granted if they fulfil the three conditions set out in Section 79 (5). The first two of these conditions require the applicant to have complied with the "prescribed formalities" and possesses the "prescribed qualifications." However, the Act does not clearly define what these "prescribed qualifications" are, which leaves it to the Commission's discretion as to who

[15] MIC is government-controlled, with the Minister for Information and Publicity appointing its members and exercising significant powers of dismissal and control over their terms of office.

[16] The Access to Information and Protection of Privacy Act (AIPPA), 15th March 2002 (General Notice 116/2002): Amended in June 2003 by the Access to Information and Protection Act, No. 5, 2003.

[17] See Media Institute of Southern Africa, MISA-ZIMBABWE, "ARTICLE 19 Global Campaign for Free Expression, the Access to Information and Protection of Privacy Act: Two Years On," ARTICLE 19/MISA – ZIMBABWE, Article 19, London and MISA – Zimbabwe, Harare, September 2004.

[18] Section 79 of the AIPPA states: (5) The Commission may accredit an applicant as a journalist and issue a press card to the applicant if it satisfied that the applicant:

(a) Has complied with the prescribed formalities; and

(b) Possesses the prescribed qualifications.

[19] Ibid., para. 2.

may, or may not be allowed to practice. These "qualifications" can be viewed as a hindrance to a journalist's right to receive and impart information as guaranteed by the Constitution of Zimbabwe. They also grant an excessive measure of discretion to politically linked individuals and bodies and thus do not satisfy the requirement that restrictions on freedom of expression be "provided by law." In addition, this provision violates labour laws as the livelihoods of journalists are effectively placed in the hands of the Commission that can use its discretion as to which journalist can be employed and which one cannot be employed. This decision should ultimately rest with the media owners themselves not a government-appointed commission.

Although Section 79 (3) prohibits the accreditation of non-citizens, they may be granted temporary accreditation for a period not exceeding 60 days, while Section 83 outlaws the practice of journalists without accreditation. Section 85 mandates the Commission to develop and apply a code of conduct for journalists. The same section confers on the Commission disciplinary powers and provides guidelines on the sanctions for misconduct. As already noted, under Section 85, the Commission has broad powers to discipline journalists for breach of code of conduct, including to terminate or suspend accreditation, to impose fines of up to Zim$50,000, to impose such conditions as it deems fit on their rights to practice, and to refer them for prosecution.

AIPPA also includes two sections limiting the content of what may be published, Section 64, titled "abuse of freedom of expression," and Section 80, titled "abuse of journalistic privilege." These sections are effectively identical in terms of the limits they impose on what may be published or broadcast. However, in the original version (before the October 2003 amendments), Section 80 (1) was broader and criminalised. It imposes a number of restrictions on journalists, including: (a) publishing falsehood; and (b) collecting and disseminating information on behalf of someone other than his or her mass media employer, unless he or she is a freelance journalist. Breach of these provisions can lead to a fine of up to 100,000 Zimbabwe dollars (approximately USD 1800) or imprisonment for up to 2 years. In the mindset of the Zimbabwe government, the practice of journalism is a privilege, and not a right, hence the Commission of any of the state offences is considered to be a breach of "journalistic privilege" (section 80). According to this section, a journalist commits an offence id he breaches any of the provisions of AIPPA. This restriction is too general and broad to constitute a limitation "authorised by law."

Section 83 (1) states that "no unaccredited journalist may practice, be employed, hold him/herself out in any manner, or pretend to be, a journalist." This is impractical because it means that in reality, even after the expiration of the certificate of accreditation after the 12 months cycle, and during the time when the MIC is considering applications for renewal of accreditation, all journalists' contracts with their employers must be rendered invalid and that no one should collect or disseminate news in that period.

The analysis of these provisions highlights the sharp contrast between free, open democracies and repressive states such as Zimbabwe.[20] In Zimbabwe, criticisms of government doctrines and policies are construed as an accusation which undermines the

[20] See State Party Report, p. 35.

government's political administration. And journalistic reporting is often perceived as unpatriotic and accordingly suppressed by repressive and coercive laws which are inconsistent with international law. It is clear that no regard was taken of the imperatives of Section 20 (2) of the Constitution which states that no person, and even the state, has the right to interfere with the correspondence of individuals, unless if this interference is "in the interests of defence, public safety, public order, the economic interests of the state, public morality or public health (section 20(2) (a) or for the protection of the reputations and freedoms of private individuals (section 20(2) (b).

III. The Jurisprudence of the African Commission on Human and Peoples' Rights and the Misuse of the Phrase "Within the Law"

The discussion thus far has explored the nature and legal effects of the provisions of the "Information Act 2002." This section, however, aims at focusing on whether compulsory accreditation of media practitioners or journalists by a seemingly partisan and government-appointed Boards and also withholding broadcasting licences are consistent with international standards and the notion of media freedom. Particularly, it will address the issue as to whether the Act requiring the compulsory registration of journalists, and prohibiting many newspapers at local level, violated the right to freedom of expression in the context of Article 9 of the African Charter and the international human rights law.[21] Numerous cases before the Zimbabwe Supreme Court examined below betray a deep tension between the media, opposition political party statements and the existing government and have confirmed that media in Zimbabwe deserves special attention and legal protection.

Notably, a number of cases that have come before the African Commission have been examined in order to highlight the Zimbabwe government's application of compulsory licensing of journalists and the inconsistencies in the "Information and Protection of Privacy Act 2002" which makes it illegal for anyone to practice journalism without being accredited by the Media and Information Commission (MIC).[22] Recently reported cases include *The Chavunduka case*.[23] It is, in fact, a landmark ruling by the Supreme Court that has dealt with these inconsistencies. In handing down its judgment in this case in 2000, the Court demonstrated its willingness to strike down legislation inconsistent with Section 20 of the Zimbabwe Constitution. In the *Chavunduka case*, the Court held that a statutory prohibition on "false news" undermines the realization of the right to freedom of expression.[24] On 10 January 1999, *The Standard Newspaper* published

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[21] See for example, Ncube, "A Comparative Analysis of Zimbabwean and South African Data Protection Systems", 2004 (2) The Journal of Information, Law and Technology (JILT). http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_2/ncube/ ; Shadow Report to the African Commission on Human and Peoples' Rights: "Zimbabwe: Human Rights in Crisis," May 2007.

[22] Section 83 of the AIPPA (2002)

[23] *Mark Chavunduka and Ray Choto v. The Minister for Home Affairs & Attorney General of Zimbabwe* [*the Chavunduka case*]: (Judgment No. S.C. 36/2000: Civil Application No. 156/99). Note, Zimbabwe is a State Party to the African Charter on Human and Peoples' Rights (ACHPR), which guarantees freedom of expression under Article 9.

[24] Law and Order Maintenance Act 1960, Section 50 (2) (a).

a story alleging that there had been an unsuccessful coup attempt in the Zimbabwean army. Two days later, Mark Chavunduka, the editor of *The Standard*, was arrested and held for over a week. Raymond Choto, the author of the article, voluntarily surrendered himself to the police. Both were severely tortured and spent time in the UK receiving treatment. They were charged with publishing false statements likely to cause fear, alarm or despondency among the public or any section thereof and faced prison sentences of seven years.

The Supreme Court further held that false statements were protected by the constitutional guarantee of freedom of expression, and that Section 50 (2) (a) of LOMA breached that guarantee in that it was excessively vague, did not serve a legislative objective of sufficient importance to warrant overriding a constitutionally protected right and was excessively broad. On this basis, the Supreme Court held Section 50 (2) (a) to be unconstitutional.

Despite the Supreme Court ruling, within two years the Zimbabwean government enacted Section 80 of the AIPPA which prohibits publishing false information which threatens the interests of the state (amongst other things). Within months of this provision being resurrected in the AIPPA, it was used against journalist Andrew Barclay Meldrum. The state report describes the Meldrum case as one in which the applicant had published a false report that a woman, connected to the opposition, had been breached by ZANU-PF supporters in the presence of her two daughters during the 2000 election campaign. What the state report fails to reveal is that in 2002 Andrew Meldrum, correspondent for the UK newspaper *The Guardian*, was acquitted of the allegation levelled against him ("abusing journalistic privilege by publishing a falsehood"). Unhappy with this result of due process, the Zimbabwean government sought to have Andrew Meldrum removed from the country – without legal basis. Within hours of the ruling of the acquittal, Andrew Meldrum was served with a deportation order by the Ministry of Home Affairs.

After establishing that one has a right to access information from a third party, in the case of the *Zimbabwe Lawyers for Human Rights and The Legal Resources Foundation v. The President of the Republic of Zimbabwe and the Attorney-General*, SC 12/03, the Supreme Court reasoned that although rights created by the Constitution of Zimbabwe are protected and guaranteed, they are not absolute and are subject to limitations that are "designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons."[25]

To qualify the rights expressed in Section 20 (1) of the Constitution, Section 20 (2) provides for broadly ranging limitations to the freedom of expression and effectively on the right of access to information. The limitations include: any other legislation that limits the constitutional right, interest of defence, public safety, public order, the economic interests of the state, public morality or public health, protection of individual reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings and where the information in question was received in confidence.[26] In

[25] Preamble of the Constitution of Zimbabwe.
[26] The Constitution of Zimbabwe, Section (2)

essence, "these provisions make it clear that even where the right of access to information has been established, it can only be exercised subject to observation of, and respect for, other people's rights, or those rights stipulated in sub (2) (a) of Section 20.[27]

A recent example of mandatory licensing of journalists and illegal application of media laws was clearly evident in the case of *Scanlen & Holderness v. Zimbabwe*,[28] where the African Commission found that the Zimbabwean Access to Information and Protection of Privacy Act 2002 (AIPPA) was repressive and illegal; an imposition of excessive burden on journalists; and a restriction on their legitimate enjoyment of the right to freedom of expression and information. Even though the Zimbabwe government argued that the "law" referred to in Article 9 of the (ACHPR) relate to "domestic law,"[29] the Commission found that Section 80 of the AIPPA was not "law" because it was vague and its interpretation contravenes Article 9 of the African Charter.[30] The Commission reasoned that registration procedures for accreditation and the regulation of journalists do not themselves constitute a violation of the right to freedom of expression. However, the imposition of onerous conditions and the control of journalists by a non-independent body infringed the rights to freedom of expression and to receive information.

Again, in this case, the African Commission adopted a broader interpretation of the phrase such as "within the law" or "in accordance with the law" in order to give legal effect to the protection of access to information. The African Commission further stressed that for expression to be "within the law"; the domestic legislation must be compatible with the African Charter or other international human rights instrument and practices.[31] As the Media Information Act was controlled by a government-appointed commission, the African Commission held that the Zimbabwe government could not argue that the limitation placed by AIPPA was permissible "within the law" i.e. within its national law.[32] This, in the opinion of the Commission was tantamount to imposing conditions for prior censorship which undermines media freedom and free speech.[33] It also implies the exercise of freedom of expression is left solely at the discretion of each State Party.[34] According to the Commission, this would cause jurisprudential and interpretative chaos,

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[27] *Zimbabwe Lawyer for Human Rights and the Legal Resources Foundation v. the President of the Republic of Zimbabwe and the Attorney-General*, SC 12/03, P. 11.

[28] *Scanlen & Holderness v. Zimbabwe*, Communication no. 297/2005 (2008); adopted during the 6th Extra-Ordinary Session of the ACHPR, Banjul, The Gambia, April 2009. Reference was made to the Inter-American Court of Human Rights case of *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* and also Zambian case of *Kasoma v. Attorney-General* civ. Case No. 95/HP/2959.

[29] Ibid., para. 68.

[30] Ibid., para. 119.

[31] Ibid., para. 115.

[32] For further understanding of the limitations to access to information, see *Good v. Republic of Botswana* (2010) AHRLR 43 (ACHPR 2010); *Constitutional Rights Project & Others v. Nigeria*, (2000) AHRLR 227 (ACHPR 1999); Constitutional Rights Project & Another Nigeria, (2000) AHRLR 235 (ACHPR 1999)

[33] Ibid., para. 122.

[34] Ibid., para. 115.

as each State Party would have its own level of protection based on their respective domestic laws.[35]

In the 2003 Supreme Court case: *Matabeleland Zambezi Water Trust v. Zimbabwe Newspapers (1980) Limited and The Editor of The Chronicle*, SC3/03, in upholding the ruling by the High Court that Section 20 (1) of the Constitution of Zimbabwe did not create a right of access to information, Justice Cheda ruled that "the section does not, in my view, cover a situation where one can approach and demand information from another party."[36] Based on the above Supreme Court ruling, it can be argued that Section 20 (1) does not provide for the right of access to information held by a third party, and that where there is "a right to receive certain information, it is that right which should not be interfered with. The one who claims under the section should first of all establish such right and then show that such right is being interfered with."[37] It is therefore the duty of the claimant to establish that he/she has a right to receive information from the holder of such information before access can be granted.

As pointed out earlier, AIPPA makes it illegal for anyone to practice journalism without being accredited by the Media and Information Commission (section 83). Only citizens and permanent residents may be accredited and the MIC may refuse to accredit anyone who does not possess, "the prescribed qualifications" (section 79). This was an issue in the *Independent Journalists Association of Zimbabwe and Others v. the Minister of State for Information and Others* [*the IJAZ case*]. This case reflects the repressive nature of the Act (2002). In this case, the applicants challenged the constitutionality of Sections 79, 80, 83 and 85 of the AIPPA on the basis of inconsistency with Section 20 of the Constitution. *IJAZ* journalists were recently denied accreditation on the basis that the newspapers had not been registered, forcing the newspapers to cease publication. This was considered as impinging on freedom of expression and freedom of the press. AIPPA which was passed in March 2002 makes it mandatory for mass media houses and journalists to be licensed through the MIC, whose board is appointed by the Minister. Again, the applicants challenged the constitutionality of the requirements compelling journalists to be accredited, criminalisation of offences relating to the abuse of journalistic privileges and statutory regulation of the profession. The applicants contended that these aspects of the Act were incompatible with the provisions of Article 9 of the African Charter which guarantees media freedom.[38]

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[35] Ibid., para. 115.

[36] *Matabeleland Zambezi Water Trust v. Zimbabwe Newspapers (1980) Limited* and *The Editor of The Chronicle*, SC3/03, p. 4.

[37] Ibid.

[38] Some of the more problematic aspects of AIPPA from the perspective of freedom of expression and of the media includes the following:

(i) It allocates every substantial regulatory power over media outlets and individual journalists to the Media and Information Commission (MIC), a body which is subject to extensive direct and indirect government control.

(ii) All media outlets and any business disseminating media products must obtain a registration certificate from the MIC.

In addition, the *Independent Journalists' Association of Zimbabwe* ("the IJAZ") argued that the compulsory accreditation system for journalists, which is actually a licensing system, not a system of accreditation, failed to pass constitutional muster for a number of reasons and was inconsistent with Article 9 of the African Charter on Human and Peoples' Rights:

(i) It did not promote any legitimate government objective or, in legal terms, the measures adopted were not rationally connected to any legitimate aim. Although the promotion of professional standards is a laudable goal, it is neither appropriate nor effective to attempt this through licensing of journalists. The Constitution does not allow for restrictions on freedom of expression on this ground, but only on the much narrower ground of protecting the rights of others.

(ii) The measure adopted, even if they did serve a legitimate goal, were not carefully tailored to achieve this goal so as to impair freedom of expression as little possible. If the aim was to protect the rights of others, this could be achieved through carefully drafted rules on content, such as defamation laws and rules relating to privacy. As the experience in other countries shows, there is no need to institute a licensing system for journalists to protect the rights of others.

(iii) The harm to freedom of expression inherent in the licensing system is disproportionate to any possible benefit. The possibility that an individual may be banned from practising as a journalist through a refusal to provide him/her with a license simply cannot be justified. This has been the clear conclusion of international, as well as national courts, including those of the region. It is also reflected in a range of authoritative international statements and the practice of countries around the world, including States in Southern Africa.

(iv) IJAZ also argued that the MIC lacks the independence from government required of a body with regulatory powers over the media. In particular, the fact that a politically controlled body has the discretion to refuse to license a journalist is open to serious abuse.

The Challenges of the constitutionality relating to State broadcasting monopoly was addressed in *Capital Radio (Private) Ltd v. Minister for Information, Posts and*

(iii) Accreditation must be obtained from the MIC before anyone may work as a journalist; effectively a form of licensing.

(iv) Foreigners and non-resident Zimbabweans are precluded from owning shares in Zimbabwean media outlets, although they may be minority shareholders in companies which own media shares.

(v) Local and foreign media outlets may only employ Zimbabwe citizens or permanent residents.

Telecommunications.[39] Until 2000, broadcasting in Zimbabwe was legally a State monopoly pursuant to Section 27 of the Broadcasting Act, 1957. In a landmark judgment of 22 September 2000, Capital Radio successfully challenged the constitutionality of the state broadcasting monopoly, facilitating the prospect of private broadcasting in Zimbabwe. The Supreme Court held that the monopoly violated the constitutional right of freedom of expression by unduly limiting the public's right to receive and impart information, on the basis of being inconsistent with Section 20 (1) of the Constitution. The Court lamented the fact that the parties had failed to agree on a regulatory framework for broadcasting and, in light of this, ordered that the applicant be allowed to proceed to set up a broadcasting service.

Capital Radio (Private) Ltd v. the Broadcasting Authority of Zimbabwe; the Minister of State for Information and Publicity, and the Attorney-General of Zimbabwe[40] *(the Capital Radio case)* was the second Supreme Court application by Capital Radio concerning provisions contravening Section 20 of the Constitution. In this application, Capital Radio challenged the constitutionality of a number of the provisions of the BSA, which formalized the broadcast regulatory framework initially introduced by unilateral presidential decree regulations (the Presidential Powers (Temporary Provisions) Broadcasting Regulations 2000). Capital Radio challenged the constitutionality of the composition of the Broadcasting Authority of Zimbabwe (*BAZ*), the licensing process, including restrictions on who may apply for a licence, and the conditions attached to licences, the short period of validity of licences, and various restrictions on programme content.

The Court under a new Chief Justice since the 2000 broadcasting judgment did strike down some of the more egregious provisions of the Act, including the following:

(a) Section 6, providing that the minister, and not BAZ, should be the final licensing authority;
(b) Section 9(1), limiting to one the number of national free-to-air broadcasting services for each of radio and television;
(c) Section 9(2), providing that only one signal carrier licence could be issued; and
(d) Section 9(3), providing that only a public broadcaster could hold both broadcasting and a signal carrier licence.

Indeed, when the Act 2002 (AIPPA) was enacted, the *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe ("ANZ") Group*[41] sought to challenge its constitutionality in the Supreme Court. On the basis that ANZ had pursued a constitutionality challenge rather than applying for a licence, the MIC refused to issue a licence to the ANZ Group for its publications *The Daily News* and *The Daily News on*

[39] Capital Radio (Private) Limited v. The Minister of Information, Posts and Telecommunications: (Judgment No. S.C. 99/2000: Constitution Application No. 130/2000).
[40] Judgment No S.C. 128/02, Civil Application No 162/2001.
[41] Communication 284/2004 – *Zimbabwe Lawyers for Human Rights &Associated Newspapers of Zimbabwe v. Republic of Zimbabwe*, Annex 3 – Communications decided during the 6th Extra – Ordinary Session, EX.CL/529(XV), P. 1-33.

Sunday, which was, at the time, the only independent newspapers in operation in Zimbabwe.[42] The denial of a publishing licence has been maintained ever since 2002. ANZ has tried to enforce its right to procedural fairness through the courts, but delays and weaknesses in the judicial system have resulted in the continued denial of a licence.
The ANZ challenged the Act 2002 (AIPPA) on the basis of its likelihood to infringe freedom of expression, free and uninhibited practice of journalism. According to the applicants, the Court declined to pronounce on the constitutionality of the Act and instead made a preliminary ruling that the ANZ had to and was supposed to comply with the provisions of the Act before challenging them as the ANZ was approaching the Court with "dirty hand."[43] On the basis of this inaccurate and repressive media law, the ANZ declined to register until the question of the constitutionality of the AIPPA provisions it was challenging had been determined by the Supreme Court. According to the applicants, the interpretation of the Constitution by the Court was contrary to the rights and freedoms guaranteed under the African Charter on Human and Peoples' Rights. However, in its ruling that one must first comply with the law before challenging it, the Court relied heavily on the English case of *F. Hoffman-La Roche and Co A.G & Others v. Secretary of State for Trade and Industry* ([1975] AC 295). That case involved a statutory order made by the Secretary of State regarding the price of drugs being sold. The plaintiff disputed the power of the Secretary to make such an order and, in the meantime, refused to comply with it. This is a classical application of the "dirty hands" doctrine.

Although in the *ANZ* judgment, the Zimbabwean government argued that Section 20 (1) of the Zimbabwe Constitution is in line with Article 9 (2) of the African Charter, commentators and legal analyse have suggested that the Information and Protection of Privacy Act is a whole framework of repressive legislation. The African Commission (ACHPR) found that the action of the Zimbabwean government in stopping the applicants from publishing their newspapers, close their business premise and seize their equipment resulted in them and their employees not being able to express themselves through their regular medium or to disseminate information. It found a violation of Article 9 (2) of the ACHPR. This scenario, sharply contrast with the universal recognition that freedom of expression and media freedom have achieved in the international legal framework. This will be addressed in detail below.

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[42] The registration application forces media outlets to disclose details such as their business plans, as well as the curriculum vitae and political affiliations of the company directors. Moreover, the Media and Information Commission can register and accredit media houses and journalists operating in Zimbabwe at its discretion. Under the Act, the MIC can take action against any journalist who writes a report deemed to be against national interests.

[43] The "dirty hands" doctrine requires those wishing to challenge a law, or more commonly its interpretation or application, to first comply with the law and then to challenge it. It is designed to prevent a situation where by mere challenge of a rule or its application renders it of no force or effect. For further explanation of the doctrine, see English case, *F. Hoffman-La Roche and Co A.G & Others v. Secretary of State for Trade and Industry* ([1975] AC 295). *Zimbabwe Lawyers for Human Rights & Associated Newspaper of Zimbabwe v. Republic of Zimbabwe*, supra note 20, para. 54.

IV. The Right to Access Information: International and Regional Legal Framework

One of the main concerns of the questions in this section is therefore the method applied by most African governments to ensure that official information or documents cannot fall into the hands of those who might place it in the public domain. However, this discussion will consider the methods of preventing and deterring, in particular, the media from its application when such information has been obtained.[44]

Several regional and international instruments that provide for the right of access to information and freedom of expression have been ratified by Zimbabwe, creating significant obligations for the country. We have already seen the unequivocal importance of freedom of information recognized during the very first session in 1946, where the United Nations General Assembly adopted Resolution 59 (1), stating:

> *Freedom of information is a fundamental human right and the touchstone of all the freedom to which the United Nations is consecration. Freedom of information implies the right to gather, transmit, and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world.*[45]

In 1997, the UN Special Rapporteur acknowledged that the right to "seek, receive and impart information" enshrined in Article 19 of the Universal Declaration "imposes a positive obligation on states to ensure access to information, particularly regard to information held by the government in all types of storage and retrieval systems."[46]
In 1999, the UN Special Rapporteur and two other special mechanisms in their Joint Declaration on freedom of information stated:[47]

> Implicit in freedom of expression is the public's right to open access to Information and to know what governments are doing on their behalf, Without which truth would languish and people's participation in Government would remain fragmented.

In their 2004 Joint Declaration, the three special mechanisms elaborated further:[48]

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national

[44] See UNESCO, (1996). Practical Guide for Journalists Investigating Infringements of Press Freedom, Paris: UNESCO and Reporters Sans Frontiers.
[45] See "Undue Restrictions: Media Perspectives of the Constitution of Malawi," Paper Presented by Charles Simango (National Director-NAMISA), Constitution Review Conference 28th -31st March, 2006, Capital Hotel. Lilongwe.
[46] Report of the Special Rapporteur: UN Doc E/CN.4/1998/40, para. 14 (28th January 1998).
[47] International Mechanisms for Promoting Freedom of Expression Joint Declaration, adopted 26 November 1999; available at: https://www.article19.org/pdfs/igo-documents/threemandates-dec1999.pdf [accessed 15 October 2017]
[48] Adopted 6 December 2004; available at:https://www.unhchr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C470?opendocument [accessed 7 October 2017]

level through comprehensive legislation (for example, Freedom of information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.

Zimbabwe's international legal obligations to respect freedom of expression are also spelt out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR),[49] to which Zimbabwe became a State Party in 1991. Article 19 of the ICCPR states:

(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 2(2) of the ICCPR further requires States Parties, where they have not already done so, to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant."

Zimbabwe is also a State Party to the African Charter on Human and Peoples' Rights (ACHPR),[50] which guarantees freedom of expression at Article 9. Article 1 of the ACHPR imposes an obligation on State Parties to recognize the rights contained in the Charter and to take positive steps to give effect to these. In May 2007, Shadow Report to the African Charter on Human and Peoples' Rights, ARTICLE 19 observed that:

> *While the government of Zimbabwe's state party report to the African Commission correctly cites Article 9 of the African Charter on Human and Peoples' Rights as the basis of the right to freedom of expression, it fails to cite also the African Commission's Declaration of Principles on Freedom of Expression in Africa, which was adopted b resolution by the African Commission in 2002.*[51]

Being a party to the African Charter, Zimbabwe has an obligation in terms of Article 9 of the African Charter on Human and Peoples' Rights (ACHPR), which places a responsibility on member States to ensure the implementation of the Charter's provisions.

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[49] International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976, Article 19: available at: http://www2.ohchr.org/english/law/ccpr.jtm (accessed 06/06/2012). It should be noted that freedom of speech has been an area in which the UN has found it difficult to make progress because of different of approach on the part of Western and other states (see H.R.C. Report, G.A.O.R. 38th Session, Supp. 40, p. 109 (1983). See also Dominic Mcgoldrick, "The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (Oxford: Clarendon Press, 1991).

[50] Adopted 26 June 1981, in force 21 October 1986.

[51] Zimbabwe: Human Rights in Crisis: Shadow Report to the African Commission on Human and Peoples' Rights, May 2007.

However, Article 9 of the ACHPR provides for a right to receive information and the right to express and disseminate opinions "within the law", making the right to information and freedom of expression limited rights subject to other national legislation. Whilst Article 9 of the African Charter guarantees freedom of expression, it does not include an express reference to freedom of the media. In such a situation, the media and journalists in Africa often feel that in the clash of objective criticisms and political debate, it is their rights and freedoms which are violated. Taking advantage of the vagueness of the provision, the legislation in Zimbabwe has imposed considerable limitations on the freedom of information. Regrettably, legislations such as the (AIPPA) and (POSA) have been used to stifle opportunities for civil society organisations to disseminate state-held information or any other information that may be considered subversive to government interests. A case in point is the arrest of Media Monitoring Project Zimbabwe's employees who were charged for contravening "Section 25 (1) (b) of the Criminal Code (Codification and Reform) Act for allegedly, "participating in a gathering without seeking authority from the regulating authority" and for contravening Section 37 (1) (b) of the Criminal Code (Codification and Reform) Act, for allegedly "participating in a gathering with intent to promote public violence, breaches of the peace or bigotry."[52]

AIPPA came into force in 2002, the same year that the 32nd Ordinary Session of the African Commission on Human and Peoples' Rights held in Banjul, October 2002,[53] the Gambia, led to the adoption by African countries of the Declaration of Principles on Freedom of Expression in Africa. Essentially, the Declaration provides the following list of principles on how the right to access information should be guaranteed by law. It reads:

> *Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law and that the right to information shall be guaranteed by law in accordance with principles set in the Declaration, which includes the following among others: everyone has the right to access information held by private bodies, this is necessary for the exercise of protection of any right; any refusal to disclose information shall be subject to appeal to an independent body and/or the courts; public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest; no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment saves where the imposition of sanctions serves as a legitimate interest and is necessary in a democratic society; and*

[52] ARTICLE 19 (2011), Zimbabwe: Unlawful Detention and Harassment of Human Rights Defender. Available at: http://www.article19.org/resources.php/resource/2889/en/zimbabwe:-unlawful-detention-and-harassment-of-human-rights-defenders.

[53] At its 32nd Ordinary Session held in Banjul, The Gambia in October 2002, The Declaration of the Principles on Freedom of Expression. The Declaration is a result of combined efforts of many stakeholders working on freedom of expression on the continent. (Annexed here as Annex II).

> *secrecy laws shall be amended as necessary to comply with freedom of information principles.*[54]

As underscored in Principle 1 of the Declaration, freedom of expression and information forms a "fundamental and inalienable right and an indispensable component of democracy" thus "Everyone shall have an equal opportunity to exercise the right of freedom of expression and to access information without discrimination."[55] Similarly, the African Charter on Democracy, Elections and Good Governance (ACDEG)[56] which entered into force on 15 February 2012 seeks to "promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs."[57] Unfortunately, Zimbabwe has not signed both the Declaration and the ACDEG; given ACDEG focuses on democracy, elections and good governance and the inaccessibility of electoral information in Zimbabwe, it is essential that Zimbabwe be lobbied to be party thereof.

Within Africa, the *Windhoek Declaration on Promoting an Independent and Pluralistic African Press* was adopted in 1991 at a UNESCO-sponsored conference. It states that "an independent press is essential to the development and maintenance of democracy in a nation." "Independent" in this context means:

> [A] press independent from governmental, political or economic control, or materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals.[58]

The African Commission on Human and Peoples' Rights has also decided on cases involving registration of newspapers. One case from Nigeria involved a legal requirement for newspaper to register, with discretion on the part of the authorities to refuse registration. The Commission stated:

> A payment of a registration fee and a pre-registration deposit for payment of penalty or damages is not in itself contrary to the right to the freedom of expression. The government has argued that these fees are "justifiable in any democratic society", and the Commission does not categorically disagree.....
>
> Of more concern is the total discretion and finality of the decision of the Registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship

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[54] Declaration of Principles on Freedom of Expression in Africa, Adopted at the 32nd Session, 17-23 October 2002, Principle IV.

[55] Principle I, II of the Declaration of Principles on Freedom of Expression in Africa

[56] For the ratification of this document, available at: http://www.africa-union.org/au/Documents/Treaties/list/Charter_on_Democracy_and_Governance.pdf (last accessed 29 March 2010).

[57] African Charter on Democracy, Elections and Good Governance, Article 2 (10)

[58] Adopted 3 May 1991 under the auspices of UNESCO.

and seriously endangers the rights of the public to receive information, protected by Article 9(1). There has been a violation of Article 9(1).[59]

The European Court of Human Rights (ECHR) has also emphasized that:

> *Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of democratic society*.[60]

One of the early cases decided by the ECHR considered the legitimacy of an order depriving an individual of the right to practice journalism, as part of an ongoing sentence in a criminal case. The individual in question, de Becker, had been convicted in Belgium of collaborating with the German authorities and sentenced to life imprisonment. The sentence of imprisonment was later commuted and de Becker released. However, de Becker's punishment carried with it a prohibition on participating in any way in the publication of a newspaper. The ECHR held that this was a breach of his right to freedom of expression.[61]

The UN Human Rights Committee (UNHRC) has further expressed concern about laws requiring the registration of newspapers which either imposed substantive conditions as a pre-requisite for such registration or which imposed excessively onerous registration requirements on newspaper. In a case from Belarus, the Committee had to consider a registration requirement which required a newspaper with a circulation of just 200 copies to register. In this case, the Committee was very sceptical of the State's claim that these measures were necessary to protect public order or the rights of others, stating:

> In the absence of any explanation justifying the registration requirements and the measures taken, it is the view of the Committee that these cannot be deemed necessary for the protection of public order (*ordre public*) or for respect of the rights or reputations others. The Committee therefore finds that article 19, paragraph 2, has been violated in the present case.[62]

Further, the Committee notes that:

> *In a democracy, the right to access to public information is fundamental in ensuring transparency. In order for democratic procedures to be effective, people must have access to public information, defined as information related to all state activity. This*

[59] *Media Rights Agenda and Others v. Nigeria*, paras. 55 and 57.
[60] See Monica Macovei, "Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights," Human Rights Handbooks, No. 2, Directorate General of Human Rights, Council of Europe, 2001, 2004.
[61] De Becker v. Belgium, 23 March 1962, Application No. 214/56.
[62] *Laptsevich v. Belarus*, 20 March 2000, Communication No 780/1997, para. 8.5.

allows them to take decisions; exercise their political right to elect and be elected; challenge or influence public policies; monitor the quality of public spending; and promote accountability.[63]

This view has been endorsed by a non-governmental organisation, ARTICLE 19. It reaffirmed that:

ARTICLE 19 believes that information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden; they cannot take a meaningful part in the affairs of the society. But information is not just a necessity for people; it is an essential part of good government. Bad government needs secrecy to survive. It allows inefficiency, wastefulness and corruption to thrive. Information allows people to scrutinize the actions of a government and is the basis for proper, informed debate of those actions.[64]

Abid Hussain, the United Nations Special Rapporteur on Freedom of Opinion and Expression, has been rather more progressive in his approach in terms of clarity and scope. In successive recent annual report to the UN Commission on Human Rights, the Special Rapporteur has stated clearly that the right to access information held by public authorities is protected by Article 19 of the ICCPR, as the following except from his report in 1999 illustrates:

The Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval system –including film, microfiche, electronic capacities, video and photographs – subject only to such restrictions as referred to in Article 19, paragraph 3, of the International Covenant on Civil and Political Rights.[65]

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[63] See United Nations General Assembly, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council, Fourteenth Session by Mr. Frank La Rue, 20 April 2010, A/HRC/14/23.

[64] See ARTICLE 19, Global Campaign for Free Expression. The Public's Right to Know, Principles on Freedom of Information Standards Series, June 1999, ARTICLE 19, London: Available at: law@article19.org/www.article19.org. (Last accessed 22 March 2012). Also could be found in "Observations on the Protection of Freedom of Expression in Ethiopia," Submission presented to the Government of the Federal Democratic Republic of Ethiopia by ARTICLE 19, The Global Campaign for Free Expression, 22 November, 2000, p. 12. Also cited in my previous book, William Edward Adjei, "The Protection of Freedom of Expression in Africa: Problems of Application and Interpretation of Article 9 of the African Charter on Human and Peoples Rights", The Edwin Mellen Press, Lewiston/Lampeter, 2016, Vol. 1, p. 512.

[65] UN Doc. E/CN.4/1999/64, para. 12.

He further elaborated on this in his Report to the UN Commission on Human Rights, stating:

> *Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold Information from the people at large is therefore to be strongly checked.*[66]

Being party to these international instruments, Zimbabwe not only has an obligation to the international community but more-so to Zimbabweans to implement national laws that conform to international best practices, regulations and framework and that best promotes the right enshrined therein. Any obligation on individuals to be accredited as a journalist is incompatible with the right to freedom of expression. In an Advisory Opinion concerning a licensing scheme for journalists in Costa Rica, the Inter-American Court of Human Rights clearly stated the principle:

> *The compulsory licensing of journalists does not comply with the (rights to freedom of expression) because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community.*[67]

It has become clear that technical registration requirements for the mass media and/or news agencies are not, per se, a breach of the guarantee of freedom of expression. However, such requirements are unnecessary and hence discouraged and they will fall foul of international guarantees if they are subject to political interference or if they are too broad in application.

V. Conclusion

The discussion in this paper has highlighted the challenges relating to the constitutional validity of AIPPA. It is noted that even though in 2002 Zimbabwe enacted the "Access to Information and Protection of Privacy Act," the Act's title is a misnomer, as it does not serve to protect privacy, but instead allows the government to control aspects of the media, through measures such as the mandatory accreditation and registration of journalists.[68] This impacted negatively on the protection of human rights. In a landmark ruling on October 17, 2014, *Nevanji Madanhire and Nqaba Matshazi v. Attorney-General*, the Constitutional Court declared criminal defamation laws unconstitutional, finding that it is "not reasonably justifiable in a democratic society."[69]

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[66] UN Doc. E/CN.4/1995/32, para. 35.

[67] Compulsory Membership *in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 79.

[68] MISA-Zimbabwe and ARTICLE 19, 2004.

[69] Note: The ruling marks the dawn of a new era for Zimbabwean media practitioners and is a great leap forward toward the alignment of the domestic legal order with international benchmarks on

However, the Zimbabwean government has yet to repeal or amend as appropriate other laws, including the Access to Information and Protection of Privacy Act (AIPPA) and the Public Order and Security Act (POSA), the provisions of which severely restrict basic rights.[70] As a consequence, AIPPA has been condemned as illegal and undemocratic not only by the Media Institute of Southern Africa-Zimbabwe and ARTICLE 19, but also numerous other organisations including the European Union, the Commonwealth and Amnesty International, Zimbabwe Lawyers for Human Rights, National Constitutional Assembly, Crisis in Zimbabwe Coalition, the Media Monitoring Project of Zimbabwe, the Zimbabwe Union of Journalists, the Independent Journalists' Association of Zimbabwe, the Federation of African Media Women in Zimbabwe, and the Foreign Correspondents Association, and other organisations.[71]

Undeniably, the wide range of media regulations and the different rates of changes in some African States indicate the complexity of the licensing/regulation issue in the promotion and protection of freedom of expression in Africa.[72] Indeed, some experts view this regulation as highly sensitive. For example, Media expert John Burrows, New

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media freedom and freedom of expression. See more at: http://fxi.org.za/home/?p=1831#sthash.FVAVLRVU.dpuf.

[70] See World Report 2015: Zimbabwe, Events of 2014.

[71] For a detailed information on the critique, see ARTICLE 19/MISA-ZIMBABWE, "The Access to Information and Protection of Privacy Act: Two Years On", September 2004; Elliot Muchena, "Revisiting the Media Lawscape: A Context-Based Reappraisal of the New Media Laws in Zimbabwe," (2013) Journal of Humanities and Social Science, Vol. 17 (3) 68-75, www.Iosrjournals.rg; The Zimbabwe Times. 2009. BBC, CNN now free to cover Zimbabwe: Available at: http://www.thezimbabwetimes.com/?p=20358 [Accessed 21 July 2010]; N. Ndlela, (2007), Broadcasting Reforms in Southern Africa: Continuity and Change in the Era of Globalisation, available at: http://reference.kfupm.edu.sa/content/b/r/broadcasting_reforms_in_southern_africa_77599.pdf.pdf [Accessed 28 September 2012]; D. Moyo, (2004) From Rhodesia to Zimbabwe: Change without Change? Broadcasting Policy Reform and Political Control: Available at: http://www.isn.eth.ch[Accessed: 16 March 2013]; Bruce Mutsvairo, Participatory Politics and Citizen Journalism in a Networked Africa: A Connected Continent, Palgrave Macmillan, London, 2016.

[72] For further discussion, see FH (Freedom House) Freedom of the Press, 2008, New York: Freedom House, 2008; Louise Borgault, "Press Freedom in Africa: A Critical Analysis, Communication Inquiry" 17:2 (1993), pp. 69-92; B. H. Bagdikian, "The Media Monopoly", Boston: Beacon Press, 2000; Cohen-Almagor, R. "Speech, Media and Ethics: The Limits of Free Expression: Critical Studies on Freedom of Expression, Freedom of the Press, and the Public's Rights to Know", Palgrave Macmillan, 2005; Cohen-Almagor, R. "The Scope of Tolerance: Studies on the Cost of Free Expression and Freedom of the Press, 2006; T. Mendel, "The Public's Right to Know: Principle on Freedom of Information Legislation: ARTICLE 19, 1999; T. Mendel, "Parliament and Access to Information: Working for Transparent Governance," WBI Working Paper Series on Contemporary Issues in Parliamentary Development, World Bank Institute; D. C. McMillin, "International Media Studies", Oxford: Blackwell, 2006; Roy A. & Nikhil D. "The Rights to Information: Facilitating Peoples' Participation and State Accountability", 10th International Anti-Corruption Conference, Prague, 10/10/2001.

Zealand's leading authority on Media Law describes the right to freedom of expression as a "terribly difficult balance":

> *If you don't regulate enough, unquestionably people can be hurt. If you're too free, you can damage society, you can damage individuals. At the other end, if you're too regulated and too restricted, the public aren't given the information they need. It is the most difficult area in the whole of the law to get right. There are just so many cross currents, so many important interests in it, that to strike the correct balance that will please everybody is virtually impossible.*[73]

Nonetheless, continuing to provide excuses for legitimizing political suppression, as we have highlighted in this article, have no place in a modern democracy. The whole framework of repressive legislation – the Broadcasting Services Act, POSA[74] and AIPPA – has been carefully crafted to achieve precisely these ends. Cynically named, AIPPA does anything but guarantee access to information. As observed by ARTICLE 19, "its limited access provisions are almost entirely undermined by a broad system of exclusions and exceptions."[75] As a matter of law, AIPPA, along with related legislation such as POSA[76] and the Broadcasting Services Act, is quite in serious breach of the right to access information as guaranteed under international law in a number of key ways. It significantly fails to strike a balance between the legitimate interests of the State, for example in preserving national security and public order, and the rights to access information and democracy. The accreditation/licensing systems, as has been observed, are illegitimate and the regulatory body is under firm government control. However, Articles 10 of the ECHR, 13 of the American Convention and 9 of the African Charter on Human and Peoples' Rights, all emphasize that the exercise and the full enjoyment of freedom of expression can be restricted under lawful and legitimate conditions.

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[73] John Burrows. "Neil Williamson Memorial Lecture: The News Media and the Law" (2003) 9 Canterbury Law Review 229.

[74] The Public Order and Security Act (POSA) were enacted on 10 January 2002, just before the presidential elections of that year. It is largely a reincarnation of the notorious Law and Order (Maintenance) Act (LOMA), which was introduced by the Colonial authorities in 1960. LOMA was widely used by the Rhodesian authorities to suppress civil dissent and many nationalists, including President Robert Mugabe, were victims of this repressive legislation, being detained for periods ranging up to many years.

[75] Cited in MISA-Zimbabwe and ARTICLE19, "The Access to Information and Protection of Privacy Act: Two Year On," p. 28.

[76] Some of the key features of POSA are:

- The police may prohibit demonstrations in an area for up to three months if they believe this is necessary to prevent public disorder;
- Public gatherings will not be allowed unless seven days' notice is given to police; and
- The police are allowed to take measures, including lethal measures, to suppress an unlawful public meeting.

International law does provide for a general "three-part-test,"[77] according to which "interference" with freedom of expression is reasonable, legal, legitimate, necessary and proportionate if it: (a) is prescribed by law; (b) pursues one of the legitimate aims; and (c) is necessary in a democratic society.[78] International jurisprudence makes it clear that this is a strict test, presenting a high standard that any restriction must overcome.[79] This test arguably has an essential part to play in building a more coherent and cohesive legal framework, a framework in which press freedom is respected, protected and upheld in a free and democratic society.

Unfortunately, the Supreme Court of Zimbabwe appears to have largely reneged on its obligation to uphold the Constitution and international law.[80] As has been revealed in the study, the Court has produced rulings that clearly flout established understandings of the scope of the right to freedom of expression and that have led to very serious breaches of this right in practice. Indeed, if Zimbabwe wishes to re-establish itself as an independent, democratic, human rights respecting country, one of the first steps must be the repeal of AIPPA, as well as of POSA and the Broadcasting Services Act. As has been noted, repressive laws like these have no place in a democracy; they seriously limit freedom of expression, and undermine participation, good governance and accountability, as well as the exposure of other human rights abuses.[81]

[77] This test has been affirmed by the UN Human Rights Committee. See *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7. The same test is applied by the ECHR. See *Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 24, para. 45.

[78] See ARTICLE 19, Global Campaign for Free Expression:" The Impact of UK Anti-Terror Laws on Freedom of Expression" Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights, London, April 2006, p. 2. See generally, A.C. Kiss, "Permissible Limitations on Rights" in Henkin L (ed.), the International Bill if Rights: The Covenant on Civil and Political Rights, Columbia University Press, New York, 1981, pp. 290-310.

[79] See for example, *Thorgeirson v. Iceland*, 25 June 1992, EHRR 843, para. 63.

[80] See for example, Torque Mude, "The History of International Human Rights Law in Zimbabwe," (2014) Vol. 2 (1), Journal of Social Welfare and Human Rights 53-86.

[81] MISA—Zimbabwe and ARTICLE 19, "Access to Information and Protection of Privacy Act, supra note 69, p. 29.

CITIZENSHIP-BASED TAXATION: OUTRAGEOUS OR BROADENING THE TAX BASE? A GHANAIAN PERSPECTIVE

Clara K. Beeri Kasser-Tee* and Tawia Akyea**

I. Introduction: Definition of Taxation

Like most definitions, there is no universally accepted one definition of tax. The reason is that different scholars have defined tax differently. Tax is often discussed in its obvious role of providing government funding. However, this is not the only foundation for tax law. The idea of tax law starts with the recognition that tax law is public law that deals with the duties and relationship of individuals/entities to government and society. This is because Tax law shares public law's purposes to influence, modify or control individual conduct for the public good. Therefore, the essence of the concept of tax cannot be found solely in its obvious role as one method to provide government funding. It is thus appropriate to define tax as a compulsory payment or financial charge, imposed by an organ of government to raise funds for direct and indirect benefits. The legal essence of the definition lies in compulsion. Law requires that the payment be made. The political or economic aspect of the definition lies in the uses to which the taxes collected will be put.[1] In another article, we will focus on the uses to which taxes are put, the ethics of taxation, and how corruption affects the attitudes of citizens towards taxation. This is, however, not the focus of this article.

There are different types of taxes. These taxes are classified differently based on the economic standpoints from which they are viewed. There are classifications of taxes according to tax base, (i.e. the measure on which the assessment or determination of tax liability is based, or the assets on which tax can be imposed. Examples of taxes classified according to tax base are: taxes on income, which include income tax on individuals and corporate or non-corporate bodies and tax on rent; taxes on capital such as capital gains tax on individuals and companies, property tax on land, wealth tax and gift tax; taxes on expenditure such as consumption or production in value added tax (VAT), among others. This paper focuses only on income tax and broadening the tax net with respect to income tax.

II. History of taxation legislation in Ghana

Due to poor historical records, coupled with the diverse social and cultural structures of ancient civilizations, it is uncertain when the first system of taxation was actually implemented anywhere in the world. What is clear however, is that taxation is as old as written language, if not as old as the history of the human race. Suffice it to say that the history of taxation is as old as the history of written language.[2]

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[1] Kunbuor Benjamin and Others, *Law of Taxation in Ghana*, (4th ed, TYPE, 2017)

[2] Tax World '*Tax World: A History of Taxation'*. Available at http://www.taxworld.org/History/

In Ghana, the history of taxation can be segregated into three (3) epochs: pre-colonialism, during colonialism, and post-independence. Although modern taxation in Ghana is often linked to colonialism, there is evidence that suggests that the concept of taxation in present day Ghana predates colonialism. Before colonialism, taxes were levied by overlords who were engaged in empire building. These taxes were in the form of land taxes. Chiefs also commonly exacted taxes in the form of receiving crops and human resources, particularly for war. So taxation in Ghana predates colonialism.[3]

During the colonial era, the British administration continued to collect taxes through the pre-colonial system, i.e. land taxes. Direct taxation by the British administration is said to have begun with the imposition of Poll Tax in the 1850s. Poll tax was however abolished in 1861 because not only did it prove inadequate to cater for the developmental needs of the country, it also became unpopular, (the people complained that their chiefs did not consult them before its implementation). There was another attempt at direct taxation in 1931, but the attempt was resisted on the grounds that there can be no taxation without representation. Eventually, the Income Tax Ordinance, 1943 (No. 27) Cap 27 was passed into law. This Cap 27 has been the starting point of most if not all the income tax legislation that we have had in Ghana since 1943. This Cap 27 was amended over the years and finally consolidated into the Income Tax Decree of 1966 (NLCD 78). NLCD 78 was further amended and consolidated into the Income Tax Decree of 1975 (SMCD 5), which was repealed by the Internal Revenue Act, 2000 (Act 592), which has been repealed by the Income Tax Act, 2015, (Act 896). The key legislation on income tax law in Ghana today is thus the Income Tax Act, of 2015, (Act 896).[4]

III. Role/ Benefits of taxation

Taxation has different uses and benefits. These include using taxation as a means of stabilizing the economy, reallocating resources, influencing behavior, etc. This paper however focuses on taxation's primary role, which is about raising revenue for the State. The SState must raise revenue because, through its government, it provides services. Such services include: maintaining the State apparatus, i.e. the executive, parliament, judiciary, regulatory bodies; provision of basic and advanced infrastructure services, free Senior High School, roads, education, healthcare, water, etc.; defensive ones, notably maintaining borders, and protecting Ghanaian interests through the armed forces, among many others.

IV. Basis for taxation of Income

Once the State decides what kind of tax it wants to apply, the State will then need

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TaxHistory.htm [Accessed 30 June 2010].

[3] See Gareth Austin, *The State and Business in Ghana: Pre-Colonial, Colonial and Post-Colonial, 1807-2000, (*AEHN meeting, Sussex, 21-22 October 2016); and Webber, Carolyn, and Aaron B. Wildavsky. *A History of Taxation and Expenditure in the Western world*, (Simon & Schuster, New York, 1986).

[4] Ali-Nakyea Abdallah., *Taxation in Ghana: Principles, Practice and Planning*, (Black Mask Limited), Accra, (2008).

to determine the tax base, that is, the class of persons or assets that the tax will be levied on. When determining the tax base, the State must consider issues of: jurisdiction, (i.e. its power to levy taxes); enforceability; and administrability. It is for this reason that Lord Dunedin observed in the case of ***Whitney* v *IRC***[5] that the process of determining liability to income tax is in three stages. The first stage is the declaration of liability, (i.e. the part of the statute which determines what persons in respect of what property are liable to tax. The second stage is the assessment. Liability does not depend on assessment. That ex hypothesis, has already been fixed. However, assessment particularizes the exact sum which a person liable has to pay. Finally comes the methods of recovery, if the person taxed fails to voluntarily pay.

A country may found jurisdiction to income tax on:

- Source of income;
- Residence of taxpayer; or
- Citizenship of taxpayer

V. Source Jurisdiction

A country is said to found its income tax jurisdiction on source where the basis for liability to income tax is because the income derives from or accrues in the territories of that country. The effect of the 'source' rule is that it is the source of the income that determines the jurisdiction to tax, and the residence or nationality of the taxpayer are irrelevant for purposes of determining jurisdiction to tax.[6] In short, the source jurisdiction would mean that all income arising from the territorial area of Ghana would be subject to the income tax laws of Ghana regardless of the nationality or residence of the recipient, unless otherwise exempted.[7] The philosophical basis for source jurisdiction includes the view that if the activities of the citizens of a country generate wealth, that country is entitled to share in it.[8]

Ghana's income tax jurisdiction under the repealed Internal Revenue Act of 2000, (Act 592) was primarily source. This is because under the repealed law, (similar to the current law), all income accruing from, derived in or arising from the territories of Ghana is subject to the income tax jurisdiction of Ghana unless otherwise exempted.[9] Ghana had a secondary jurisdiction in that repealed Act which was founded on residence. This is because under that Act, foreign income, (i.e. income not having its source in Ghana), was subject to Ghana's income tax jurisdiction only if such income was brought into, received in or deemed to be brought into or received in Ghana by a person who is resident in Ghana. Thus, under the repealed Act 592, Ghana did not have jurisdiction over: (i) the

[5] (1925) 10 TC 88

[6] See, Mills J.E.A. 'The basis of liability to tax. Setting the records straight after Fynhout' 15 UGLJ 1-16

[7] See Kubi & Others v Dali [1984-86] GLR 501

[8] Kerguelen Sealing & Whaling Co., Ltd v CIR, 1939 AD 487, 10 SATC: 363.

[9] See Internal Revenue Act, 2000 (Act 596), ss 1, 5 &6; Income Tax Act, 2015, (Act 896), ss 1, 2 and 3(2); Kubi & Others v Dali [1984-86] GLR 501; and Mills J.E.A. 'The basis of liability to tax. Setting the records straight after Fynhout' 15 UGLJ 1-16.

foreign income of a non-resident whether or not such income was brought into, received in or deemed to be brought into or received in Ghana; and (ii) any foreign income or any part of the foreign income of a resident person where that income was not brought into, received in or deemed to be brought into or received in Ghana, (unlike the current law). In short, Ghana did not have income tax jurisdiction over foreign income, unless such foreign income was that of a person who was resident in Ghana, and, such person had brought into, received in or is deemed to have received that specific foreign income in Ghana.[10]

VI. Residence Jurisdiction

Residence based taxation instructs that a country can tax a person's income if that person is resident or domiciled in that country, regardless of the source of that income, i.e. regardless of where that income is generated. In other words, residence based jurisdiction entitles a country to tax the worldwide or global income of its residents, regardless of their nationality and regardless of the source of their income. Ghana's repealed Act 592 was said to be partly residence because it was not the entirety of a person's foreign income that was subject to Ghana's income tax jurisdiction. Rather, it was only the portion of the foreign income that was brought into or received in Ghana or deemed to be brought into and received in Ghana.[11] This is however no longer the case under the Income Tax Act, 2015, (Act 896). Under the income Tax Act of 2015, (Act 896), the global income of a person resident in Ghana is subject to the income tax jurisdiction of Ghana, regardless of the source of the income and regardless of the nationality of the income earner, unless otherwise exempted under Ghana law. This rule is wider than was the case in the repealed Act 592 because now, the entirety of the foreign income of a resident person is subject to the tax jurisdiction of Ghana, regardless of whether such income is received or brought into Ghana. The legal effect is that under Act 896, Ghana's income tax jurisdiction is no longer secondarily residence, it is now primarily residence.[12]

A Ghanaian permanent establishment is treated in the same manner as a resident company.[13] So the global or worldwide income of a non-resident person that is connected with a Ghanaian permanent establishment is also subject to Ghana's income tax jurisdiction unless otherwise exempted.[14] The effect is that if a person is not resident in Ghana, but has a Ghanaian permanent establishment, the income of that person connected with that Ghanaian permanent establishment is subject to our tax laws.

VII. Citizenship-based taxation

Citizenship-based taxation is a tax regime that taxes a citizen's worldwide

[10] Ibid
[11] Internal Revenue Act, 2000 (Act 596), ss 1, 5 &6
[12] The Income Tax Act, 2015, (Act 896), ss 1 &3.
[13] The combined effect of section of the Income Tax Act, 2015 (Act 896), ss 1, 3, 107(1) (a) and101 (4).
[14] The Income Tax Act, ibid, s. 3(2) (b (ii).

income, although that citizen may not be resident in the country.[15] In other words, the reason for bringing that person within the income tax jurisdiction of that country is because the person is a citizen of that country.

Most countries practice either residence or source based taxation or both. With the exception of the United States and Eritrea, no other country is known to practice citizenship-based taxation.[16] While many view residence and source based taxation as reasonable and justifiable, the same cannot be said of citizenship-based taxation. Citizenship-based taxation is vehemently condemned by many. However, in spite of this widespread disapproval, the US has been practicing citizenship-based taxation for a very long time.

VII.1 Arguments against Citizenship-based taxation

One of the arguments against citizenship-based taxation is that if all States can tax persons living in their territory on income from foreign sources and persons living outside of their territory on income from domestic sources, persons deriving income from States other than that in which they live will often be compelled to pay two taxes on the same income. There is therefore real risk or likelihood of double taxation.[17]

This argument is a legitimate one on the face of it. There are however 2 questions to answer, and one would observe from these answers that this argument in so far as it seeks to discredit citizenship-based taxation but not residence jurisdiction to income tax is not sustainable. The two (2) questions are as follows:

a. Do residence and source based jurisdiction eliminate or reduce the threat of double taxation?

b. Is the issue of double taxation so unresolvable that it ought to overrule citizenship-based taxation even if there are benefits to such taxation?

Residence and source based jurisdiction do not eliminate double taxation of income in different countries. Both residence and source jurisdiction to income taxation do sometimes result in double taxation, the reason why there are many double taxation treaties between States, although only two (2) countries practice citizenship-based taxation: the United States and Eritrea. Indeed, many more countries are negotiating and entering into double taxation and prevention of fiscal evasion treaties. Ghana does not currently found its jurisdiction on citizenship. This notwithstanding, Ghana has at least eleven (11) double taxation and prevention of fiscal evasion treaties with other countries.[18]

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[15] See Cabezas, Montano. 'Reasons for Citizenship-Based Taxation', Penn St. L. Rev. 121 (2016).
[16] Ibid.
[17] Edward S. Stimson, 'Jurisdiction to Tax Income', 22 CornellL.Rev. 487 (1937).
[18] Ghana has signed tax treaties, commonly referred to as double taxation agreements with the following countries: The United Kingdom, France, Belgium, the Netherlands, Germany, South Africa, Italy, Switzerland, and Denmark and very recently, with Mauritius, and the Czech Republic.

The only reason these countries entered into double taxation treaties is because of the real likelihood of double taxation in spite of the fact that neither of them practices citizenship-based taxation. Citizenship-based taxation is therefore not the only type of taxation that has the likelihood of resulting in double taxation.

Moreover, it is known that the issue of double taxation is resolvable by countries in double taxation treaties and/or an effective and efficient foreign tax credit system. For this reason, Ghana may negotiate and enter into double taxation treaties with other countries in a manner that addresses effectively issues of double taxation. This paper suggests that Ghana will have more to negotiate for in double taxation treaties if it widens its income tax jurisdiction to include one founded on citizenship. In fact, Ghana may seek to initiate negotiations for such double taxation treaties with countries she considers desirable for the purpose, and for their mutual benefit.

Furthermore, the issue of double taxation can be addressed in an efficient foreign tax credit system. The power to tax has been claimed to be one of the attributes of sovereignty, and its exercise is coterminous with the bounds of a nation's jurisdictions. The exercise of tax jurisdiction is therefore unlimited and whatever limitation one can think of will be a practical one of enforcement. There are thus no rules of international law or custom on taxation. In addition, a nation's taxing powers, (i.e. its tax jurisdiction), are not limited by any rules of international law or custom. Taxes are therefore clearly territorial, and in the absence of a treaty one country cannot enforce its tax laws in another country.[19] In the words of Lord Mansfield CJ (as he then was) ***'no country ever takes notice of the revenue laws of another".***[20] In the era of tax evasion and taxpayers' reluctance to disclose fiscal information relevant for tax assessment purposes, States would be required to co-operate more to enforce their tax laws. This they do through double taxation and prevention of fiscal evasion treaties. This paper submits that the argument that citizenship-based taxation will result in double taxation is not a strong enough ground against citizenship-based taxation for two reasons: both source and residence based taxation sometimes result in double taxation, and, in any case, problems associated with double taxation are resolvable through double taxation treaties and effective foreign tax credit systems provided for in the domestic legislation of the various States.

A second argument against citizenship-based taxation is that in the era of globalisation, citizenship-based taxation is an anomaly that should be abandoned[21]. This argument is founded on the view that worldwide taxation, to the extent that it is even popularly understood, is associated with residence rather than citizenship around the world.[22] The argument continues that Citizenship-based taxation is an anomaly known to

[19] Russel v Scott (1948) AC 422 at p.433

[20] iPlanche v Fletcher (1779) 1 Douglas 251 at p.253, per Mansfield CJ

[21] Allison Christians, 'A Global Perspective on Citizenship-Based Taxation', 38 Mich.J. Int'lL. 193 (2017); Cabezas, Montano. "Reasons for Citizenship-Based Taxation." Penn St. L. Rev. 121 (2016): 101.

[22] See, Avi-Yonah, Reuven S. 'International tax as international law', Tax L. Rev. 57 (2003): 483.;See also Ruth Mason, 'Citizenship Taxation', 89 S. CAL. L.R. 169, (2016) 187-96, (outlining

and understood well only by a subset of United States of America, (U.S.) tax law experts. Moreover, resident U.S. persons are not really taxed on the basis of their citizenship alone. For those not resident in the territory, the fact that an obscure and anomalous law applies to them is anything but obvious. [23] The argument then advocates that citizenship-based taxation be given up for residence based taxation.

This statement ought to be situated in the concept of taxation to determine whether or not it can be said to be an accurate statement. To begin with, one of the cardinal principles of taxation is that every citizen should be made to pay her "fair share" of tax. This calls for an equitable distribution of the tax burden. So whether citizenship-based taxation will be an anomaly or not depends on whether it plays any role in the fair distribution of the burden of taxation in the era of globalisation. This analysis must be done in the context that in spite of the fact that the world may now be discussed as a global village, taxes are still and are likely to continue to be territorial. The statement cannot therefore be an accurate statement of tax law.

Secondly, it is a generally accepted rule that the concept of rights goes with duties. Citizens everywhere know that they are entitled to certain rights from the States whose nationals they are. That ought to go with an understanding that they ought to owe certain duties to such a State as well. In an era of globalisation, technology and the internet, access to information particularly access to the laws of the various countries is now much easier. Citizens can therefore have access to the laws of Ghana through the internet, along with the filing requirements for taxes. With the expectation that artificial intelligence will increase globally, there is real potential for a corresponding increase in access to expertise on the tax laws of Ghana. The argument of obscurity often raised against citizenship-based taxation therefore cannot continue to hold.

This paper submits that the argument that citizenship-based taxation is an anomaly in the era of globalisation is neither a legitimate ground not to practice it, nor does it address one of the very important reason of taxation, which is, will this benefit the country? The history of taxation shows that countries ought not to adopt income tax jurisdictions on the bases of popularity among nations. Rather, a country ought to determine its income tax jurisdiction using two key considerations: the economic needs of its people; and the need to address social justice[24]. There is no argument that Ghana is at the stage of development where she needs a lot more revenue to address the economic needs of her people. There is also consensus among Ghanaian taxpayers that Ghana needs to broaden or widen her tax base. This is because the tax burden cannot be said to be

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the vastly different relationships States have with their residents versus with their nonresident citizens); Reuven S. Avi-Yonah, 'The Case Against Taxing Citizens, 58 TAX NOTES INT'L (2010), 389, (stating that "[i]n a globalized world, citizenship-based taxation is an anachronism that should be abandoned"); and Allison Christians, 'Drawing the Boundaries of Tax Justice', in*,'* Kim Brooks ed. '*The Quest For Tax Reform Continues*: *the Royal Commission on Taxation Fifty Years Later',* (Carswell, (2013) 63-65.

[23] See Cynthia Blum & Paula N. 'Singer, A Coherent Policy Proposal for U.S. Residence-Based Taxation of Individuals', 41 Vand. J. Transnat'll. (2008), 705, 717.

[24] Bardopoulos, Anne. 'International taxation & domestic taxation: Tax avoidance and double tax agreements.' *University of Cape Town Postgraduate Diploma in Taxation Dissertation* (2007).

evenly distributed among Ghanaians. While, this paper agrees that Ghana ought to do more to bring the informal sector within the tax net, this paper submits that one way to do so is through citizenship-based taxation. The argument that in the era of globalisation, citizenship-based taxation is an anomaly that should be abandoned is therefore simply unconvincing in the Ghanaian context.

Although we live in a global world, taxes are territorial, as discussed above. It is globally accepted that citizens of a country cannot be subject to any taxation unless an authority vested with power to impose taxes exercises its power to impose the tax. The tax laws of one country are therefore not enforceable in the territory of another country without the express agreement or authority of that country. The territorial basis of taxation is exemplified in the constitutional provision in Ghana that no taxation shall be imposed in Ghana otherwise than by or under the authority of an Act of Parliament[25]. Only the Parliament of Ghana therefore has authority to impose taxes or authorize the imposition of taxes. Taxes can also not be waived in Ghana without the prior approval of Parliament. [26] In Ghana, therefore, tax is purely a creation of legislation. This means that if the laws of Ghana allow her to found her income tax jurisdiction on citizenship, this would make citizenship-based taxation legal and constitutional in Ghana. One cannot address a legal and constitutional right as an "anomaly". The United States of America is an example of this. Since its laws permit citizenship-based taxation, citizenship-based taxation, (along with residence based taxation) are the norm rather than an anomaly in in the U.S. A claim of anomaly is therefore not only unfounded, it also does not accord with the nature of tax legislation. This view finds support in the U.S. Supreme Court's reasoning in the case of *Cook v. Tait*[27].

In *Cook v. Tait*[28] the U.S. Supreme Court held that citizenship-based taxation is constitutional. The Court further reasoned that: citizenship-based taxation is appropriate given the inherent benefits received by U.S. citizens and their property from the U.S. government, regardless of where the citizens made their home or where the citizens' property was located. This paper argues that citizenship-based taxation cannot therefore be rightly deemed an anomaly in any country whose laws authorize it. In the discussion of whether or not to expand her income tax jurisdiction to include citizenship-based taxation, Ghana ought to consider only what benefit she may derive from the citizenship-based taxation in the light of enforceability and administrability. Should Ghana's parliament choose to found an income tax jurisdiction on citizenship, it would be legal and constitutional, and cannot be rightly deemed an anomaly in law.

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[25] The 1992 Constitution, article 174.

[26] Ibid.

[27] 265 U.S. 47, 56 (1924). In that case, the Supreme Court noted that "the government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen."

[28] Ibid.

A third argument against citizenship-based taxation is that citizenship-based taxation is an outdated mode of assessment and has no place in today's globalized society.[29] Many have however debunked this assertion.[30] So this assertion has already been discredited. Suffice it to add that, citizenship-based taxation is a tried and tested mode of taxation rather than that it is outdated. As already discussed above, the critical questions that determine a nation's considerations in determining its tax base are the economic needs of a country, administrability and social justice. It was Michael Graetz who said in his essays titled "**Follow the Money**"[31], that "it would be foolish to deny the successes of citizenship-based taxation for the U.S." As discussed above, the history of taxation shows that a nation's decision for determining its tax base has been dictated by two (2) things: the economic needs of a people, and the need to address social justice.[32]An assertion that citizenship-based taxation is an outmoded mode of assessment therefore does not accord with the history of taxation. Tagging a thing one way or another is hardly a beneficial academic exercise. This paper takes the view that the better way to determine the benefits of citizenship-based taxation, must be with regard to costs of implementation and collection. This is because it is not in dispute that Ghana, a developing nation, has economic needs she must address for her people. Ghana therefore ought to invest in ascertaining reliable data on the cost benefit analysis of citizenship-based taxation, and implement citizenship-based taxation or otherwise solely on this ground. It is submitted that not only is the assertion that citizenship-based taxation is "outdated" untrue, it is also unfounded.

A fourth argument against citizenship-based taxation is that there may be administrative and enforcement challenges associated with the administration of citizenship-based taxation.

This argument, although founded on a legitimate consideration, is not borne of the facts. It is reported that citizenship-based taxation has raked in revenue for the United States. It is for this reason that Michael Graetz says in his essays titled "**Follow the Money**", that "it would be foolish to deny the successes of citizenship-based taxation for the US". The fact that the U.S. has persisted in its citizenship-based taxation since 1921 and despite the widespread condemnation of such jurisdiction to tax must be because it derives real benefits from this jurisdiction. This paper however will not recommend citizenship-based taxation to Ghana simply because America is practicing it. Rather, the writers will recommend citizenship-based taxation because: the needs of the country require more taxation, and, this will broaden the tax base and address issues of social justice. It is suggested that the next urgent step is for Ghana to invest in the required data which is needed for an assessment of the costs of implementation or administration of

[29] Reuven S. Avi-Yonah, the Case against Taxing Citizens, 58 TAX NOTES INT'L 389 (2010).
[30] See Ruth Mason, Citizenship Taxation, 89 S. CAL. L. REV. (2016).
[31] Graetz, Michael J. "Follow the Money: Essays on International Taxation-Introduction." (2016).
[32] Bardopoulos, Anne. "International taxation & domestic taxation: Tax avoidance and double tax agreements." *University of Cape Town Postgraduate Diploma in Taxation Dissertation* (2007).

citizenship-based taxation by Ghana as against its benefits. Ghana may then proceed to include "citizenship" as one of its jurisdiction to tax or otherwise.

In conclusion on this, it is clear that citizenship-based taxation is neither popular nor fashionable. However, does this fact by itself make citizenship-based taxation wrong for Ghana, a country that is in the throes of development, clawing its way to provide essential goods and services for its people? This paper will demonstrate that citizenship-based taxation will directly and indirectly broaden the tax base and address issues of social justice, for which reasons the writers recommend it to Ghana.

VII.2 The case for Citizenship-based taxation

1. Citizenship-based taxation is both Constitutional and justifiable

Article 174 of the 1992 Constitution provides for the power to levy taxes, who can do so, and how this can be done. This article is to the effect that a tax must be imposed under an Act of parliament or pursuant to authority granted under an Act of parliament. Any tax law passed pursuant to article 174, and which founds Ghana's income tax jurisdiction on citizenship will therefore be constitutional. In other words, citizenship-based taxation will be constitutional and legal in Ghana if passed pursuant to article 174 of the 1992 Constitution. One may however ask, although citizenship-based taxation maybe constitutional, is it justifiable?

It is submitted that citizenship-based taxation is not only constitutional, it is also justifiable. This submission finds support in the U.S. Supreme Court reasoning in the case of *Cook v. Tait*[33] discussed above. In holding that citizenship-based taxation is constitutional, the Supreme Court also reasoned that citizenship-based taxation is justifiable and appropriate given the inherent benefits received by U.S. citizens and their property from the U.S. government, regardless of where the citizens made their home or where the citizens' property was located. The Court in that case continued that,

> "[T]he government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen)".

[33] 265 U.S. 47, 56 (1924) ("[T]he government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to The United States and the relation of the latter to him as citizen.")

The question therefore is, are Ghanaian citizens entitled to benefits irrespective of where they make their home and/or regardless of where their property is situate?

Citizens of Ghana whether resident in Ghana or not are entitled to enjoy the rights in the 1992 Constitution of Ghana to a very large extent. The government needs money to afford these rights, for example, free Senior High School, tuition fees in Ghanaian public universities, voting rights in Ghana, among others. Ghanaian citizens are entitled to enjoy these rights whether or not they are resident in Ghana. Indeed, there are some Ghanaians resident outside Ghana who send their wards back to Ghana to attend public university, and, some of these wards return to their countries of domicile upon completing university education. Although not resident in Ghana, these Ghanaians would have benefited from goods and services provided by the Ghanaian taxpayer. The question is if Ghanaians everywhere are entitled to benefits from the State, is it not only fair and right that Ghanaians everywhere contribute, (through taxation) to enable the State provide these goods and services that they are entitled to enjoy?

Secondly, anytime that Ghanaians in other countries face challenges, the Ghanaian people demand, and rightly so, that the government go to the rescue and assistance of such persons. It is revenue that the government must use to undertake such services. Why therefore would it be outrageous to suggest that the persons who have a right to benefit from such services ought to contribute to raising the resources for such services?

An equitable tax system is that which ensures that the burden of taxation is fairly distributed, i.e. that each pays their fair share. These are equally the tenets of social justice, i.e. that we share in the benefits and the pain of the community. Citizenship-based taxation is therefore fair, as it ensures that all who are entitled to benefits in the country contribute their fair share to raise the revenue required to afford these benefits.

2. Citizenship-based taxation is proven to have been successful and served the US well.

It is reported that citizenship-based taxation has been successful in raising revenue, for the U.S., the reason the U.S. has stuck with it in spite of constant pressure from several quarters to abolish it.[34] Indeed, it may be said that the U.S. ought by now to have raised the needed revenue, and ought to be in a position to abolish same and still be fine. This notwithstanding, the U.S. still practices citizenship-based taxation. Has Ghana raised enough revenue, and need not seek more equitable avenues to raise more taxes? Ghana needs the money to meet her developmental objectives. In addition to seeking avenues to improve her collection processes, Ghana definitely needs to broaden her tax base. Ghana is at a phase of her developmental stage where she is still unable to provide essential goods and services to the majority of its citizens. There is therefore the need to raise more revenue, while not overburdening the existing tax base. The way to do this is to broaden the tax base. Citizenship-based taxation is one of the alternatives Ghana ought to consider in broadening its tax base.

[34] Graetz, Michael J. "Follow the Money: Essays on International Taxation-Introduction." (2016).

Citizenship-based taxation "has witnessed, indeed facilitated, a massive expansion in international capital flows".[35] Citizenship-based taxation may therefore not be fashionable, (there are hardly any taxes that are fashionable anyway). This notwithstanding, citizenship-based taxation is fair, equitable, justifiable and constitutional. The considerations of the U.S. Supreme Court in *Cook v. Tait* are therefore still very much relevant, particularly for Ghana at this stage of her development.

3. The circumstances of a people have determined the kinds of taxes and mode of collection, since time immemorial.

The authors have noted above that the history of taxation demonstrates two things:

1. The economic needs of a people determine the kinds of taxes a country imposes, the rate of such taxes and their mode of collection; and
2. The need to address social justices.

The history of Britain shows that Britain has always increased taxes or broadened its tax base in times of war. It was no different with the Unite States. Indeed, the main reason for its choice of citizenship-based taxation was to raise revenue for its war needs.[36] The reasons and motivations for these countries in their choices of taxation have thus been similar – to raise revenue to finance their engagements in wars they were fighting. With the resolution of the wars, some of these taxes were rescinded. Taxes have thus been known to be imposed in times of financial crises, and reduced in response to public opposition to high tax rates, once the financial crisis passed.[37] Ghana may not be involved in a war of guns, but she certainly is fighting her own developmental and economic wars, in her quest to provide her citizens with essential goods and services. Ghana's current circumstances thus require that she broadens her tax base, and citizenship-based taxation is one way to do this. What is sauce for the U.S. may just be sauce for Ghana.

4. Citizenship-based taxation will ensure that we gain more from double taxation.

Broadening her tax jurisdiction gives Ghana the opportunity to negotiate for more in double taxation treaties. Double taxation is the levying of tax by two or more jurisdictions on the same declared income (in the case of income taxes), asset (in the case of capital taxes), or financial transaction (in the case of sales taxes). This double liability is often mitigated by tax treaties between countries. Under international law, tax treaties impose obligations on States to guarantee that they become a part of the domestic law and usually require ratification by each Contracting State. Double taxation treaties are thus agreements between sovereign States under public international law to deal with tax co-ordination and related matters. At the same time double taxation treaties become a part of the domestic law of the Contracting States after they have been incorporated.

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[35] Ibid

[36] Eisenberg, Ernest O. 'The Changing Philosophy of Taxation.' (Marq. L. Rev. 18 (1933)): 211; Dowell, Stephen. '*History of Taxation and Taxes in England*.' Vol. 1. (Routledge, 2013).

[37] Konoplitskaya, A. V. 'Principles of Taxation'. (*ПРОБЛЕМЫ ФОРМИРОВАНИЯ ЕДИНОГО НАУЧНОГО ПРОСТРАНСТВА*. 2017).

States' objective in entering into double taxation treaties is among other things to ensure improved cooperation amongst themselves for combating fiscal evasion. Double taxation treaties therefore generally provide for mutual assistance and exchange of information between the Contracting States. In the era of tax havens and tax evasion, countries need to co-operate more to enforce fiscal evasion laws and to provide information. In negotiating these treaties, Ghana must consider her own unique tax needs, strengths and weaknesses. A very broad tax base gives Ghana leverage to negotiate for more.

This paper cannot ignore the fact that taxation is not always envisioned as a means to generate significant additional public revenue but that it is also a vehicle of social justice. As already submitted above, social justice requires that if as a citizen is entitled to benefits, s/he must also share in the tax burden. It has been argued that people ought not to be taxed without representation. The converse is also true. People ought not to enjoy the benefits of citizenship without enduring their fair share of the burden of taxation.

VIII. Recommendations

On the basis of the above arguments, this paper makes the following recommendations:

VIII.1 Include Citizenship as a basis for Ghana's Income Tax Jurisdiction

Now that we have established that citizenship-based taxation is constitutional, fair and equitable for Ghana at this stage of her development, we recommend that it be added to the existing income tax jurisdictions of residence and source. Section 101(1) (a) of Income Tax Act, 2015 (Act 896) defines a "resident person" to include a citizen depending on: whether or not that citizen has a permanent home outside Ghana, and, whether or not that citizen lived in that permanent home outside of Ghana for the whole of that year of assessment. Section 100(1)(a) of the Income Tax Act is to the effect that an individual is resident in Ghana for a year of assessment if that individual is a **citizen,** other than a citizen who has a permanent home outside of Ghana and lives in that home for the whole year. The effect of this definition is that a Ghanaian citizen who has a permanent home outside Ghana, and lived in that home outside Ghana for the whole year of assessment, is not considered to be resident in Ghana for tax purposes. However, if the same person lives in Ghana during a particular year of assessment, then she is deemed to be resident in Ghana for tax purposes, and, Ghana by law has jurisdiction over her global income for that year of assessment. The unpredictability and difficulty of administrability in such a situation is obvious. This paper therefore suggests that section 101(1)(a) of the Income Tax Act be amended to read:

> "An individual is resident in the country for a year of assessment if that individual is a citizen, notwithstanding whether or not that citizen has a permanent home outside the country".

Such an amendment would make the global income of citizens subject to Ghana's income tax jurisdiction unless otherwise exempted.

Another approach would be to impose a citizenship tax separate from income tax. This would be a kind of head tax payable exclusively by citizens. The issue as to whether such a tax should be flat or graduated should be left to open discussion. There should also be a mechanism that allows for the existing tax base to offset such head tax against income tax that they have already paid.

VIII.2 Address the Data Challenge

We acknowledge that there is currently a 'data challenge' facing the Ghana Revenue Authority (GRA) in its assessment of taxes. We are also aware that there are being developed certain solutions to this data challenge in addition to reforms that are currently ongoing, all of which collectively will deal with some aspects of the data challenge. The data challenge however does not affect only citizenship-based taxation, it affects even our existing jurisdiction to tax. Addressing the data challenge is therefore imperative whether or not we introduce citizenship-based taxation. This paper believes this is the right time for us as a country to invest in data and research, as we seek to revolutionarise our tax system.

VIII.3 Research the Cost Benefit Analysis

In addition to addressing the data problem, Ghana must invest in a cost benefit analysis of citizenship-based taxation. This can be done by research into the numbers of Ghanaians resident outside the country, the nature of their incomes and the income flows. The Ministry of Foreign Affairs could be helpful in this kind of research. The Ghana Revenue Authority must next invest in determining the cost of implementing citizenship-based taxation. This information will inform a decision on whether or not it will be cost effective, (from an administrative point of view), to add citizenship-based taxation to our existing income tax jurisdiction. It is submitted that the cost benefit analysis ought to be the main consideration in any decision on whether or not to include citizenship-based taxation in our tax jurisdiction.

VIII.4 Efficient Tax administration and Judicious use of Taxes

The key to efficient tax policy or administration is to facilitate and encourage voluntary compliance with the requirements of the tax laws. Three of the factors relevant to encouraging voluntary compliance are: convenience, accountability and the judicious use of taxes. These, we refer to as the "ethics of taxation". By the ethics of taxation, we are referring to taxpayers voluntarily paying their taxes because they believe that it is the right thing to do. Studies have shown that voluntary compliance with law is founded largely on ethics. Taxpayers generally voluntarily pay their taxes if they believe it is the right thing to do.

Taxpayers need to see the benefits of paying taxes, the judicious use of paying taxes, and the confidence that their taxes will be applied to solve issues of social justice in

order to form the belief that paying taxes is right in a civil society. The ethics of taxation cannot therefore be overemphasized. The ethics of taxation is however a topic the writers plan to discuss in a subsequent publication. That subsequent discussion will also address the role of corruption or perceptions of corruption in the non-willingness of a people to pay taxes. For this reason, this paper will not discuss the details of the ethics of taxation here. Suffice it to say that the Ghana Revenue Authority must put in efforts aimed at building public confidence in the tax system. This will directly and indirectly inspire taxpayers to voluntarily comply with tax laws, as people are more willing to be tax compliant if they believe in the integrity of the tax system and the judicious use of their taxes. The law enforcement agencies must also ensure uniformed and consistent enforcement of existing laws, not only for purposes of raising revenue, but also to directly or indirectly inspire voluntary compliance with tax laws. In seeking to inspire voluntary compliance in the payment of taxes, tracking and accounting to the people of Ghana on exactly how much has been collected from each source of taxation and what these taxes are used for, cannot be overemphasized.

IX. Conclusion

If there is no taxation without representation, there ought not be sharing of the benefits of citizenship without a fair share in the burden of taxation. Rights and benefits ought to go with the burden of taxation**.** One may therefore not like citizenship-based taxation, but it certainly is neither unconstitutional nor unfair. Indeed, it is the authors' argument that citizenship-based taxation is fair and equitable. Ghana owes duties to her citizens, be they resident in Ghana or not. Government needs resources to be able to provide citizens access to the enjoyment of these rights. Government raises revenue from taxpayers to provide these goods and services. It is a principle of taxation that a good tax system must be equitable in which everyone pays their fair share. Residents, citizens and others must therefore pay their fair share for these goods and services. That is equity. Citizenship-based taxation is therefore equitable, it is submitted.

CONSTRUCTING AN ILLIBERAL DEMOCRACY THROUGH LIBERTY LAWS: THE CAMEROON EXPERIENCE - LIBERTY LAW IN WANT OF LIBERTY CONTENT?

Nchotu Veraline N. ep. Minang*

Abstract

Liberty is one of the most sought-after commodities in the world since it is linked to the dignity of man. Yet, it is not easily accessible as apparent in its letter. In recent times, emphasis on the dignity and inviolability of the individual has greatly changed the climate with respect to collective organizations such as the State. The guarantee of liberty stands as one of the characteristic hallmarks for recognition of States as Modern Democratic States. The quest for such recognition has greatly fostered strides towards freedom from varied kinds of arbitrary rule, and more importantly, influencing the espousal by states of democratic concepts and precepts even if that is only going to be by the letter. True democracy engenders new political consciousness and forms of government that grows out from a people's culture and regulated by legal processes. Therefore, veritable modern democratic States aim to protect the rights and freedoms of members of the society by creating a conducive environment where such rights can be expressed. In order to do this, government must deal with the perennial problem of the desirability, nature and amount of State interference needed to equalize power relations in the public sphere. The dilemma faced by States generally, is ascertaining how much liberty should people be able to exercise, and the scope of the powers of public administrators to guarantee such liberty. That is, such liberty should be exercised while not losing powers necessary for the maintenance of public law and order. Following the strong currents of the winds of change in the 1990s, the Republic of Cameroon, in its march towards earning the status of a Modern Democratic State, adopted the 1990 liberty laws. By these laws, citizens are offered the opportunity to express themselves as individuals and as members of a group. These rights defined and protected in these laws were accorded a constitutional status in the 1996 Constitution. However, asserting these rights within the precepts of their legal definition has often been an up-hill task. The situation has become aggravated following the current uprisings that is gripping the country now for three years running. This paper assesses the effectiveness of the State in enabling the realization of the right to public assembly and all its corollaries as key components of the right to freedom of expression in a bid to building a modern democracy. Adopting doctrinal approach, content analysis of legal texts and observation, it is established that the State of Cameroon through its regulatory powers tend to be restrictive in its perception of the essence of a mutual co-existence of liberty and democracy. That is, democracy and the rule of law are often employed as political tools rather than essential elements for substantive realization in the lives of the people. In effect the spirit of the law is trumped by political overtones that serve the interest of a few in the public space. Until efforts are made to translate the spirit of the law into reality it will for a long time be a challenge for Cameroonians to express themselves. The people on their part must be resilient in asserting their constitutional rights using the available channels including international processes.

I. Introduction

Liberty entails a mode of function which include both freedom and constraint of action.[1] This is because society is structured in a way necessitating that its members act following a specific pattern in order to attain individual and collective objectives and to prevent chaos. There exists extensive literature[2] on the concept of liberty and debates relating to the search for a middle ground between restraining and not restraining it. Even the naturalists who believe firmly that man in the state of nature is free to act the way he wants, still hold that only what would not infringe on another's liberty is acceptable[3]. By implication, this calls for restraint. On the other hand, positivists[4] recognize and believe that although liberty defines us as human beings, it will be dangerous without restraint and any curtailment should be as a result of agreement amongst the people. The position of the positivists denotes a legal definition of liberty and processes of attaining same. At the end of the Cold War that polarized the Northern and the Southern Hemispheres announcing the triumph of capitalism over communism, the attention of the world was then focused on what was happening in the States that had hitherto, been in the middle[5]. The 90s saw Africa with all its potentials enveloped in dictatorial and closed regimes where liberty was somewhere close to taboo, come into the limelight. These archaic governance structures felt the brunt of the wind of change[6] and were purged out, opening political space, establishing "free[7]" pluralistic societies. It was in the wake of all this that Cameroon, during its famous "Special Liberties Parliamentary Session[8]", adopted Law No. 90/46 of 19th Dec. 1990 to repeal Ordinance No. 62-OF-18 of 12th March 1962. In its place, a series of laws liberalizing the society were adopted. Amongst others, Law No. 90/53 of 19th Dec. relating to freedom of Association, Law No. 90/54 of 19th Dec. 1990 relating to

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[1] Randy E. Barnett, The Structure of Liberty, Justice and the Rule of Law, Clarendon Press, Oxford, 1998

[2] Natural law theorists such as John Locke, Hobbes, Acquainas, Bennet etc.

[3] John Locke, Two Treatises of Government (1690), ed. Peter Laslett (Cambridge, Mentor, rev. ed. 1963), p. 311. Leo Strauss, The Political Philosophy of Hobbes: Its Basis and Genesis, trans., E. M. Sinclair (1936; repr., Chicago: University of Chicago Press, 1952), 118–28. Also, C. B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke (London: Oxford University Press, 1962), 61–68. Pufendorf, S. (1991). On the duty of man and citizen according to natural law. Cambridge, UK: Cambridge University Press.

[4] William H. George, Auguste Comte: Sociology and the New Politics, American Journal of Sociology, University of Chicago Press, Vol. 33, No. 3 (Nov. 1927), pp. 371-381. Robert P. Kraynak, THOMAS HOBBES: From Classical Natural Law to Modern Natural Rights, Colgate University, available at; http://www.nlnrac.org/. accessed on 12/5/2019.

[5] Characteristic of the African and Asian continents where the States were caught up in a polarized world with the dominant powers aiming at establishing their eminence over them

[6] Although most African States succeeded in obtaining independence in the 60s, shredding of shackles was enveloped in a force of establishing open and free societies.

[7] Many changes adopted by political authority at the time were geared at enabling freedom. But most of the times as is the case with Cameroon, the intended "freedom" could be defined as a stillbirth because up till date the struggle for freedom continues.

[8] The National Gazette tags it as such.

the maintenance of Law and Order, Law No. 90/55 of 19th Dec. 1990 to lay down regulations governing public meetings and processions. The Cameroon Constitution of 1996 establishes a form of constitutional democracy in which substantive fundamental rights, essential to personal autonomy are no less integral than rights to participate in the political processes.

Even with these laws, there exist an eternal tension between balancing the pendulum between liberty that serves to advance democracy and restraints that are necessary for the same course. Does liberty denote the issuance of a license to exercise the substantive liberties recognized therein? In describing the "state of nature" or world without government, John Locke wrote, "though this be a State of Liberty, yet it is not a State of License[9]." By this note, it can be deduced that it can just as well be “liberty,” but which must not be left to go wild. A fervent advocate for liberty, Bannet still believes that even in the absence of government, the exercise of liberty is governed and controlled by innate precepts[10]. Locke, in his position, negates the establishment of a State empowered to authorize the exercise of liberty, although at the same time acknowledging the essence of ensuring controlled exercise of same. He does not recognize the State or public authority as veritable residence for liberty for fear that it may no longer be itself if left in the custody of the State. In effect, he recognizes that there is need for restraint but fails to define which liberties should be restrained and those that ought not to be. According to him, reasonability should rule the exercise of liberties. It seems to be a perennial tussle defining limits of government intervention and scope of liberty to be enjoyed by members of the public either as individuals or as members of a group.

If the Magna Carta was opted for by the Whigs, it was for no other reason than an attempt of extricating the people from arbitrary rule and getting them share in the management of political power by instituting equality before the law. The thirteen American colonies waged a war of liberation and participation in governance as reflected in the Declaration of Independence and the American Constitution. The Declaration of the Rights of Man and Citizen of 1789 did not leave any room for the French citizen to conjecture on the idea of liberty, freedom and participative governance. These events and legal instruments that emerged at the end blazed the trail for democracy as we know it today. Democracy as an ideal and a goal is a benchmark for the development of States. Social structures such as the State are constructed through laws and regulations. Considering that liberty is one of the necessary elements for any meaningful democracy and the complexity of human nature that is principally geared towards the satisfaction of the self, arguments abound for essence to regulate the exercise of liberty. Such regulation plays a key role in the establishment of a State where rights and duties are recognized and respected without any fear of favor or malice. That is, a State where the principles of the rule of law reigns and functioning institutions ensure the protection of individual liberties

[9] C.f. Randy E. Barnett, The Structure of Liberty, Justice and the Rule of Law, Clarendon Press, Oxford, 1998, pp.12.

[10] Barnett, Randy E, The Structure of Liberty: Justice and the Rule of Law, Clarendon Press, Oxford, 1998.

based on fairness and a lot more that can be couched under the concept of liberal democracy.

Swept off in the democratization wave in the 90s, most African States re-defined their municipal administrative structures through law to enable them accommodate the changes and to positively impact the lives of their people. Legislatures got to the adoption of positive law, wherein autonomous spheres of action were defined. Without necessarily taking the same trajectory, the government of Cameroon through the afore-mentioned laws defined spheres of individual and collective liberties. Through doctrinal, content analysis and observation, this work sets out to examine whether the translation of the letter reflects the spirit of the liberty laws in contemporary Cameroon. In that respect a theoretical assessment of the possibility of these laws to promote democracy is examined in Part (I) and the practical application of these laws will be examined in Part (II).

II. Liberty Laws with liberty Contents: Liberal Democracy

Liberty is freedom from all restraints, but for such as are justly imposed by law. The 1990 parliamentary session raised hopes and expectations in the citizens that liberty will be secured and enjoyed to the extent that the law permits it. The reflection of this can be seen in the way the national gazette is stamped "SPECIAL LIBERTIES[11]". Hopes and expectations of the establishment of a free open society through law spiked high with the understanding that Cameroonians from thenceforth could be able to tell anyone, most especially the government, what they don't like to hear[12]. Indeed, Cameroonians were witnessing a great transformation in a government that was ready to embrace democracy by law. If the relationship between liberty and democracy could be understood as a compound system of checks and balances of each other[13]following Solum's conception of a fair social organization,[14] then the limitation of individual liberties and freedoms in order for each and every member of the society to live as part of that society in a harmonious manner, can be inferred. Using dramatic examples to explain his point, Barnett[15] holds that "society (State) has a structure that, by constraining the actions of its members, permits them at the same time to act and accomplish their ends. Without any such structure, chaos would reign, and the current population could not be sustained". Even in

[11] Official Gazette of the Republic of Cameroon, 31st Year, No. 1 (supplementary Issue), 1st January 1991.

[12]Goerge Orwell, unpublished introduction to Animal Farm, https://www.nytimes.com/1972/10/08/archives/the-freedom-of-the-press-orwell.html. Visited on 14/3/19.

[13]C.f. Andre, The relationship between liberty and democracy is complex because being part of a democracy usually entails limiting certain personal liberties at the expense of democratic principles, while people safeguard their individual liberties by putting limitations on democracy.

[14] Solum, Lawrence B. "The Foundations of Liberty." Michigan Law Review 97, no. 6 (1999): 1780-812.

[15] Randy E. Barnett, The Structure of Liberty Justice and The Rule of Law, Clarendon Press. Oxford, 1998.

the state of nature, John Locke[16] sees the essence of constraints and the respect of certain basic principles in the exercise of the power of auto-determination (liberties). Hart[17] on his own holds that our commitment to social cohesion is ruled by the terms of agreement. If the terms of agreement are composed in the liberty laws, then it conforms to the theory that any curtailment is not done haphazardly but defined by basic principles whether drawn from nature, having a divine source or being a product of the people's debate and agreement. In this instance, the liberty laws invariably ordain a basis for control. Barnett in his analogy observes that there exist a variance in the nature of social structures qualifying some as enhancing the enjoyment of liberties by its citizens while others stifles such enjoyment. It is on that score that we explore the 1990 law in order to define where it falls short, by examining the necessity of legal definition (A), and an assessment of the repressive mechanisms for non-compliance of the basic rules for articulating them (B).

II.1 Necessity for Legal Definition of Liberty in Democratic Practice

The constitutional principle of separation of powers is necessary for the protection of personal liberty from progressive and unlawful encroachment by the concentration of powers in one department. While the protection of individual liberties is recognized and founded in constitutional principles of civilized States, these States hold powers that can rightfully be exercised over any member of the community, against his own will, to prevent harm to others. This draws our attention to Locke's categorization of the freedoms one ought not to have and are properly constrained which he terms as "license". But his perception of license seems abstruse. He is not quite clear on how the constraints be done but however says it is out of the concept of authorization. From this position, we borrow Justice Harlan's[18] reasoning in his dissenting opinion in Poe that "interpreting (understanding) liberty requires judgment about the balance between liberty and order ("ordered liberty")". That is, liberty can be exercised without constraint if such exercise does not distort the orderly functioning of the social fabric. By implication, the learned law Lord apparently concurs with Locke for his statement does not insinuate express authorization, but simply the expectation of avoiding disorder.

On this argument, for the sake of ordered liberty, the Cameroonian legislator caved into clarion calls in the 1990s in adopting the liberty laws. If democracy means more than the functioning of effective representative institutions, but also upholding fundamental principles and rights, then these laws adopted in the name of democracy were expected to fulfil that requirement. There is no argument that the rule of law plays a key role in attaining it. Therefore, to enable a democracy with these elements, there is need for the guarantee of both liberties and freedoms which, although permit persons to exercise their power of auto-determination, also ensures that that is done while not infringing on the rights of others to do same and even that of the State as both a moral person and the

[16] John Locke, Two Treatises of Government (1690), ed. Peter Laslett (Cambridge, Mentor, rev. ed. 1963), p. 311.
[17] H. L. A. Hart, The Concept of Law Oxford: Oxford University Press, 1961, p. 188.
[18] Poe v. Ullman, 367 U.S. 497 (1961).

guarantor of those liberties. We anchor our argument on Hillel Steiner's[19] explanation that, "if two actions are such that their joint occurrence requires either (i) the same object being in different places at the same time, or (ii) different objects being in the same place at the same time, then they are incompossible". In their nature, the 1990 Cameroon liberty laws, going by Locke's distinction expressly provides for liberties. They however provide for "license" in exceptional instances which may be couched under Locke's distinction between actions that can be carried out without restriction and actions that call for restriction. The provisions for liberty could be aimed at preventing the "imcompossible" for the sake of an ordered society. By virtue of the definition of "public meeting" we deduce that the organizers and participants will be making use of common goods such as public space. It is a principle that members of the public have equal rights to public goods such as public spaces and should be treated equally in that respect. However, without an authority in charge with ensuring such equal access, a situation may arise where one or more persons would want to use a resource at the same time and this resource cannot simultaneously be used to satisfy the desires of the two persons.

Fuller[20] in his seminal jurisprudential essay identified two basic approaches to social ordering in human society - the State as the organization by common aims and organization by reciprocity. These two approaches represent the ways people may by coming together, secure an advantage for all participants. This is possible because by common aims, participants have a common objective. On the other hand, reciprocity implies that participants want different objectives but must understand that in order to get what they want, the other person must get what he wants. Safeguarding one's interest requires ensuring safeguarding of the other's interest as well. Once the other person's interest is in jeopardy there will be rupture and all interests will be put at risk. This takes us back to the concept of "ordered liberty". The preamble to the Cameroon constitution enunciates the key principles necessary for the base of these approaches of social ordering. The constituent power did not fail to highlight the fact of the people agreeing on basic principles of living together with its opening phrase "We the people of Cameroon…to build a Cameroonian fatherland on the basis of the ideals of fraternity, justice… resolved to …ensure wellbeing of every citizen without discrimination…". An examination of the constitution and other laws inspires a concurrence with Hart[21] that people are committed to living together by the nature of agreements that they have had in a discussion. How else can such a discussion be manifested other than in a set of binding rules -the constitution and the liberty laws. Hence the law stands as the agreement between the people on the recognition of their liberties and mechanisms of articulating such liberties. By virtue of this theory, article 2 of Law No 90/55 shows how the Cameroonian people have agreed on the exercise of their liberty to holding public meetings a subject of declaration (i) on the one hand, and to the regime of authorization (ii) on the other.

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[19] H. N. STEINER, The Structure of a Set of Compossible Rights, journal of Philosophy, 74 (1977), 767-8.
- An Essay on Rights (Oxford: Blackwell, 1994).

[20]Lon L. Fuller, The Morality of Law, 2nd revised edition, Yale University Press 1969

[21] H. L. A. Hart, The Concept of Law Oxford: Oxford University Press, 1961, p. 188

1. The Need for Declaration

Section 3(2) of law 90/55 subjects the holding of public meetings to "prior declaration". If within the context of this work a declaration is understood as a formal statement, proclamation or announcement, it therefore denotes that it is not a request for permission. It is simply an act of auto-determination. In very simple terms, a declaration is a mere expression of intention to hold a public meeting made to the custodian of the public peace and order. This presupposes that it is made for informative purposes. As custodian of public order, the public administrator owes a duty to use such declaration for social ordering by activating the necessary mechanisms for the successful holding of the public meeting. The reasons for opting for "declaration" rather than authorization can be anchored on Barnett's liberal conception of justice axed on the pillars of knowledge, interest and power. He holds that knowledge is essential in an organization such as the State in order to prevent chaos in the utilization of otherwise scarce resources such as public goods.

> …the problem of a person or association making knowledgeable choices among alternative uses of physical resources is compounded by other persons and associations striving to make their own choices. Indeed, given the number of possible choices persons might make, the number of persons making choices, and the physical proximity of each to the others, it is remarkable that the world is not in complete chaos. The world is not in chaos, I suggest, because concepts and institutions have evolved to harness the diverse knowledge about potential uses of resources in a manner that contributes to harmonious and beneficial interaction.

Concurring with Barnett, we think that the information through declaration ensures the prevention of chaos because it keeps imcompossibles at bay. The letter of the law embodies a spirit of liberation, freedom and autonomy. For that reason, the State in setting the structure of freedom does not want to cage it anymore but simply want to be notified that it is being exercised. This position is in consonance with the stance of the African Commission who in their decision in Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) / Nigeria[22]hold that the State should refrain from interfering in the enjoyment of fundamental rights. It speaks of restraining the government from undue interference and the necessity of interference is only defined by law as provided for in para 46 of the same judgment. On the other hand, members of the public who may neither be initiators nor participants in the exercise of such liberty equally need to be informed of the event. For purposes of peaceful and orderly social cohesion there is need for record of who is exercising liberty, where and when. On this score, a declaration is of necessity because if every citizen has the freedom to initiate and hold a public meeting, and it happens that they choose the same location and time, the chaos that can be borne out of it may be unimaginable. Kirk[23] in his thesis on "Freedom" holds that it is the most sought-after good by most people around the globe. As

[22] Comm 155/96, para 45
[23] Ibid

such, there is need for legislation to regulate the way people exercise their freedom to hold public meeting as an aspect of democratic practice.

In the multifarious nature of democracy, legal definition and protection of rights and liberties imports the element of the rule of law. This is indispensable for any meaningful democratic practice because the rule of law is vital for democratic principles to stand. It is for this very reason that democratic States do not leave to chance, what can be defined and protected in law. section 3 (2) of Law No. 90/55 law identifies the Public Administrator who has jurisdiction of the place of the planned meeting as the duty bearer. This is in consonance with the provisions of Law No. 90/54 of 19th December 1990 relating to the maintenance of public law and order which recognizes administrative authorities as custodians of public law and order. When governments assume control over streets, parks, and other common resources, they are acting in that capacity of as custodians of public property. For good reason, however, governments in free societies are denied many of the rights accorded private individuals and institutions because republican theories specify that government exists at the pleasure and for the benefit of the general public. Therefore, the public administrator who is the representative of government in his capacity as such, is expected to offer the citizens equal treatment in the use of public goods, once the declaration is made.

2. The Place of Authorization in a Democratic Regime

The Cameroon legislator recognizes and provides for two types of public meetings and provides for them as such. Article 3(3) of the law prohibits meetings held on public highways generally. He however recognizes the need of a special prior authorization by the pubic authority of the locality to hold meeting in those areas that otherwise will not host public meetings. Herein, the concept of "license" comes into play justified by exceptional circumstances. By this act, the public administrator permits the utilization of the venue that in normal circumstances is outlawed for such activities. Herein, the issue is the location of the public meeting and nothing else. What is in dispute here is not the exercise of liberty but the place of exercise of such liberty. Although the law is silent on what will constitute a public highway, it could be understood within the local context that it refers to trunk "A" roads such as inter-urban roads. From such a perspective, the liberating spirit of the law could be discerned from the fact that while initiators and participants of public meeting should not be deprived a chance, other users of the public highway should also be taken into consideration because of the existence of different preferences. Since it is impossible to control preferences and opinions, the legislator thought it wise to control actions that impede the ability of others through ordered actions[24].

II.2 Legal Recognition of Public Gatherings

We open our discussions here by searching for reasons why States think of providing legal definition for public meetings. Of what essence is public meeting to

[24] Friedrich A. Hayek, Law, Legislation and Liberty, vol. 1, Chicago, University of Chicago Press, 1976, p 96

democracy? If democracy is conceived in the simplest of terms as a government by the people for the people of the people, there is need for people to congregate to be part of that government. Tocqueville in his discourse holds that,

> [I]n democratic countries, the science of association is the mother science; the progress of all the others depends on the progress of the former. Among the laws that govern human societies, there is one that seems more definitive and clearer than all the others. For men to remain civilized or to become so, the art of associating must become developed among them and be perfected in the same proportion as equality of conditions grows"[25].

Without legal protection, this key element of building veritable democracies can be lost because public gatherings enhance all the other elements necessary for durable democracies. As an ideal, democracy aims essentially to preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, foster the economic and social development of the community, strengthen the peaceful cohesion of society[26]. At the dawn of independence, Cameroon was pretty much ruled with a firm grip on the exercise of liberties and freedoms. Haven in most cases been a recast of the French colonial administrative set up and the fear of disintegration, firmly established stringent rules limiting the exercise of liberties remained in place until the 1990s. It must first be remarked that by repealing Ordinance No. 62-OF-18 of 12th March 1962 to repress subversive activities[27], the legislator unveiled the public sphere for people to freely gather for any reason and every reason. This ordinance was greatly reputed for its repressive force that gnawed the power of self-rule. Section 2 of law No. 90/55 defines a public meeting as "any meeting held in a public place or a place open to the public…" In the construction phase of the "democratic" State of Cameroon, the legislator seems to have exhibited her/is mastery of the basic tenets as propounded by Tocqueville who holds that,

> When citizens can associate only in certain cases, they regard association as a rare and singular process, and they hardly think of it. When you allow them to associate freely in everything, they end up seeing in association the universal and, so to speak, unique means that men can use to attain the various ends that they propose. Each new need immediately awakens the idea of association. The art of

[25] Alexis de Tocqueville, Democracy in America: Historical-Critical Edition of De la démocratie en Amérique, ed. Eduardo Nolla, translated from the French by James T. Schleifer. A Bilingual French-English editions, (Indianapolis: Liberty Fund, 2010). Vol. 3. availablt at; https://oll.libertyfund.org/titles/2287. Accessed 27/4/2019.

[26] Principle 3 of the Universal Declaration on Democracy, Inter-Parliamentary Union Geneva, Switzerland, 1998.

[27] See law no 90/46 of 19th December 1990 to repeal Ordinance No. 62-OF-18 of 12th March 1962 to repress subversive activities.

> association then becomes, as I said above, the mother science; everyone studies it and applies it[28].

If we agree with him that complex society challenges can be resolved if people can freely associate, then evidently, such approach implies democracy. Reason being that it is not only the act of pooling ideas but taking ownership of such problem and concerting efforts to ensure its resolution. It gives a sense of belonging and a sense of preservation of what common good there is. From the letter of the law, the legislator did not want to provide for rare instances for people to associate but that it should be a regular occurrence as an auto-determination. The gatherings defined within the purview of that law may include marriages, funerals, political meetings, public demonstrations and all other demonstrations. Having understood the conception of public meetings, the next question that may require conditions for the holding of such gathering may be understood in two ways. The legislator did not intend the law to require reasons for public gathering. The second proviso of Section 3(1) makes it succinctly clear. It provides that "persons shall be free to hold public meeting, no matter their purpose". The holding of a public assembly requires no justification. This provision is enveloped in the concept of freedom or liberty in a very clear manner. That is, people "shall be free". From their own volition, people may decide to hold public meetings. Public meetings according to the law refers to "meetings in public places or held in places open to the public[29]". These provisions inadvertently signify that the State is restricted from interfering in the exercise of free will in initiating and effectively holding an assembly that people freely decide to participate or not. It must be understood that Tocqueville was not naïve not to see the risk public meetings could pose to the social fabric, if not structured. It is in the recognition of it that he immediately reassures public authorities that "public gatherings may come along with challenges for the State, but such challenges only end up strengthening the State in the long run". The pre-requisite of exercising the power of auto-determination by the individual is that s/he be able to associate with another and/or hold a public meeting. Of course, it will be of no relevance if people are not permitted to associate with each other to form a gathering. As discussed above, appropriating and resolving issues of common concern cement fissures that may threaten the very existence of the State. It must have been on this score that the legislator thought it wise to adopt Law No 90/53 of 19th December 1993 relating to Freedom of Association providing for a system of declaration of certain associations[30] and authorization[31] for others.

From the legal provisions it could be deduced that a group of youths are as free as adults to meet in a public sphere for different reasons. While the youths may be meeting to

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[28] Alexis de Tocqueville, Democracy in America: Historical-Critical Edition of De la démocratie en Amérique, ed. Eduardo Nolla, translated from the French by James T. Schleifer. A Bilingual French-English editions, (Indianapolis: Liberty Fund, 2010). Vol. 3. available at; https://oll.libertyfund.org/titles/2287. Accessed 27/4/2019.

[29] Section 2 of law No. 90/53

[30] Part two of the law identifies those associations that fall within the regime of declaration

[31] See part three of the law

plan a birthday party or organize an engagement party or even a wedding, the adults could be meeting for political party meeting, funeral or just to get rid of the constraints of time. Both groups could as well jointly meet for whatever agenda that they have. In fact, the legislator permits the citizens through this law to congregate in the spirit of exercising their public liberties. If democracy is construed as "self-government", and a characteristic of a modern State, then it was but wise that the 1996 Cameroon constitution accords it a constitutional status in its march towards openness. Such openness lead to the congregation of people in public spaces wherein ideas and philosophies are nursed and nurtured, thereby grooming democracy. This is because modern democratic principles require government to establish its legitimacy through broad and sustained consultation with the people, and public meetings serve as a key factor in ensuring that.

III. Intangibilities embedded in the Practical Application of the Law

The letter of the law speaks of "liberty", but the same law is embedded with weaknesses that tend to recoup whatever liberty the legislator may have intended. Such limitations can be identified in the text of the law (A) and the practical application of the law by the custodian of Public Law and Order (B)

III.1 Liberty laws and its Liberalization Concept

One would be naïve and grossly wrong to take the letter of the law at surface level in its provision for "declaration" that it implies dispensation of the requirement for authorization or permission to hold a public meeting. We may want to open our discussions by questioning whether engaging a democratic process imply liberty or vice versa? Haper[32]warns against such a sweeping consideration for it may be illusory because certain undercurrents in the democratic process can eliminate liberty and vice versa. We argue that since liberty is as multifarious in nature as democracy, it may not be easy to have a clear-cut response. Liberty, just like democracy is what the beholder takes it to be. The law regulating the holding of public meetings and processions, no doubt created space for opinion forming, exchange and dispersal which are all characteristics of democracy. Yet it is embedded with claw-back provisions (i) with overshadowing political overtones than legal ones fitting for the purpose as announced in its title and/or the spirit of the times(ii)

1. The existence of Claw-back Clauses and Provisions

Section 8 (1) of the law obliges the public administrator to issue a receipt on the declaration by the initiator of the meeting. Neither does the law provides a definition for the term "receipt" nor its content. Within the context of this work if among the several definitions of the term "receipt" we adopt the first definition provided by Black's Law Dictionary[33] as "… a written acknowledgement that something has been received", then it can be construed as a document to show proof that the declaration was made. The supposition is that the public administrator acknowledges in writing that he received the

[32] ibid

[33]Bryan, A. Garner (ed.) Black's Law Dictionary 9th ed. P 1362

declaration. However, it is not as simplistic as it sounds in the letter of the law. The lack of precision of definition and content of the document to be issued when a "declaration" is made is a major issue because it makes it subjective in many ways. A perusal of receipt no. 09/RDMP/F34/02/SP issued by the public administrator of Penka Michel[34] gives a very different meaning to the concept. The subjectivity of the law is translated into the public administrator simply abdicating his functions as custodian of the public peace and entrusting same to citizens who may not be skilled in such a domain. If the content of the receipt stipulates that the initiator of a public meeting takes responsibility for the maintenance of public law and order in case of any instance, that may be tantamount to inhibiting the holding of same. This is so because the ordinary civilian is not entrusted with the authority to activate the use of public power in case it is needed to maintain public law and order.

By so charging, the content of this document seemingly resonates the provisions of the otherwise repealed Ordinance No. 62 which firmly established an illiberal society wherein members of the public supposedly adopted auto-censorship approaches to avert the harsh penalties. If the organizer is charged with ensuring that nothing should be said or done that will impede public order, they are inadvertently being empowered to censor what people say and/or control what people do. Firstly, the very limitless nature of public order makes the application of this provision quite subjective. Secondly, this is attributed to members of the public desirous to hold public meetings without express assessment of the competences to do so. This may have been different if the legislator included a clause calling for reasonableness in the exercise of the freedom to hold public meetings. That is, the initiator may have done all what is reasonably possible to prevent the breach of public law and order but failed. Would he still be held liable for no fault of his? This seems evident because Section 8(2) read alongside Section 231 of the Penal code. These provisions do not give room for mitigating circumstances in a case where the initiator of such meeting acting reasonably, yet there was still a breach of public law and order. Therefore, the receipt and the afore-cited provisions apparently recoups what the law has hitherto provided, and which is necessary to the development of the rule of law and democratic practice.

2. Just or Unjust Law?

Considering the enforcement of this legislation and its respect by the citizens, we burrow Thomas Aquinas' stance that "Laws framed by man are either just or unjust"[35] to question whether the 1990 liberty laws and more particularly Law No 90/55 were just laws? If a just law is that which appeals to the conscience of people to feel obligated to

[34] A receipt issued on the 1st of March 2019 in response to a declaration by Mr Donlefack Martin, President of the organization Committee of the Ngim Nu Cultural Festival of the Bamendou People of the West Region of Cameroon. There is no legal prescription of the content of this receipt. However, the general tendency is to word it as found in this copy.

[35] Aquinas, Summa Theologica, p. 233.

obey not out of fear,[36] but out of conviction of its fairness and/or impartiality then, we may want to examine the response of the people to these laws. Furthermore, Hart holds that legal rules create obligations of obedience when they are "thought important because they are believed to be necessary for the maintenance of social life." By analogy, in an organized society, there is need for some form of ordering through law that the people feel bound to respect the law because it is an enabling instrument for peaceful social cohesion. This, in no way denotes the existence of minimal breaches necessitating some form of force to ensure its enforcement. But when the national umpire Mr Daniel Mekobe Sone, Lord Chief Justice of the Supreme Court of Cameroon, amongst other things while highlighting the democratic nature of the State, the importance of the 1990 laws with particular mention of Law No. 90/55 on public gatherings, deplores the abuse by Cameroonians of the right to freedom of expression, of which the holding of public meetings is one of its corollaries[37], it calls to question and examination of the justiciability of this law. One would not be naïve to think every member of the public will feel obligated to respect even a just law. No. However, within the context of this work which is carried out within a background of contemporary Cameroon, its questioning fits squarely. Peaceful public gatherings are muzzled by public authorities around the country[38]. This reasoning is anchored on the fact that a law that is rippled with lacunae and provides room for unreasonability and lack of commitment by the subjects of same places, it under the test of justiciability of same.

3. The 1990 Liberty Spirit at Test?

The background to the adoption of the 1990 liberty laws in general, may not have been as eventful as the events that led to the adoption of the Declaration of the Rights of Man and Citizen in 1789 in France. But it was of a magnitude that questions the spirit of the law vis a vis the spirit that reigned at the time. We argue in the first instance that these

[36] Both naturalists and positivists seem to hold the same view in this regard for instance, Locke holds a similar view with HLA Hart, acknowledging that it is difficult for positivists to distinguish between a law that people will respect because they feel obligated and that respected out of fear. It is actually a real challenge. However, circumstances could be employed to draw conclusions that may still be rebuttable because while a section of a population may be attracted to respect a piece of legislation because their interests are protected in some way, albeit not expressed, others may simply feel disadvantaged by the law and therefore prone to always be seen as law breakers.

[37] Elvis Teke, Cameroon: 2019 Judicial year solemnly opened, available at; http://www.crtv.cm/2019/02/cameroon-2019-judicial-year-solemnly-opened/. Accessed on 12/05/2019

[38] Chancelin Wabo, L'autorité administrative a signé cette note d'interdiction le 19 février 2019, where the district officer banned a political party meeting L'Union des Mouvements Socialistes (UMS) and proceeded to the arrest of militants who ignored the ban https://www.lebledparle.com/actu/politique/1106758-bafang-le-sous-prefet-interdit-le-meeting-du-maire-pierre-kwemo, Franck Foute, Cameroon: Several MRC activists injured during a march in Douala, January 26, 2019 at 16:27, Updated on March 11, 2019 at 4:49 pm, available at; https://www.jeuneafrique.com/716261/politique/cameroun-plusieurs-militants-du-mrc-blesses-au-cours-dune-marche-a-douala/. Accessed on 12/05/2019.

laws are perfectly within the canons of democratic principles. Identifying and charging the public administrator as custodian of public peace and order is essential for social cohesion. He is the only one designated in law to ensure the maintenance of public law and order based on the reason that he is presumed to live in the locality he administers and can therefore make informed and reasonable decisions relating to the maintenance of public law and order. However, these laws could be said to have been "still births" of a democratic process precipitated by global trends and pressure, rather than emanating from the people, for they reflected the people's wishes in letter, but lacking same in spirit. This will be illustrated in several points below.

Firstly, although the requirement of declaration has been discussed above, it is perceived here from the angle of emptying the liberalizing element in its lacuna of identifying the right duty-bearer in the event of breach of public peace. The requirement for declaration presupposes that the public administrator as custodian of public law and order, discharges his functions by taking guard of any eventuality in the process of holding the public meeting. The law ought to provide in express terms that he is the duty-bearer here and not otherwise.

Secondly, article 8 provides that if the manifestation will gravely disrupt public order, the public administrator has two options. Option 1 empowers the public administrator to transfer such manifestation to a different location. Should this option be interpreted as a mechanism aimed balancing the pendulum between competing claims/interests, then here again, we invoke the role of the knowledge theory to avoid collision of competing interests, which inadvertently implores the interest theory necessary for the protection of general interest in the maintenance of law and order. From this perspective, the liberty or freedom here is constrained with the change of location importing the economic term of "opportunity cost" for holding the meeting. For it to be perceived as a just piece of legislation for the construction of a liberal democracy, the decision of the public administrator should be understood as a reasonable position that promotes and protects the freedom. That is, it could be understood as an effort by the legislator to submit socialization in the service of justice aimed at upsetting subjective perceptions of interests. If that is the spirit, then it is a necessary provision for compliance by the public not because of the fear of punishment but because they feel bound by it for purposes of peaceful social cohesion. But from the observations of the Lord Chief Justice, there seems to be a missing link.

Option 2 provides for extreme eventualities. Here, the public administrator may prohibit the holding of such meeting and inform the signatory of the declaration with immediate effect. Locke[39] recognizes the essence of regulating the exercise of liberty and the respect of certain basic principles even in a state of nature. There is even a more urgent need for such respect in a structured organization such as the State. Such restrains and rules are equally supposed to reflect the society within which they are to be respected and applied in terms of what Hart[40] considers to be a "product of the people". The 1990 laws

[39] John, Locke, Two Treatises of Government 1690 Peter Laslett, (ed) Cambridge, Mentor, rev. ed. 1963 p. 311.

[40] H. L. A. Hart, The Concept of Law Oxford: Oxford University Press, 1961, p. 188.

were voted by the Cameroon national assembly and therefore presupposing that they are a product of agreement between the people. The power to prohibit a public meeting seems to be an extreme position with regards to the opening phrase of Art. 3 which ordains the holding of a public meeting irrespective of the purpose of the meeting. This extreme situation is defined by the fact that the meeting is scheduled to hold in a public highway and that there may be a threat to public peace. Its non-definition of what a public highway will consist of raises serious interest and compliance issues. The rule of law requires fairness of the law as enunciated by the constitutional principle of equality before the law. Therefore, no gap should exist between the rule of law and one who is charged with administering justice. Considering the seamless nature of that concept, and the legislator abdicating her/his duties in limiting its boarders, the determination of a threat to, or breach of public peace and order becomes subjective. Such subjectivity raises serious compliance issues especially within a context where most public administrators bear a misconception of protecting the government of the day. As such, this law accords to the public administrator, limitless powers that may rather tend to corrode the democratic foundations and it is in such instances that the public administrator is perceived as a repressive tool.

Thirdly, within the context of the rule of law, the legislator did not lose sight in providing for recourse just like it was done with penalties for non-compliance. The initiators of a public meeting could seize the competent recourse mechanisms in case they feel wrongfully constrained. Considering that one of the pre-eminent conditions for the principle of the rule of law is equality before the law, and the State, standing on a higher rung being in possession of exorbitant powers, the legislator strives to attain this through the administrative justice system established through law No 2006/022. This law lays down the organization and functioning of Administrative Courts. Section 2(3)(e) charges jurisdiction in matters relating to the maintenance of law and order in the first instance to regional administrative courts[41]. Section 2(3)(a) of the same law provides grounds for administrative liability only in cases of ultra vires acts. To my mind, this is too limited within a context where law no. 90/55 provides a large margin of discretionary powers for the public administrator. Juxtaposing the margin of discretionary powers with the grounds of liability tilts the pendulum in favor of public administration. It may well be argued that outrageous and unreasonable acts could be couched under "abuse of authority". There is a possibility of doing that within an audacious administrative justice system that can even invoke it suo moto. But given the context, it is not safe to leave what the law can expressly protect to the court's imagination. The supposition would have been to include a broad base for administrative liability system as is the case with common law, to include outrageous actions and unreasonability. Until the base is expressly broadened, initiators of public meeting within the current dispensation may be left at the mercy of the public administrator who juggles with interest and power struggle vis a vis the population.

Furthermore, the constitutive elements of what would jeopardize public peace and order are left at the discretion of the public administrator whom in durable democratic settings are expected to discharge the office without fear of favor or malice. That may be difficult to attain in a Cameroon that has been subjected to a litany of challenges lately.

[41] This provision is to be read along with the provisions of Section 14 and 15 of the same law.

This argument is based on the apparent schizophrenic reactions of public officers in simple things like a welcome gathering of a mayor to his municipality[42] and other public manifestations that fall within the category of public meetings defined by this law. Credit to such responses could be given to a piece of legislation fraught with ambiguities that render the translation of public liberties contained in same, a myth.

III.2 Inconsistencies affecting the Implementation of the Law

If the right to hold public meetings as defined in the 1990 law is couched within natural law precepts, then the exercise of that right in Cameroon ought not to be infringed. If the law recognizing that right was to be considered a just law, then, the title of this work may have been different. That is, if the commands of the law bind the consciences of the people, it implies that the people saw good reason in not breaching the law at least, consciously. The letter of the law could have been direct in a way, but, apart from the in-built limitations that hinder the realization of the right, the practical application seems daunting. The letter of the law carries a high liberalizing pitch. Yes, public meeting can be held irrespective of the purpose for such meeting because such meetings may enhance "life, liberty and the pursuit of happiness"[43] and all that is required is a simple declaration. What is termed "declaration" is effectively transformed into an authorization. If a "declaration is considered as a formal statement, announcement or proclamation embodied in an instrument,[44] by analogy, it is not a request for permission. It could be understood as an act carried out for information purposes to the custodian of the public peace and order of the locality. Following our concurrence with the knowledge theory above, which is based on the premise that individuals, associations and the public administrator are presumed to have the competence to make informed decisions on the use of public spaces, and in that situation, the public administrator plays an intervening role, when he stands to issue a "receipt[45]", we seek to know what it is and what is expected of the public administrator. If a receipt is understood as an acknowledgment of the reception of something, then it is no more than that. This is especially true when it is coming in after a "declaration". The expectations of the public administrator are no more than ensuring that there is no clash of the use of a common good on the one hand, and on the other, may be understood that he stands guard as a professional in the maintenance of public peace and order. The document emanating from the public administrator is in all situations way-out of the concept of a "receipt" as defined above. A careful perusal presents an authorization in letter and spirit. This receipt permits the holding of a public meeting without which, the meeting will be considered illegal.

Conceiving and delivering the so-called receipt lies within the powers of the public administrator who constitutes part of the executive branch of government. The

[42] Why is it that the mayor of Bafang Paul Kwemo's supporters were arrested? Their manifestation to receive their mayor was banned.

[43] Barnett, Randy E., The Structure of Liberty Justice and the Rule of Law Clarendon Press, Oxford, 1998, pp.67.

[44] Black's Law Dictionary 9th ed.

[45] Art. 8(1)

practice of issuing the receipt in terms of its content in Cameroon seems to be uniform although the law fails to stipulate a strict and uniform order. Apparently, it would take a public administrator with a liberal mind to interpret the "declaration" and issue a "receipt" that reflects the liberalizing spirit of the 1990s. So far, the practical application of the law has been tilted to importing the "interest" and "Power" theories. That is, more often than not, Cameroon public administrators tend to act as protégés of the government in power. In recent times, the Cameroon public administrator in a majority of cases, tend to exhibit schizophrenic tendencies to the holding of public meetings. It is not clear what scare it is. It may be argued that there is a greater tendency in issuing receipts for public meetings that advance the course of the government in power than to those that may uncover their weaknesses. In this case, such argument would be anchored on the interest theory in the sense that such public meetings are scheduled to serve the interest of particular persons who hold the power to so advance.

There equally exist a complex knit of legislation that seem to re-incarnate the otherwise repealed Ordinance No. 62-Of-18 of 12th March 1962 to Repress Subversive activities. An examination of Part iv of Law No.90/55 titled Penalties and Miscellaneous Provisions, the 1998 and the 2014 terrorism law read together sends a shiver through the spine. It is possible to assert that a repressive law is replaced by liberal laws with repressive provisions. For instance, Section 9(1) (b) of Law No. 90/55 penalizes in case such declaration was made to "mislead the authorities on the conditions and purpose of the meeting". This ambit is quite ambiguous because if Section 2 of the same law is understood in such a liberal spirit that one would think that the purpose of such meeting is of little or no consequence to the public administrator. It even leads one to the misconception that the prerequisite of holding a public meeting a mere "declaration" meant to such that such public liberties are adequately guaranteed and protected by preventing clashes of meetings by different groups of persons. But this section 9 seems to translate it into an authorization. This is irrespective of the constitutional status thereof.

IV. Conclusion

Parliament no doubt adopted a litany of legislation which in principle was aimed at liberalizing not only the political space in Cameroon but also ensure that individual liberties are protected and promoted. However, the circumstances under which the legislation was conceived failed to fully canalize a true spirit of liberalization. For liberalization to attain its plenitude, it is important that the law recognizing and protecting same, should not be a "manufacture, but a growth[46]". These laws can be considered as a "manufacture" because rather than emanating from the customs of the people, they were adopted as a kind of panacea to solve a problem that was raging at the time. They neither truly reflected the natural wishes of the people nor their culture. It could well be argued

[46] Charles E. Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State
Constitutions Which Protect "Life, Liberty, and Property", Harvard Law Review, Vol. 4, No. 8 (Mar. 15, 1891), pp. 365-392.

that their culture had been diluted by successive foreign administrations. But if they reconstruct a culture based on either the British and/or the French colonial culture of liberties, a hybrid may develop that is unique to them and therefore truly guarantee liberty and democracy. Any such law should be adopted primarily with the spirit to liberate the people and not with that of protecting the existing government. Given the pervasive social problems of knowledge, interest, and power confronting every human society, if human beings are to survive and pursue happiness, peace and prosperity while living in society with others, then their laws must not violate certain background natural rights or the rule of law. The 1990 liberty laws fostered hollow hopes in Cameroonians and the practical application seems to make the writer incline to the believe that "citizens in a democracy have all the tools in their hands to enslave themselves" and some of such tools is the legislature. Until Cameroonians go back to the drawing table with frankness to remedy the situation, the 1990 liberty laws have constructed and are bound to maintain an illiberal democracy.

AN APPRAISAL OF THE EMERGING JURISPRUDENCE FOR THE PROTECTION OF WITNESSES IN NIGERIA

Suzzie Onyeka Oyakhire*

Abstract

This paper is an overview of the legal framework for witness protection in Nigeria. For several years, the constitutional rights of the accused person to fair hearing rights in a criminal prosecution formed the basis of adjudication in court and the content of academic literature in Nigeria. Recent developments in the administration of criminal justice have brought witness protection concerns to the forefront in Nigeria and a witness protection jurisprudence has emerged within legislation and case laws. Primarily a doctrinal research, this paper examines the primary and secondary sources of the legal developments of witness protection in Nigeria comprising statutes, case law, international instruments and other online sources. Also, it highlights the inadequacies within the existing legal framework for protecting witnesses in Nigeria. The South African and Kenyan Witness Protection Programmes provide useful insights on international best practices on witness protection and a basis for improving the Nigerian system.

Keywords- witness protection, legal framework, criminal justice, Nigeria.

I. Introduction

Nigeria operates an adversarial criminal law system and it is the duty of the prosecution to prove the accused's guilt beyond reasonable doubt.[1] The prosecution must call and provide essential evidence to prove its case. This includes the oral evidence of witnesses.[2] The evidence provided by reliable witnesses is crucial in criminal prosecutions and their testimony is of high evidentiary value if it conclusively proves the involvement of the accused person in a crime.[3] Over the years, victims and witnesses of crimes in Nigeria have been neglected and left without any form of formal recognition or protection. This is primarily because the criminal laws for a long time focused on the rights of the accused person to fair hearing and this formed the basis of several criminal adjudication in Nigerian courts. However, in Nigeria as well as in other jurisdictions, more attention has been given to the interests and rights of victims and witnesses particularly their protection. This recognition is primarily because of the re-emergence of victims and witnesses as

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[1] Evidence Act 2011, section 135.

[2] *Ibid*, section 126.

[3] Uyo Salifu 'Fighting Boko Haram: why Nigeria needs a cohesive witness protection programme' *Institute for Security Studies* 5 May 2015, <https://issafrica.org/ctafrica/news/fighting-boko-haram-why-nigeria-needs-a-cohesive-witness-protection-programme> accessed 25 February 2017.

essential components of the criminal justice system especially their roles in criminal proceedings.[4]

The testimonies of witnesses occupy a fundamental position within the criminal justice process since the successful conclusion of each stage of criminal proceedings depends on the cooperation of witnesses.[5] Unfortunately, prosecutors are faced with the unwillingness of witnesses to cooperate with them during criminal trials because of intimidation, fear of possible reprisals or actual threats to their lives by the accused person against whom they testify.[6] Witness intimidation is detrimental to the successful trial of criminal cases or other judicial procedures and is often treated as a crime in national legislation.[7] Witness intimidation aims at discouraging individuals from cooperating with law enforcement authorities.[8] In Nigeria, following the attempts by law enforcement to investigate and prosecute members of the Boko Haram sect for acts of terrorism perpetrated by them, a specific challenge to achieving this was the unwillingness of witnesses to testify because of the weakness of not having a robust witness protection program.[9] Witness intimidation is therefore considered a fundamental threat to the rule of law[10] and fatal to the criminal justice system.[11]

Witness protection measures have been introduced within the criminal justice system of several states to facilitate witness cooperation and to ensure that they are not harmed because of their decision to cooperate with law enforcement.[12] There is a

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[4] Claire Ferguson and Brent E Turvey 'Victimology: A Brief History with an Introduction to Forensic Victimology' Chapter 1, 3, <https://booksite.elsevier.com/samplechapters/9780123740892/Sample_Chapters/02~Chapter_1.pdf>, accessed 14 May 2018.

[5] Mark Mackarell, Fiona Raitt & Susan Moody 'Briefing Paper on Legal Issues and Witness Protection in Criminal Cases' *The Scottish Executive Central Research Unit* 2000, 1 <http://www.gov.scot/resource/doc/156628/0042080.pdf> accessed 26 November 2014.

[6] *United Nations Office on Drugs and Crime* 'Victim Assistance and Witness Protection' <http://www.unodc.org/unodc/en/organized-crime/witness-protection.html> accessed 6 September 2014.

[7] Jemima Njeri Kariri and Uyo Salifu 'Witness Protection Facilitating Justice for Complex Crimes' Institute of Security Studies Policy Brief 88, August 2016, 3 <https://issafrica.s3.amazonaws.com/site/uploads/policybrief88.pdf> accessed 2 August 2017.

[8] Kelly Dedel 'The Problem of Witness Intimidation' Guide no. 42 (2006) Centre for Problem-Oriented Policing <http://www.popcenter.org/problems/witness_intimidation/print/> accessed 27 November 2014.

[9] Human Rights Watch 'Spiraling Violence- Boko Haram Attacks and Security Force Abuses in Nigeria' <https://www.hrw.org/report/2012/10/11/spiraling-violence/boko-haram-attacks-and-security-force-abuses-nigeria> accessed 26 May 2019.

[10] Ibid.

[11] Peter Finn & Kerry Murphy Healey 'Preventing gang and drug related witness intimidation' U.S. *Department of Justice- Office of Justice Programmes National Institute of Justice: Issues and Practices* November 1996, <https://www.ncjrs.gov/pdffiles/163067.pdf> accessed on 10 January 2012.

[12] *United Nations Office on Drugs and Crime* 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' 2008, 7

consensus within academic literature that witness protection is good practice and that states should adopt measures to ensure that witnesses cooperating with law enforcement authorities are offered protection against intimidation. There is therefore a need to put in place measures which guarantee the safety of the witnesses in jurisdictions where they are not so enshrined. In Nigeria, witness protection has emerged within general criminal laws and has been relied on by the courts to protect witnesses in the face of intimidation in court.

This paper thus examines the evolution of witness protection within the legislation and case law which forms the crux of the existing legal framework for witness protection in Nigeria. It also highlights the inadequacies of these laws. This paper is divided into four parts. Part one introduces the issue for consideration and the definition of witness protection. Part two presents an overview of the existing legal framework for witness protection. This analysis also highlights Nigerian cases where protective measures were adopted to protect witnesses testifying in certain criminal trials. Part three examines the characteristics of witness protection and draws bests practices from Kenya and South Africa. Part four highlights the inadequacies within the existing legal framework and the practices from Kenya and South Africa are utilized to make recommendations useful for improving the inadequacies within the existing framework in Nigeria.

II. What is Witness Protection?

Witness protection connotes a range of measures adopted at any stage of criminal proceedings to safeguard witnesses and ensure their cooperation through providing evidence.[13] It means the methods of providing security to witnesses, ensuring their safety and those of their families, including everything that they are entitled to have by law, in exchange for the witnesses' testimony.[14] Also, it is described as the application of measures instrumental in preventing or minimising the risk of harm and/or reducing any threats to a witness[15] cooperating with law enforcement authorities in fulfilling their mandate to investigate or prosecute crime and ensure that criminals are punished for their crimes. Witness protection measures may be made available at different stages of a

<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf> accessed 20 December 2011.

[13] Kariri & Salifu (note 7)1.

[14] Kerati Kankaew 'Thailand's Witness Protection Programme' in Securing Protection and Cooperation of Witnesses and Whistle-blowers Fourth Regional Seminar on Good Governance for South East Asian Countries, Co-hosted by UNAFEI and the Department of Justice the Republic of Philippines, 6-9 December 2010, Manila, the Philippines, November 2011, Tokyo, Japan, 92 <*http://unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_all.pdf*> accessed on 9 May 2013.

[15] Transitional Justice Unit, *The Need for Witness Protection and Transitional Justice in Zimbabwe*, Zimbabwe Human Rights NGO Forum (September 2015) <*http://www.hrforumzim.org/wp-content/uploads/2015/10/Witness-protection-and-Transitional-Justice-in-Zimbabwe.pdf*> accessed 13 April 2017.

criminal proceeding, as it may be needed at the investigation stage, during trial or even at the end of trial.[16]

Generally, witness protection aims to guarantee the physical and psychological protection of witnesses at all stages of criminal proceedings.[17] It aims to minimise and manage any risk(s) witnesses may face resulting from their interaction with the prosecutors and security agencies. In jurisdictions with formal witness protection programmes, it is used to tackle organised and high-profile crimes such as corruption, terrorism, economic crimes, trafficking in persons, cybercrime, drug trafficking, war crimes and genocide. Consequently, witness protection is considered an essential element of a country's 'arsenal' against crime.[18] According to a report of the Office of the United Nations High Commissioner for Human Rights, witness protection is meant to allow witnesses to participate in the justice system without fear.[19]

There is proof that individuals are more likely to cooperate with law enforcement and testify if they can be guaranteed of their safety.[20] This is because there are generally two aspects to the need for protecting witnesses.[21] First, there is the need by investigators and prosecutors to ensure that the evidence of witnesses collected during investigation is not destroyed by witnesses who 'resile from their statements under oath.'[22] Second, is the need to guarantee the physical and mental safety of the witnesses which calls for physical protection of the witness at all stages of the criminal proceeding.[23] Without appropriate provisions for the protection of witnesses and victims, including their physical and psychological integrity, privacy, and dignity,[24] their lives may be threatened. Also, witnesses may not be forthcoming, thereby paralysing the justice system.[25] The

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[16] *Law Commission of India* 'Consultation Paper on Witness Identity Protection and Witness Protection Programmes' August 2004, 1, available at http://lawcommissionofindia.nic.in/Consultation%20paper%20on%20witness%20identity%20Protection%20and%20witness%20protection%20programmes.pdf, *a*ccessed on 10 January 2012.

[17] *Ibid.*

[18] UNODC Good practice (note 12) 22.

[19] United Nations Human Rights Office of the High Commissioner, *The Protection of Victims and Witnesses: A Compilation of Conference Reports and Consultations in Uganda* (2010) 83 <*http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf*> accessed 7 February 2017.

[20] Kariri & Salifu (note 7) 4.

[21] *Law Commission of India* (note 16).

[22] Ibid at 15.

[23] Ibid.

[24] Human Rights Council Twelfth Session Agenda Item 2 Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the Truth, Report of the Office of the High Commissioner for Human Rights, Summary, A/HRC/12/19, 21 August 2009, para 3, p 4 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf> accessed 5 May 2015.

[25] Gregory Lacko 'The protection of witnesses' *Department of Justice Canada- The International Cooperation Group* 2004 1,<http://justice.gc.ca/en/ps/inter/protect_witness/WitnessProtection-EN.pdf> *a*ccessed 20 December 2011.

overarching objective of most witness protection programmes is therefore to combat impunity[26] arising from the unsuccessful investigation and prosecution of crime.

III. The Legal Framework for Witness Protection in Nigeria

In Nigeria, there is no established witness protection programme as witness protection issues have only been brought to the forefront of criminal justice administration in recent times. However, witness protection requirements have been captured within the text of several criminal laws in Nigeria. These provisions have in turn been relied on by the courts in Nigeria as the basis for protecting witnesses testifying during criminal trials and whose safety was at risk. This section highlights the legal framework for protecting witnesses and this includes legislative provisions, case law and Nigeria's witness protection obligations under international law.

III.1 Witness Protection Legislation in Nigeria

This comprises of:

The Constitution of the Federal Republic of Nigeria;
The Corrupt Practices and Other Related Offences Act 2000;
The Economic and Financial Crimes Commission (Establishment) Act 2004;
The Terrorism Prevention (Amendment) Act 2013;
The Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015;
The Administration of Criminal Justice Act 2015.

1. The Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended)[27]

Although not expressly stated, the proviso to section 36 (4) of the CFRN validates witness protection incentives in Nigeria. The section states that:

(a) a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;

(b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a commissioner of the government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

Consequently, in the interest of justice, witnesses who are exposed to intimidation because of their cooperation with law enforcement agencies can be assigned protective measures.

[26] HRC Twelfth Session (note 24) Para 67, p 18.
[27] Cap C 23 LFN 2010.

2. The Corrupt Practices and Other Related Offences (ICPC) Act 2000[28]

Section 64 of the ICPC Act provides for the protection of informers and information. Section 64 (1) provides that where any complaint is made by the commission in consequence of information received by an officer of the commission, the information referred to in the complaint and the identity of the person who made the information shall be secret between the complainant and the officer who received the information. The section goes on to state that everything contained in such information, the identity of the person who gave the information and all other circumstances relating to the information shall not be disclosed or be ordered to be disclosed in public.

Section 64 (2) extends the degree of the protection by ensuring that if any document or visual or sound recording contains any information which is likely to disclose the identity of the informer, the court shall ensure that all such parts be concealed from view or to be obliterated so far as it is necessary to protect the identity of such an informant. The essence of this provision is to ensure that the identity of informers who provide information about corruption and other corrupt practices are protected, from the possibility of reprisal attacks or intimidation.

3. The Economic and Financial Crimes Commission (Establishment) (EFCC) Act 2004[29]

Section 39 of the EFCC Act provides for the protection of informants as well as the information provided by them. The section states that 'officers of the Commission cannot be compelled to disclose the source of information or identity of their informers except by the order of the court.' This section relates to information provided by any informant during the investigation of all economic and financial crimes such as advance fee fraud, money laundering, counterfeiting and other crimes, which the EFCC is empowered by section 6 of the EFCC Act to investigate and prosecute.

4. Terrorism (Prevention) (Amendment) Act (TPAA) 2013[30]

The effect of witness intimidation to the successful investigation and prosecution is recognised and criminalised by sections 23 and 24 of the TPAA. Apart from penalising witness intimidation, the TPAA also provides for the protection of witnesses from intimidation. Accordingly, by section 34 (1)

> The Court may on its own or on a motion by the Attorney-General or a relevant law enforcement or security agency, protect a witness or any person in any proceeding before it where it is satisfied that the life of the person or witnesses is in danger and take such measures as it deems fit to keep the identity and address of the witness or person secret.

The protective mechanisms include anonymity and confidentiality measures which protect the identity and address of the witness,[31] use of pseudonyms, camera proceedings, and

[28] Act No 5 of 2000.

[29] Act No. 1 of 2004 CAP E 1 LFN 2010. The Act repeals the EFCC Act, No 5 of 2002.

[30]The Act amends the Terrorism (Prevention) Act No 10, 2011 and makes provision for extra-territorial application of Act and strengthens terrorist financing offences.

undisclosed location etc.[32] Section 34 (3) however emphasises that factors such as public interest, public safety and national security are conditions precedent to adopting such protective measures.[33] The courts in Nigeria have recognised the importance of the TPAA in the bid to supress terrorism and all forms of criminality in the society[34] and have relied on these provisions as the basis for protecting witnesses testifying in terrorism prosecution in Nigeria.

5. The Trafficking in Persons (Prohibition) Enforcement and Administration (NAPTIP) Act 2015[35]

By section 1 of this Act, a primary objective of this piece of legislation is to 'provide an effective and comprehensive legal and institutional framework for the prohibition, prevention, detection, prosecution and punishment of human trafficking and related offences in Nigeria.'[36] Also, the Act aims to protect victims of human trafficking.[37] To facilitate protection, the NAPTIP is empowered to co-ordinate, supervise and control the protection, assistance and rehabilitation of trafficked persons.[38] The protective measures envisaged under this Act provide for the physical and psychological protection of victims and witnesses. These include testimony by video-link and other electronic medium,[39] holding of proceedings at a place to be decided by the court, the use of pseudonyms and other orders to ensure that the identity and addresses of the witnesses are not disclosed.[40] The Act however states that these protective measures are available to informants who provide useful information in investigation or prosecution of an offence under the NAPTIP Act. Such information provided shall also be protected.[41] The establishment of shelters[42] aimed at providing protection, assistance, counselling and training for the victims and to facilitate their reintegration into the society,[43] is recognised as fundamental to the psychological protection of these victims.

A key provision of this Act is the link between the need to protect witnesses and the existence of intimidation. Consequently, where the court is satisfied that the life of the witness or any person providing such information to the NAPTIP is in danger, it is

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[31] Section 34 (1)
[32] Ibid, 34 (2) (a-d).
[33] Ibid, 34 (3) (4)
[34] See John Chuks Azu 'Nigeria: Witness Protection Law-Enter Masked Witnesses' *Daily Trust* 28 May 2013 <https://allafrica.com/stories/201305290066.html> accessed 24 February 2017.
[35] Act No 4 of 2015. The Act repeals the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended 2005).
[36] See section 1 (a).
[37] Ibid, 1 (b).
[38] See section 5 (m) (i).
[39] See section 45 (4),
[40] See section 47 (2-5).
[41] See section 46 and 47 (1) of the Act.
[42] See section 64 (1)
[43] See section 64 (2)

necessary and expedient to adopt protective measures to guarantee the safety of that witness.[44]

6. The Administration of Criminal Justice Act (ACJA) 2015

As a reform law, the ACJA builds upon the existing criminal justice framework in Nigeria and fills up the gaps observed in these laws.[45] By section 1, a primary objective of the ACJA is to ensure 'that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, the protection of society from crime and the protection of the rights and interests of the suspect, the defendant and the victim.' In recognising the need to protect witnesses in Nigeria, reformers included within it a witness protection mandate.

Accordingly, a combined reading of section 232(1) and section 232 (4) of the ACJA provides that in a trial for rape, defilement, incest and other sexual offences,[46] terrorism and other related offences, economic and financial crimes, trafficking in persons and related offences, and any other offence for which an Act permits the use of protective measures, that the court may order the use of protective measures for witnesses testifying. Such protective measures available to the witnesses include confidential measures which protect the names, addresses and identity of the victims and witnesses, use of pseudonyms, video link evidence, screen or mask, written deposition of expert evidence or any other measures which the court considers appropriate in the circumstances.[47] The ACJA, thus expressly provides witness protection for the range of crimes listed within the previous criminal laws. It however extends the range of crimes to include rape, defilement and other sexual assaults and other crimes permitted by an Act of legislature. The ACJA was relied on by the prosecution in the *Dasuki Sambo Case* discussed below as the basis for requesting witness protection for the prosecution's witnesses.

III.2 Case Law on Witness Protection in Nigeria

As an emerging practice, case law on witness protection in Nigeria is scanty. There have however been instances where protective measures have been adopted to protect witnesses testifying in criminal proceedings in Nigeria. In adopting protective measures in these cases, the court relied on the witness protection provisions especially in the TPAA 2013 and the ACJA 2015. In these instances, the prosecution required protection from the court claiming that the witnesses were susceptible to intimidation from the defendants. These cases reflect the mind of criminal law stakeholders concerning the legal developments of witness protection practices in Nigeria.

[44] See section 47 (2).

[45] Yemi Akinseye-George 'An Overview of the Changes and Application of the Administration of Criminal Justice Act 2015' in Adedeji Adekunle, Suzzie O Oyakhire, Chukwuemeka Nwabuzor (eds.) *Issues on Criminal Justice Administration in Nigeria* (NIALS Press, 2016) 2-3.

[46] See section 231.

[47] See section 232 (2) (3)

1. FRN v Kabiru Umar

This case is part of the terrorism prosecutions in the wake of terrorist activities in Nigeria by members of the Boko Haram sect. Kabiru Umar was the mastermind of the Christmas day bomb blast in 2011 at St Theresa's Catholic Church Madala, which killed about 44 persons and wounded 75 others.[48] This trial provided a basis for trying out the witness protection provisions in the Terrorism Prevention Act of 2011.[49] The court in adjudicating on the terrorism charges relied on the provisions of the TPAA to grant protective measures such as the use of masks and pseudonyms for the prosecution witnesses. The protective measures adopted also excluded the public from the court in accordance with section 34 of the TPAA. With these protective measure in place witnesses were able to testify freely in the prosecution of Kabiru Umar.

2. FRN v Aminu Ogwuche

Aminu Ogwuche was one of the suspects and masterminds of the twin bomb blast by the Boko Haram sect on April 2014 at Nyanya which killed over 75 persons and injured others.[50] The court granted the prosecution's request asking that the witnesses in the ongoing trial give their testimony using masks.[51] In this terrorism trial, the protective measures adopted by the court ranged from shielding the witness from the public, the use of aliases and trial in camera for security reasons.[52] The prosecution justified the use of protective measures on the grounds that 'the nature of the case for which the accused persons were standing trial is sensitive and there was need to ensure witnesses' protection so as not to expose them to harm.'[53] The defence however objected to the constitutionality of these protective measures. They argued that 'by seeking to limit counsel's appearance for the accused persons to only the lead counsel, was an unwarranted infringement to the constitutional rights of the accused persons to their rights to counsel of their choice.'[54] The court rejected the prosecution's request for protection claiming the protective measures

[48] See Ikechukwu Nnochiri 'Boko Haram: Kabiru Sokoto Sues FG over Conviction' *Vanguard* 29 January 2016, <https://www.vanguardngr.com/2016/01/boko-haram-kabiru-sokoto-sues-fg-over-conviction/> accessed 24 February 2017.

[49] Azu (note 34).

[50] Kingsley Omonobi & Victoria Ojeme 'Ogwuche, Nyanya bombing suspect extradited to Nigeria' *Vanguard* July 15, 2014, < https://www.vanguardngr.com/2014/07/nyanya-bombing-aminu-ogwuche-co-mastermind-extradited-nigeria/> accessed 25 January 2016.

[51] 'Nyanya Bombing: Witnesses to Testify in Masks' *Channels Television* 11 May 2015, available https://www.channelstv.com/2015/05/11/nyanya-bombing-witnesses-to-testify-in-masks/, accessed 25 February 2017.

[52] Ibid.

[53] Ibid. See also 'Nyanya Bombings: Court okays secret trial of Ogwuche, others' 12 May 2015<https://factnewsonline.com/news/1771-Nyanya-Bombings-Court-okays-secret-trial-of-Ogwucheothers> accessed 23 July 2016.

[54] Ibid.

applied for contravened the rights of the defendant to fair hearing.[55] Consequently, witnesses refused to testify in this trial and the trial was inconclusive.[56]

3. FRN v Mohammed Yunus Nazeef

Like the previous cases, this case involved the prosecution of terrorism related offences. This case is instructive as it reflects the adverse effects of the refusal of the courts to grant protective measures on the successful investigation and prosecution of offences. In this case, a witness testifying in the prosecution of the defendant refused to testify because the trial court refused to grant protective measures aimed to allow the witness to wear masks while testifying during the trial.'[57] Apart from refusing to allow masks, the court also rejected requests which sought to exclude the public from the court. The court reasoned that, 'it would not be in the interest of justice to bar members of the public from witnessing the trial of the accused person.'[58] The court however permitted the use of screens to shield the witness from the public. [59]

4. The Prosecution of Henry Okah

Henry Okah was arrested and prosecuted for masterminding several attacks, including two bombings that killed about 12 people in Abuja during the Independence Day celebration in 2010.[60] He was charged and prosecuted for acts of terrorism under the South African Anti-Terrorism Act[61] under their universal jurisdiction and under an arrangement with the Nigerian government because although he was a Nigerian citizen, he was a permanent resident in South Africa. During his trial, several prosecution witnesses who were Nigerians and flown into South Africa to testify against Henry Okah expressed fears concerning their safety. These witnesses were thus protected under the SA witness protection programme.[62] The evidence provided by the witnesses in this case contributed significantly to Okah's conviction and ultimately promoted a criminal justice response to terrorism.[63]

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[55] Ihuoma Chiedozie 'B'Haram: witness refuse to testify in open court' *Punch* 4 April 2014 <*http://www.punchng.com/news/bharam-witness-refuses-to-testify-in-open-court/*> accessed 6 May 2015.

[56] Ibid.

[57] Uyo Salifu 'Fighting Boko Haram: why Nigeria needs a cohesive witness protection programme' *Institute for Security Studies* 5 May 2015, <https://issafrica.org/ctafrica/news/fighting-boko-haram-why-nigeria-needs-a-cohesive-witness-protection-programme> accessed 25 February 2017.

[58] Ikechukwu Nnochiri 'Nigeria: Boko Haram -Court Declines Secret Trial of Kogi Varsity Lecturer' *Vanguard* 4 April 2014, available at https://allafrica.com/stories/201404040295.html, accessed 24 February 2016.

[59] Salifu (note 57).

[60] 'Court affirms Henry Okah's Conviction' *Punch* 23 February 2018 <https://punchng.com/court-affirms-henry-okahs-conviction/> accessed 29 May 2019.

[61] The Protection of Constitutional Democracy against Terrorist Related Activities Act 33 of 2010.

[62] Kariri & Salifu (note 7) 8.

[63] Salifu (note 57).

This case contributes to the emerging witness protection practice in Nigeria as it reflects the importance of international cooperation as a crucial aspect of witness protection. By article 27, of the United Nations Convention against Transnational Organised Crime (UNCTOC)[64] 'state parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention.' Interstate cooperation plays a significant role in facilitating witness protection objectives particularly in the context of transnational organised crime, terrorism[65] and violation of international humanitarian law.[66] In practice, interstate cooperation has played a significant role in issues relating to witness relocation.[67] Interstate cooperation may be useful to moderate the challenges that arise from inadequate funding, lack of trained personnel and poor infrastructural capabilities.

5. FRN v Sambo Dasuki

The defendant Sambo Dasuki, a former National Security adviser to President Goodluck Jonathan was arrested and faced trial for charges ranging from unlawful possession of firearms and money laundering by mismanaging the sum of $2bn meant for procuring arms to combat Boko Haram insurgents.[68] The prosecution requested for protective measures and asked the court to grant measures aimed at ensuring that the trial be conducted in secrecy by providing special cover for witnesses, use of private witness rooms and the use of face masks.[69] The prosecution stressed that section 232(1) of the ACJA permitted the witnesses to be shielded or masked. He argued further that shielding the witnesses would not prevent the defence from cross-examining them as they would be visible to the defence.[70] The defence counsel however objected to the use of protective

[64] Adopted by the UN General Assembly Resolution 55/25 of 15 November 2000, <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>.
[65] Council of Europe, Committee of Ministers Recommendation 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, Explanatory Report, para 92 p 15 <www.legislationline.org/documents/id/8998 >accessed 23 March 2013.
[66] See Article 93 (1) (j) Rome Statute.
[67] Human Rights Council, Fifteenth Session; Agenda items 2 and 3-Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development July 2010, Para 40 p 13 <http://www2.ohchr.org/english/issues/women/docs/A-HRC-15-40.pdf> accessed 10 January 2012.
[68] 'Nigeria's Dasuki arrested over $2bn arms fraud' BBC News 1 December 2015, available at <https://www.bbc.com/news/world-africa-34973872> accessed 28 May 2019.
[69] 'Sambo Dasuki Objects to Secret Trial as FG Files Fresh Charges' 26 December 2015, <http://newswirengr.com/2015/10/26/sambo-dasuki-objects-to-secret-trial-as-fg-files-fresh-charges/> accessed 18 March 2018.
[70] 'Dasuki: Court grant FG's application to shield witnesses' *The Guardian* 15 June 2017, <https://guardian.ng/news/dasuki-court-grants-fgs-application-to-shield-witnesses/> accessed 18 March 2018.

measures during this trial on grounds that the case is harmless and one that does not warrant a secret trial.[71] The defence argued that the protective measures requested were in breach of the defendant's right to fair hearing especially the right to cross examine the witnesses. He argued that in criminal proceedings, the right of the defence to confront the witnesses testifying against the accused person is fundamental and that the anonymity of the prosecution's witnesses, if granted, deprives the accused person of conducting background checks on the witnesses.[72] They argued further that, the prosecution witnesses who were security officials were armed and can protect themselves without more protection from the court.

The court however granted protection for the prosecution witnesses.[73] The court permitted them to testify behind a screen that will be provided by the court. The court added, however, that they will not be shielded from the defence lawyers in the court throughout the trial. Consequently, the court ordered that the screen be used in a way that it would not shield the witnesses from being seen by him, the defendant and members of the prosecution and defence teams. The protective measures were only to shield the witnesses from the public.[74] It is argued here that permitting the defence to see the witnesses testifying against him defeats the purpose of witness protection which aims at protecting the identity of the witnesses from the object of intimidation, which is the defendant or friends of the defendant.

It is important to note here that in response to the objection by the defence that witness protection was unnecessary in this case, that is illegal possession of fire arms, the court explained that the protective measures were granted on the charges involving money laundering.[75] The court thus confirmed that because of the nature of the case, the protective measures were in order since section 232 (4) of the ACJA allows the use of screens in prosecutions involving economic and financial crimes. The court noted that the status of the defendant as a former NSA was proof that he was a potential threat to the witnesses testifying against him. Furthermore, the court in dismissing the objections raised by the defence that the protective measures requested by the prosecution was unconstitutional, said that there was no proof that the protective measures will prejudice against the defendant.[76] The reasoning of the court here is justified on the basis that the protective measures awarded did not infringe on the constitutional rights of the defendants since the defence had the opportunity to cross examine the prosecution's witnesses who were not shielded from the defence counsel and the court.

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[71] Sambo Dasuki (note 69).
[72] Ibid.
[73] Court Grants FG's Application for Protection of Witnesses in Dasuki's Trial, This Day June 16, 2017 <https://www.thisdaylive.com/index.php/2017/06/16/court-grants-fgs-application-for-protection-of-witnesses-in-dasukis-trial/> accessed 18 March 2018. See also Ade Adesomoju 'Dasuki: Court Grants Protection for FG Witnesses' *Punch* 15 June 2017, available at <https://punchng.com/dasuki-court-grants-protection-for-fgs-witnesses/> accessed 18 March 2018.
[74] Ibid.
[75] Ibid.
[76] Adesomoju (note 73).

III.3 Nigeria's Witness Protection Obligation (s) under International Law

Witness protection is recognised as an important tool in criminal justice administration both under national criminal law systems and within international law instruments. Although there is no single universal treaty on witness protection, witness protection obligations can be found within specific international agreements. Most notably are the United Nations Convention against Transnational Organised Crime (UNCTOC)[77] and the United Nations Convention against Corruption (UNCAC).[78]

1. The United Nations Convention against Transnational Organised Crime (UNCTOC)

The UNCTOC is the main international instrument in the fight against organised crime.[79] It is further supplemented by three Protocols, which target specific areas of organised crime: the protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.[80] The states that ratify this instrument are committed to adopting a series of measures against transnational organised crime, including procedures to ensure cooperation with law enforcement agencies, such as witness protection.

Article 24 of the convention calls on parties to the convention to 'take appropriate measures within its means to provide effective protection from potential retaliation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention.' The convention extends protection not only to the witnesses testifying, but also for their relatives and other persons close to them. The kind of protection envisaged under the convention includes relocation of witnesses, non-disclosure of witness' identity, use of video links and other evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness.[81] It is however important to emphasise that these measures are to be undertaken without prejudice to the rights of the defendant to due process and fair trial.[82] Nigeria is a signatory to the UNCTOC and has ratified it. Consequently, Nigeria is bound under international law to the witness protection obligations under this convention.[83]

2. The United Nations Convention against Corruption (UNCAC)

The UNCAC is the only legally binding universal anti-corruption instrument.[84] The convention covers many different forms of corruption such as bribery, trading in

[77] Supra (note 64).
[78] Adopted by the UN General Assembly Resolution 58/4 2004, <https://www.unodc.org/unodc/en/corruption/uncac.html>.
[79] Supra (note 64).
[80] Ibid.
[81] See Article 24 (2) (a) (b).
[82] See Article 24 (2).
[83] See Nigeria's ratification status at <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>.
[84] Supra (note 78).

influence, abuse of functions and various acts of corruption and corrupt practices in the private sector. Like the UNCTOC, the states that ratify the UNCAC are committed to adopting a series of measures against corruption such as criminalization of corruption and to adopt procedures to ensure cooperation with law enforcement agencies, such as witness protection. As such, state parties are called to take appropriate measures within their domestic legal systems to provide effective protection to witnesses and experts who testify in corruption proceedings from potential retaliation or intimidation.[85]

The protective measures include relocation of witnesses, non-disclosure of witnesses' identity, use of video links and other evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness.[86] It is however important to emphasise that these measures are to be undertaken without prejudice to the rights of the defendant to due process and fair trial.[87] Nigeria has ratified the UNCAC and is bound under international law to the provisions of this convention, including the witness protection obligations.[88]

IV. Characteristics of Witness Protection Programmes

Witness protection has been included as part of the criminal justice system of several states such as US, Canada, Australia, Germany, Italy, UK, Mexico, South Africa and Kenya. Collectively, these states have set standards which resonate as the best practices for witness protection. However, this section focuses on the practices in Kenya and South Africa which are reflective of international best practices. These jurisdictions are highlighted because they are the only African countries with a well-established witness protection programme. The international best practices thus include:

IV.1 The Enactment of a Comprehensive Witness Protection Legislation

Generally, a significant aspect of witness protection regimes is that they are based on legislative frameworks. South Africa[89] and Kenya[90] respectively, have enacted a comprehensive witness protection legislation to regulate the administration of witness protection and contains provisions for issues which concern the operational principles, the location of programme,[91] personnel,[92] budget and finances.[93] Dandurand and Farr acknowledge that witness protection programmes that are grounded in legislation have

[85] See Article 32 (1). See also article 33.
[86] See Article 32 (2) (a) (b).
[87] See Article 32 (2).
[88] See Nigeria's ratification status at <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.
[89] Witness Protection Act 112 of 1998, (as amended by Act 12 of 2004) <http://www.justice.gov.za/legislation/acts/1998-112.pdf> accessed 23 March 2015.
[90] Witness Protection Act No 16 of 2006 (as amended by Act No 2 of 2010) <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/WitnessProtectionAct_No16of2006.pdf>, accessed 23 March 2014.
[91] Section 2 (South Africa) and section 3A (Kenya).
[92] Section 3-6 (South Africa) and Section 3E and 3F (Kenya).
[93] See section 3J and 3K (Kenya).

clearer management guidelines which identify the main centre of responsibility for the program and specify the reporting requirements.[94] Another importance of a witness protection legislation is that it specifies the eligibility considerations and stipulates the conditions for protecting or terminating a witness protection arrangement between the witnesses and the protecting authority.[95] These stipulations formalise witness protection and set a uniform and objective standard for witness protection, thereby minimising inconsistencies, the risk of breakdown in communication or cooperation, gaps in services to witnesses, and inefficient or ineffective procedures.[96] Consequently, the absence of a comprehensive witness protection is detrimental to the effectiveness of witness protection.[97]

IV.2 Establishment of a Witness Protection Unit

Another significant characteristic of witness protection is the establishment of a witness protection unit that is empowered to administer witness protection and facilitate protection objectives as expressed within the legislation. Generally, there are two administrative models for witness protection. The first option is to locate the witness protection unit within an existing institution; usually the Police or the Office of the Attorney General and the second option is the creation of a new independent Agency.[98] In South Africa, section 2 establishes the Office for Witness Protection within the Department of Justice (Office of the Prosecutor) to provide protection for witnesses. On the other hand, section 3A of the Kenyan legislation establishes a new independent Witness Protection Agency to oversee the protection of witnesses.[99] The witness protection units have the sole function to establish and maintain a witness protection programme as well as to determine the eligibility criteria and determine the type of protective measures to be applied.[100]

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[94] Yvon Dandurand and Kristin Farr 'A review of selected witness protection programmes *Prepared for Research and National Coordination, Organized Crime Division, Law Enforcement and Policy Branch, Public Safety Canada* 2010, 38 <*http://www.publications.gc.ca/collections/collection_2011/sp-ps/PS4-96-2010-eng.pdf*>, accessed 17 January 2013.

[95] See sections 7-13 (South Africa) and sections 5-12 (Kenya).

[96] United Nations General Assembly; 'Extra Judicial, Summary or Arbitrary Execution- Note by the Secretary General *Sixty-third Session Item 67 (b) of the provisional agenda*Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms.* A/63/313 20 August 2008 para 32 p 13 <http://www.unhcr.org/refworld/docid/45c30c0c0.html>, accessed 20 December 2011.

[97] Steven William Kayuni an Edister Jamu 'Failing witnesses in serious and organised crimes: policy perspectives for witness protective measures in Malawi' (2015) 41 (3) *Commonwealth Law Bulletin* 425.

[98] HRC 15th session, above (note 67) 19.

[99] Witness Protection Act No 2 of 2010.

[100] See section 10 (South Africa) and Section 3C (Kenya).

Where a specialised witness protection unit is established to administer protection to witnesses, it offers a greater guarantee of the effectiveness of the system and prevent failures resulting from incompetence.[101] Also, such a centrally organised unit helps to maintain a constant commitment to protecting the witnesses by all cooperating agencies and provides a consistent contact person for intimidated witnesses and helps to facilitate evaluation.[102] With the creation of a unit which overtime fulfils its witness protection mandates, this encourages professionalism and specialization in dealing with the witnesses and it ensures the accountability of the individuals charged with specific responsibilities to protect and the efficient management of resources.[103]

IV.3 Wide Range of Protective Measures

As defined earlier, witness protection means all measures adopted to protect witnesses at all stages of the criminal proceedings. There is a wide range of protective mechanisms available to protect witnesses. These protective measures are broadly categorised into physical[104] and psychological measures[105] which may take the form of procedural or non-procedural/operational measures.[106] These include pre-trial measures such as the use of police patrol/surveillance, use of safe houses and temporary change of residence;[107] procedural measures used during criminal proceedings such as anonymity and confidentiality measures which protect the identity and address of the witness, use of pseudonyms, camera proceedings, and undisclosed location;[108] and post-trial and long term measures such as the inclusion of witnesses in a witness protection programme[109] facilitated through identity changes and relocation of the witness.

Witness protection programmes are recognised as the most common protective mechanisms and are established in witness protection legislation of several national jurisdictions.[110] They are considered as an effective means of dismantling powerful criminal organizations are generally restricted to witnesses exposed to the highest threat

[101]Tool 5:17 'Law Enforcement and Prosecution' 246 <*http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-17.pdf*> accessed 3 December 2014.
[102] Finn and Healey (note 11) 60.
[103] OHCHR Compilation document (note 19) 31.
[104] See Article 24 (2) (a-b) of the UNTOC. This is replicated by Art 32 (2) of the UNCAC.
[105] See Articles 43 (6) and 68 (1) Rome Statute. See also Paragraph 6 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
[106] OHCHR compilation document (note 19) 5. See also Nicholas Fyfe & James Sheptycki 'International trends in the facilitation of witness co-operation in organized crime cases' (2006) 3 (3) *European Journal of Criminology* 324.
[107] See section 8 (South Africa). See also OHCHR Compilation document (note 19).
[108] See sections 13, 15 22 (Kenya).
[109] See section 10 (2) (b) South Africa and section 5 (Kenya).
[110] See for example section 3521 (a) (1) of Title 18 US Code; section 2 Witness Protection, Security and Benefit Act of Philippines; section 4 Witness Protection Program Act 1996 of Canada, section 4 Witness Protection Act 2006 (as amended 2010) Kenya; section 4 Witness Protection Act 1994 of Australia.

levels[111] which cannot be adequately tackled by alternative means.[112] Since acts of intimidation exist from the investigative stages with the aim of discouraging witness from reporting crimes or from giving evidence in court[113] and may continue till long after the trial is concluded, witness protection aims to ensure that short term and long-term protective measures are available to protect witnesses during all stages of the criminal proceedings.

IV.4 Confidentiality Obligations

International best practices on witness protection recognise that confidentiality is required for the success and effective management of witness protection.[114] Confidentiality requirements are specified in the protection agreements between a witness and the protection authority which requires them to maintain secrecy about their arrangement.[115] A breach of confidentiality is a ground for terminating protection and is punishable.[116] Since the primary aim of witness protection is to guarantee the safety of witnesses and prevent them from risks associated with cooperating with law enforcement, confidentiality is necessary because if not maintained, compromises the witness who may be further exposed to harm.[117] Confidentiality is easily maintained where witness protection is established through a legislation stating the clear roles and responsibilities of parties and also achieved in the context of a specialised witness protection unit with specified and designated officials who have developed specialization over the years.[118]

V. Shortfalls of the Existing Witness Protection Framework in Nigeria

The discussions in the preceding section provide a basis for assessing Nigeria's efforts in developing a system for protecting witnesses. From the assessment of the legislative framework of witness protection therefore, a few shortfalls are identified within the existing framework.

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[111] OHCHR Compilation document (note 19) 11.
[112] UNODC Good Practices (note 12) 29.
[113] Nicholas R Fyfe and Heather Mckay 'Desperately Seeking Safety Witnesses' Experiences of Intimidation, Protection and Relocation' (2000) 40 *British Journal of Criminology* 677.
[114] Section 11 (4) (b) (ix) South Africa and section 7(1) (b) Kenya.
[115] Ibid.
[116] See sections 13 (1) (f) & 21 (South Africa) and section 10 & 30 Kenya.
[117] Gareth Newham 'Keeping the Wolves at Bay: Issues and concerns in establishing a witness protection programme in South Africa' Research report written for the Centre for the Study of Violence and Reconciliation, (October 1995) <*http://www.csvr.org.za/old/index.php/publications/1720-keeping-the-wolves-at-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa.html*> accessed 16 May 2015.
[118] See Piotr Bakwoski 'Witness Protection Programmes European Experiences in the International Context' Library Briefing, Library of the European Parliament, 28 January, 2013, <http://www.europarl.europa.eu/document/activities/cont/201301/20130129ATT59967/20130129ATT59967EN.pdf> accessed 3 December 2017.

V.1 Absence of a comprehensive witness protection legislation

Currently, there is no single comprehensive witness protection legislation in Nigeria. Witness protection is found in pockets of several criminal laws, with very limited provision for witness protection. There are no express stipulations to regulate the administration of witness protection and other issues to facilitate the operational principles, eligibility requirements, and the conditions for terminating a protection arrangement. As such, witness protection in Nigeria is ad hoc and primarily at the discretion of the prosecutor in the absence of any clear objective criteria for administering witness protection.

The inconsistent application of protective measures is observed in the refusal of the courts to grant the same protective measures which it had granted in a previous case to a subsequent case with similar facts in issue where objections about constitutionality of protective measures are raised.[119] Accordingly, the Office of the United Nations Human Rights Commissioner suggest that 'legislative guidelines on witness protection measures are important foremost to guide courts on the range of protective measures to avail witnesses appearing before them; to criminalise witness/victim/defendant intimidation and to ensure that the rights of the accused are maintained and not unjustifiably infringed upon.'[120] Protecting witnesses in the absence of a comprehensive legislation falls short of providing a comprehensive basis for witness protection.[121] In recognition of this inadequacy and the need for a legislative basis for witness protection, the Nigerian Senate has passed the Public Interest Disclosure and Witness Protection Bill 2017, which is currently waiting adoption by the House of Representatives and presidential assent.[122]

V.2 Absence of a Central Administrative Body

Within the existing framework, witness protection is administered by several government institutions; the police, the NAPTIP, ICPC, EFCC. This is because they administer witness protection depending on the Act under which witness protection is applied for. Consequently, there is no specialised agency with the sole responsibility of administering witness protection. This also presents a basis for ad hoc arrangements which are extremely sensitive to changes in personnel at the various cooperating agencies.[123] A system of protection involving many agencies is unlikely to have bureaucratic safeguards in place to ensure that the secrecy required for witness protection is maintained.[124] International best practices on witness protection supports the establishment of a single

[119] See previous discussions on the *Kabiru Umar, Aminu Ogwuche* and *Mohammed Yunis Nazeef* cases above.
[120] OHCHR Compilation document (note 19) 42.
[121] Kariri & Salifu (note 7) 7.
[122] Available at http://www.justice.gov.ng/documents/PUBLIC%20INTEREST%20DISCLOSURE%20AND%20%20%20WITNESS%20PROTECTION%20BILL,%202017%20FINAL%20040417.pdf, accessed 18 July 2017.
[123] UNGA Extrajudicial summary (note 96).
[124] Ibid.

witness protection unit with designated personnel, budget and finance. This aids specialization, accountability and confidentiality needed for effectively protecting witnesses and for facilitating inter-agency cooperation. The witness protection bill 2017 proposes the establishment of a new independent witness protection agency to administer witness protection in Nigeria.

V.3 Inadequate Protective Measures

As discussed earlier, there is a wide range of protective measures to protect witnesses at all stages of the criminal proceedings. However, within the Nigerian framework, witness protection is limited to procedural measures available to witnesses only during the criminal proceedings in court. More importantly, there are no provisions for long-term protection to cater for the safety of the witnesses after trial and even after the conviction of the suspect. The current system therefore takes no account of the presence of intimidation that continues after criminal proceedings have been concluded.[125] Also, it fails to consider the utility of a witness protection programme for witnesses exposed to the highest threat levels. From the scope of crimes covered within the legislative framework such as terrorism, human trafficking, economic and financial crimes, these constitute crimes with high threat levels such as risk of harm from the Boko Haram sect, the restriction to procedural protective measures are inadequate for protecting such witnesses.[126]

VI. Conclusion

Witness cooperation through their testimony is crucial to the success or otherwise of a criminal proceeding. However, the absence of witness protection would discourage the voluntary testimony of witnesses who fear for their safety. Recent experiences in the administration of criminal justice in Nigeria especially in the light of terrorism prosecutions confirms the significance of witnesses to an effective criminal justice system and that there is a growing recognition of the need to protect them.

In this paper, the existing legal framework for protecting witnesses was in Nigeria examined. It found that although there is no comprehensive legislation on witness protection in Nigeria, witness protection has been included in the text of several criminal laws with the intent of safeguarding the rights and interests of witnesses and preventing or minimising their exposure intimidation, threats, or reprisal attacks arising from their decision to cooperate with law enforcement. From these laws, witness protection is available to witnesses in Nigeria who are exposed to intimidation in the prosecution of crimes such as corruption and other corrupt practices, economic and financial crimes, terrorism, human trafficking and sexual offences.

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[125] Fyfe and Mckay (note 113) 677.

[126] Elaine Pearson 'The need for effective witness protection in the prosecution of traffickers: a human rights framework for witness protection' *presented at the First Pan-African Regional Conference on Trafficking in Persons Abuja, Nigeria* 19-23 February 2001 <*http://old.antislavery.org/archive/other/witnessprotection.pdf*> accessed 4 May 2015.

As deduced from the preceding analysis, within the global practice of witness protection, certain standards have emerged which resonate as best practices. These include the enactment of a single comprehensive witness protection legislation, the creation of an autonomous witness protection authority, the availability of protective measures from pre-trial to post trial stages of the criminal proceedings and the necessity of confidentiality requirements. In Nigeria however, witness protection is ad hoc; there is no comprehensive witness protection legislation setting the eligibility criteria, no central administrative control and no long-term measures to protect witness post-trial. Accordingly, witness protection in Nigeria, witness protection requires a positive and conscious effort by the law reformers to improve on these inadequacies to ensure its effectiveness.

There is need for an effective witness protection framework to be established in Nigeria and this includes the enactment of a comprehensive witness protection legislation, the creation of an independent witness protection authority, the establishment of a witness protection programme to cater for long-term protection facilitated through identity changes and witness relocation, the specific inclusion of confidentiality provisions and inter-agency cooperation specifications and penalties for breaches of the confidentiality requirements. This requires the state to invest resources and allocating the necessary funds through budgetary allocation to issues of witness protection.

CHALLENGES TO IMPROVING THE FINANCIAL REGULATION REGIME AGAINST MONEY LAUNDERING AND TERRORIST FINANCING IN WEST AFRICA*

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Abstract

The Designated Non-Financial Businesses and Professions (DNFBPs) play critical roles in economic and financial transactions in West Africa. Concerns over increasing activities of money laundering and terrorist financing in West Africa through DNFPBs has led to a strong focus on anti-money laundering institutional reforms. This study conducted desk reviews from eight (8) countries in West Africa. The countries were selected based on the prevailing incidences of money laundering and terrorist financing involving DNFBPs. Poor regulation, supervision, and monitoring have made DNFBPs extremely vulnerable to money laundering and terrorist financing. Not only could they be exploited by criminals, terrorist financiers and their appendages, but also DNFBPs could knowingly collaborate with them to launder criminal proceeds or move and conceal terrorist funds. Such vulnerability is compounded by the largely informal nature of West African economies. Therefore, there is the need for West African governments, regional institutions, such as GIABA, and development partners to focus on strengthening the frameworks for regulating, supervising and monitoring the operations of DNFBPs; strengthen the institutional capacities of regulatory and supervisory agencies; sensitize DNFBPs and regulatory and supervisory authorities on anti-money laundering (AML); and counter the financing of terrorism (CFT) and related issues by integrating DNFBPs into the formal economy, among others.

Key Words: Money laundering, terrorist financing, Designated, Non-Financial Businesses and Professions

I. Introduction

Concerns over increasing activities of money laundering and terrorist financing in West Africa through Designated Non-Financial Businesses and Professions (DNFPBs) has led to a strong focus on anti-money laundering institutional reforms. DNFBPs are, generally, those businesses and professions of high monetary value that provide non-financial services. Money laundering in West Africa has been found to be underpinned by the expansion of transnational organized criminal networks, drug trafficking and terrorist networks.[1] Indeed, money laundering and terrorist financing have the potential to distort,

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undermine and undo the economic and political gains made in West Africa since the sub-region embraced the third wave of democratization in the early 1990s. In recent years, the economies of some West African countries have been among the fastest growing economies in the world, even in the context of a struggling global economy.[2] Data from the African Development Bank (2018) shows that, on the average, the West African region recorded an economic growth rate of 2.5 percent in 2017, 3.6 percent in 2018 and this is projected to increase to 3.8 percent in 2019. Such progress has also underpinned continuous inflow of Foreign Direct Investment (FDI).[3] For instance, in 2012 alone, more than $15 billion was invested in West Africa's economy.[4] West Africa also continues to make advances in the practice of democracy and good governance, and the attainment of peace and security.

West Africa's economic and political progress seems to be threatened by the growing activities of money laundering and terrorist financing. In 2012, for instance, the UN Office on Drugs and Crime (UNODC) estimated that $500 million out of the $1.25 billion generated from the sale of 30 tons of cocaine either remained in West Africa or was laundered through the region.[5] Such influx of drug money has often distorted currencies and foreign exchange reserves in the region. It is also estimated that between $40 and 65 million have been accrued in ransom payments for kidnappings between 2008 and 2012 in the region,[6] and this facilitates the planning and execution of terrorist activities.[7]

The seriousness of the threats posed by money laundering and terrorist financing prompted series of institutional reform measures including the establishment of the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA) in 2000 under the auspices of ECOWAS to combat the menace. GIABA was mandated, among other things, to assist ECOWAS member states through the provision of technical assistance to ensure compliance with international anti-money laundering and counter

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[1] Akyeampong, E. (2005). Diaspora and drug trafficking in West Africa: A case study of Ghana. *African Affairs, 104*(416), 429-447.; United Nations Office of Drugs and Crime (2007). Cocaine trafficking in West Africa: The threat to stability and development. Vienna: UNODC.; McGuire, P. (2010, March). Narcotics trafficking in West Africa: A governance challenge. *The Pardee Papers(9)*.; New York University Center on International Cooperation (2012). The impact of organized crime and drug trafficking on governance, development & security in West Africa. *Expert Meeting Summary of Proceedings*.; UNODC (2008). Drug trafficking as a security threat in West Africa. Vienna: UNODC.

[2] World Bank (2013). The Africa Competitiveness Report (2013). Washington, DC: World Bank.

[3] African Development Bank Group (2018). Annual report

[4] See for example, Africa Investment Report (2015).

[5] Cited in 'Drugs: The New Alternative Economy of West Africa', Available at http://mondediplo.com/2013/02/03drugs. (Accessed 10 October 2014).

[6] Lacher, W. (2012). *Organized crime and conflict in the Sahara-Sahel region.* Washington, DC: Carnegie Endowment for International Peace. p. 9.; ENACT Report (2019). Organised crime index – Africa.

[7] GIABA & FATF (2013). Terrorist financing in West Africa. Dakar: GIABA.

financing of terrorism standards issued by the Financial Action Task Force (FATF). This paper reviews the legislative, policy and institutional measures put in place by eight West African countries to prevent, detect, prosecute and adjudicate cases of money laundering and terrorist financing within the DNFBP sectors. The rest of this paper is organised as follows: the next section of the paper presents the study methodology. It is followed by a brief description of the political and economic contexts of governance in West Africa. The third section discusses the role of DNFBPs in economic and financial transactions in West Africa, followed by a presentation of empirical results. The paper concludes with a discussion of key findings and their implications for research and practice.

II. Methodology

The study covers eight (8) out of the fifteen (15) ECOWAS member States: Cape Verde, Cote d'Ivoire, the Gambia, Ghana, Mali, Nigeria Senegal, and Sierra Leone. It commenced with an extensive review of literature drawn from Mutual Evaluation Reports and Follow-Up Reports of GIABA member States, official government reports, reports by the United Nations Office of Drugs and Crime (UNODC), the World Bank, and internet-based sources. A research team, comprising one researcher from each of the aforementioned member States and a lead researcher, then conducted desk reviews under the supervision of the lead researcher between February and July 2014. The final report was discussed by GIABA Technical Commission in May 2015 in Yamoussoukro, Côte d'Ivoire.

The countries were selected based on the prevailing incidences of money laundering and terrorist financing involving DNFBPs compared with other GIABA member States. Nigeria, Ghana and Senegal are of particular importance because of the extent to which, for instance, their real estate markets have been reportedly contaminated with criminal proceeds. Mali is of equal importance, not least because of the high incidence of terrorism and, by implication, terrorist financing, in recent years, and the potential implication for regional peace, security, and stability.

III. Contextualizing Political and Economic Governance in West Africa

The governance and institutional environment of West Africa is characterised by administrative arrangements with "powerful" executives who wield near-complete control over productive resources, and who often materially enrich themselves and their relations at the expense of the majority of citizens.[8] State institutions, including security, law enforcement, regulatory and supervisory agencies are undertrained, under-institutionalized, and under-resourced; and are often captured by narrow sectarian interests, thereby seriously undermining the rule of law.[9]

Within the economic environment, the high rate of unemployment, low per capita income, purchasing power parity below US$2 a day, high illiteracy rates, poor nutrition and low life expectancy rates are suggestive of a substantial proportion of the population

[8] Diamond, L. (2011). Why Democracies fail. Journal of Democracy 22(1):17-30.
[9] Alemika, E. O. (2013). The impact of organised crime on governance in West Africa.

being poor over extended periods of time.[10] A UNDP report noted that most of the countries in West Africa (13 out of 15) are ranked as experiencing 'lowering development'.[11] This is likely to be a strong factor that is driving unemployed youth into serious crimes, particularly the lucrative drugs trade. Besides, economic activities in the region are dominated by large and heterogeneous informal sectors (60-70%) where transactions are conducted predominantly in cash and are not sufficiently regulated by existing formal arrangements.[12] It is evident that some of the largest and fastest growing sectors of economies in the region, particularly real estate, construction, and retail and wholesale trade, are informal.[13]

One dominant social value within the West Africa sub-region is family, tribe and ethnic loyalty, which is often elevated above state loyalty. Public servants are often under pressure to promote the interest of their extended families, ethnic groups, and communities when carrying out their duties.[14] This tribal and ethnic loyalty often breeds nepotism and creates corrupt social networks within the society.[15]

IV. The Role of DNFBPs in Economic and Financial Transactions in West Africa

Designated Non-Financial Businesses and Professions (DNFBPs) in West Africa identified by the Financial Action Task Force (FATF) include casinos, real estate agents, dealers in precious metals, dealers in precious stones, legal practitioners, notaries, and Trust and Company Service Providers (TCSPs).[16] Irrespective of the size or nature of the economy within which they operate, DNFBPs provide critical services in both economic and financial transactions, especially those of high monetary value. For instance, the management of business investments, purchase of real estate or precious metals require

[10] Oduro, A. D. & Aryee, I. (2003). Investigating chronic poverty in West Africa. CPRC Working Paper No 28.

[11] UNDP, Human Development (2009). *Overcoming barriers:Human mobility and development*. New York, USA: UNDP.

[12] GIABA (2010b). Threat assessment of money laundering and terrorist financing in West Africa. Dakar: GIABA. Haug, J. (2014). *Critical overview of the (urban) informal economy.* Friedrich Ebert Stiftung.

[13] Adams, A. (2008). *Skills development in the informal sector of Sub-Saharan Africa.* World Bank: Mimeo.; Haan, H. C. (2006). *Training for work in the informal micro-enterprise sector: Fresh evidence from Sub-Saharan Africa.* Dordrecht: Springer.; Lund, F., & Skinner, C. (2003). *The investment climate for the informal economy: A case of Durban, South Africa.* School of Development Studies: University of Natal.

[14] Ngouo, L. (2000). Organizational development consulting in the context of structural adjustment program in Sub-Sahara Africa: Role and responsibilities of consultants. *International Review of Administration Sciences, 66*, 105-118.

[15] Prah, K. (1993). Socio-cultural dimensions of ethics and accountability in African public services. In S. Rasheed, & D. Olowu (Eds.), *Ethics and accountability in African public services.* Nairobi: African Association for Public Administration and Management/ICIPE Press.; Dzorgbo, S. (2001). *Ghana in search of development: The challenges of governance, economic Management and Institution Building.* Aldershot: Ashgate Publishing Ltd.

[16] FATF (2012). *International standards on combating money laundering and the financing of terrorism and proliferation.* Paris: FATF.

the services of lawyers, real estate agents, accountants and dealers in precious metals. In countries with large service or real estate sectors, lawyers, notaries, accountants, and other DNFBPs are particularly important.

In West Africa, the operational size and importance of DNFBPs vary according to the nature of the economies within which they operate. Accordingly, it is important to situate the role or importance of DNFBPs within the context of, not only recent economic and financial developments in West Africa, but also the nature or structure of national economies. The DNFBPs that are of particular importance and may be vulnerable to, or serve as conduits for money laundering and terrorist financing are identified. Thus, the economic and financial realities of the region are such that not all DNFBPs may require the same attention in terms of anti-money laundering and counter-financing of terrorism.

One of the central themes about money laundering and terrorist financing is how to regulate the phenomenon. 'Regulation' involves the effort to modify the socially-valued behavior of others through the promulgation and enforcement of rules, typically by establishing an institutionally direct regulator.[17] Money laundering regulation thus involves developing and promoting policies both at the international and national levels to combat the phenomenon. This involves bringing together the policy-making power of legal, financial and law enforcement experts.

An important question that divides scholars in the literature is whether regulation, particularly statutory laws on money laundering matter at all. One view holds that legislation is not a countermeasure to money laundering, and that statutory laws are either not relevant to money laundering or they may be counterproductive.[18] They observe that formulating and executing specific laws on money laundering as a countermeasure may be ineffective since the phenomenon is only a product of illegal activities. According to this view, statutory legislation should target feeder activities that lead to money laundering rather than being directed at the product of these activities. They observe that monitoring and controlling these feeder activities effectively will naturally result in a reduction in money laundering. Rahn (2001) has also suggested that the existence of an efficient set of legislations and good enforcement by courts on criminal activities should be sufficient for curbing money laundering.[19] However, it is noted that money laundering regulation comes at a cost.

An alternative view sees regulation as an effective measure for containing money laundering. According to this view, "law matters" in regulating money laundering. Rooted

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[17] Selznick, P. (1985). Focusing organizational research on regulation. In R.G. Noll (Ed), Regulatory policy and the social sciences. Berkeley: University of Califonia Press, 363-367.; Ogus, A. (1994). *Regulation: Legal form and economic theory*, Clarendon Press.; Diantith, T. (1989). Legal research and legal value. A revised version of an inaugural lecture delivered at the Institute of Advanced Legal Studies on November 1, 1988.

[18] Chong, A., López-de-Silanes, F. (2007). Money Laundering and its Regulation. Working paper // Inter-American Development Bank, Research Department, No. 590.

[19] Rahn, R. (2001). The case against federalizing airport security. Washington, DC, United States: Cato Institute. http://www.cato.org/pub_display.php?pub_id=3865.

in regulatory economics[20], this view observes that statutory regulations, in particular, are crucial for controlling the illegal sector of the economy. This view noted that the existing legal regime to control crime is not sufficient to curb money laundering because litigation may be too unpredictable and expensive to serve as a deterrent.[21] To counter these problems, a less expensive and efficient regulatory framework is required.

Empirically, this view is supported by Chong and Lopez-de-Silanse's (2007) study on the determinants of money laundering and its regulation in over 80 countries using multiple sources. Their results show that tougher money laundering regulation has an impact on reducing the phenomenon. In particular, measures that criminalize feeding activities and improve confiscation tend to matter more than other features of legislation. They also found that not all legislation provides the appropriate set of "legal tools" to facilitate the fight against crime.

The above arguments notwithstanding, there is a dearth of empirical data to support both arguments. Towards empirical analysis of the outcomes of reform efforts, this paper reviews the legal, policy, and institutional measures put in place to prevent, detect, prosecute and adjudicate cases of money laundering and terrorist financing in the selected West African countries. The findings of the desk review are presented and analyzed next.

V. Findings:

V.1 Legal, Institutional and Operational Frameworks for Regulating DNFBPs in West Africa

There are a number of legal instruments regulating the operations of DNFBPs in West Africa. However, instruments relating to anti-money laundering and counter-financing of terrorism laws and regulations are derived from a number of international instruments that serve as a general framework for developing legislative, regulatory, supervisory, and operational measures. Some of these include the United Nations Convention against Transnational Organized Crime (UNTOC), the International Convention for the Suppression of the Financing of Terrorism and the United Nations Convention against Corruption (UNCAC). The FATF Recommendations in particular are the primary instruments that guide countries in their fight against money laundering and terrorist financing. The FATF Recommendations (for example Recommendations 22, 23, and 28) stipulate measures for regulating the operations of DNFBPs, the application of customer due diligence and record-keeping (Recommendations 10, 11, 12, 15, and 17) to DNFBPs. Below is a review of the specific legal and institutional frameworks regulating DNFBPs *viz.:* real estate agents/agencies, lawyers and other legal professionals, dealers in precious minerals, and accountants.

Real Estate Agents/Agencies

[20] Landes, D.S. (1998). *The wealth and poverty of nations: Why some are so rich and others so poor*. New York, United States: W. W. Norton.

[21] Djankov *et al*., (2002). The regulation of entry. *Quarterly Journal of Economics* 117: 1-37.

The level of regulation and supervision of the real estate sector differs from country to country. In Senegal, real estate activities are subject to provisions stipulated by Law No. 94-69 of 1994. Other regulatory and supervisory requirements are also contained in Law No.81-61 of 1981, Law No. 82-07 of 1982, Decree No. 82-731 of 1983, and Decree No. 83-764. These legislations contain provisions that establish the processes and procedures for issuing licenses to real estate agents upon fulfilling various requirements, including those related to their integrity and their financial positions.

In the case of Ghana, the Company Code, Act 179 of 1963 regulates the real estate sector. Besides, the sector has an Association of Real Estate Developers called Ghana Real Estate Development Association (GREDA) that aims at providing a united organizational front in making recommendations to government on ways of promoting real estate development, and seeking solutions to the practical problems in the property market.

In the Gambia, there are no specific legislations requiring the registration, regulation or sanctioning of real estate agents in the event of committing an offence. Hence, the real estate sector is largely unregulated. For instance, land transactions are conducted in cash through unregistered informal agents. The Real Estate (Liability for Debts) Act (CAP 57.04) 1913, which governs the real estate sector only relates to the payment of debt. Also, there are no effective regulatory and supervisory guidelines for real estate agents in terms of detecting and reporting suspicious transactions to the FIU.

In Cape Verde, the real estate market is unregulated and highly informal, except for the general licensing requirements for the construction of buildings and the large resort-like projects, which account for the vast majority of intermediation.[22]

In the case of Sierra Leone, there is no legislation restricting cash-based transactions, as such, the cash intensive nature of the real estate business in Sierra Leone makes the sector vulnerable to money laundering and terrorism financing. However, the Anti-Money Laundering and Combating of Financing of Terrorism Act, 2012 (and subsequently, The Anti-Money Laundering and Combating of Financing of Terrorism (Amendment Act, 2019) provides that in the absence of a supervisory body, the Financial Intelligence Unit assumes the role of supervisory authority for the purposes of anti-money laundering and counter-financing of terrorism controls.

Despite being an important sector to the economies in West Africa, activities in the real estate sector are not sufficiently regulated. As a result, the potential for real estate agents serving as conduit for laundering illicit funds, in Senegal, for example, is high. There is lack of an internal anti-money laundering and counter-financing of terrorism program in the form of a mechanism allowing real estate agencies to identify, detect, keep and report suspicious transactions to the Financial Intelligence Unit (FIU). Guidelines to help reporting entities fulfil their anti-money laundering and counter-financing of terrorism obligations are inadequate. Moreover, large disparities in legal regulation exists between various sector actors, from the real estate agency to the individual broker.

[22] IMF (2009). World Economic Outlook (WEO) Update - Contractionary Forces Receding But Weak Recovery.

V.2 Lawyers and other Legal Professionals

Lawyers and other legal practitioners – barristers, solicitors, notaries, and magistrates play critical roles in various transactions, especially those involving real estate management, business investments, and sale and purchase of goods and services in West Africa. To ensure ethical and professional conduct and adherence to high standards on their part, the activities of legal practitioners (lawyers in particular) are subject to the rules and regulations of Bar Associations in the countries in which they are based. These associations serve as supervisory and regulatory authorities for lawyers.

In addition to the rules and regulations of national Bar Associations, the activities of lawyers and legal practitioners are regulated by specific legislations. In particular, the activities of lawyers in Mali are regulated by Law 94-042 of October 13, 1994; in Senegal by Law No. 0409 of 4 January 2004; in Ghana by the Legal Profession Act, 1960; in Sierra Leone by the Legal Practitioners Act, 2000 (Act No. 15 of 2000); Statutory Instrument No. 1 of 2011 and Legal Practitioners (Amendment) Act, 2015; in The Gambia by the Legal Practitioners Act, 2015 (Act No.16 of 2015); and, in Nigeria by the Legal Practitioners Act, 1975. However, these legislations do not contain provisions specifically related to anti-money laundering and counter-financing of terrorism. Hence, countries in the region, in complying with the FATF Recommendations, lawyers and legal practitioners are required to comply with their anti-money laundering/counter-financing of terrorism laws. In Senegal, for instance, the Anti-Money Laundering Law No. 2004-09 of 2004 and Law No.2009-16 of 2009 on terrorist financing are applicable to the legal profession. In Cote d'Ivoire, the anti-money laundering law (Law No. 2005-554 of 2 July 2005) and the counter-financing of terrorism law (Law No. 2009-367 of 12 December 2009) are applicable to lawyers. This is, to some extent, in line with the international anti-money laundering/counter-financing of terrorism laws which indicate the inapplicability of confidential provisions in carrying out obligations as a reporting entity.

V.3 Dealers in Precious Minerals

Mining activities are regulated by a combination of legislations. In Sierra Leone, the revised Mines and Minerals Act of 2009 and the National Minerals Agency Act of 2012 provide the legal and regulatory frameworks for the mining sector. The latter Act established the National Minerals Agency as the regulatory institution for the sector. The Agency is mandated to process licensing applications, monitor compliance with the provisions of the Acts, and oversee exploration and mining activities. Sierra Leone also acceded to the Extractive Industries Transparency Initiatives (EITI) status on 22 February 2008 and established the Sierra Leone EITI Steering Committee (SLEITI), which is a Multi-Stakeholder Group (MSG) made up of mining companies, government agencies and civil society organizations, including the media. The EITI initiative is geared towards promoting greater transparency in the extractive industry with the view to addressing resource governance challenges and maximization of revenues and benefits for the citizenry.

Mining activities in the Gambia are regulated by the Mines and Quarries Act (CAP 64.01) of 2009. The Act established an authority with the mandate of issuing licenses. However, the mining sector is largely unregulated in practice, thereby making it

vulnerable to money laundering and terrorist financing. In Senegal, Law No. 77-92 of 1972 set up the Chambers of Trade and the National Union of Chambers of Trade (UNCM). The law does not cover any provisions related to anti-money laundering and terrorist financing. Concerning transactions in gold, the import and export authorization, which is valid for, and is renewable yearly, is subject to the prior approval of the Currency and Credit Department of the Ministry of Finance.

In Ghana, the Minerals Commission was established under Article 269 of the 1992 Constitution and the Minerals Commission Act 1993 (Act 450). The Commission serves as the main promotional and regulatory body for the minerals sector in Ghana. It is responsible for the regulation and management of the utilization of the mineral resources as well as the coordination and implementation of policies relating to mining in the country. It also ensures compliance with Ghana's mining and mineral laws and regulation through effective monitoring. Other related laws are the Minerals and Mining Law of 1986 (PNDCL 153), as amended by the Minerals and Mining (Amendment) Act of 1994 (Act 475) and the Minerals and Mining Act 2006 (Act 703) which regulates mining in Ghana. There is also the Ghana Chamber of Mines, which is the main minerals industry association in Ghana. The Chamber represents the collective interests of companies involved in mineral exploration, production and processing in Ghana. Its activities are entirely funded by its member companies, which produce over 90 per cent of Ghana's mineral output.[23]

V.4 Accountants

In Senegal, Law No. 2000-05 of 2000 set up the National Order of Public and Chartered Accountants. In Mali, Act No. 96-024 provides for the status of the Association of Certified Accountants and Chartered Accountants.

Likewise, in Ghana, the Chartered Accountants Act 1963 (Act 170) requires the Institute of Chartered Accountants, Ghana (ICAG) to administer and manage the activities of accounting and auditing firms.

Also, in the Gambia, the Financial Reporting Act of 2013 established the Gambia Institute of Chartered Accountants, which considers application for the registration of members; it establishes the code of professional conduct and disciplinary requirements and mechanisms.

In Sierra Leone, accountants are regulated by the Institute of Chartered Accountants of Sierra Leone (ICASL). The powers of ICASL as a self-regulatory body are contained in the Institute of Chartered Accountants of Sierra Leone (ICASL) Act No. 5 of 1988. The ICASL is a member of the International Federation of Accountants (ICAN). The ICASL has a legal right to regulate the private practice of audit as enshrined in the ICASL Act of 1988 (Section 21, (1-6)).

The study noted that, in Senegal, large international accounting firms care about compliance with international anti-money laundering and counter-financing of terrorism standards, and firms working domestically. That apart, the Anti-money Laundering Law

[23] Ayee, J., Søreide, T., Shukla, G. P., & Tuan, M. L. (2014). Political economy of the mining sector in Ghana. *Policy Research Working Paper 5730*. The World Bank.

No. 2004-09 of 2004 and Law No. 2009-16 of 2009 on terrorist financing are applicable to the profession. However, accounting firms are not clearly designated as reporting entities under anti-money laundering and counter-financing of terrorism laws. Besides, the Act does not contain any provisions directly linked to money laundering and terrorist financing. Though accountants in the Gambia are required by law to practice according to the common international standards, the Act does not clearly provide the need for the keeping of records regarding transactions with clients and does not create a reporting obligation to the FIU or any other body on suspicious transactions.

The very nature of the activity of public and chartered accountants in the region provides them with wide possibilities of detecting suspicious transactions in business. However, the legal framework must first be reviewed in order to broaden the scope of anti-money laundering and counter-financing of terrorism to the profession.

The real estate sector is one of the most vibrant sectors where DNFBPs have had a strong influence for decades. Across West Africa, significant variations exist in the regulatory regimes governing the real estate sector. The real estate sector has also been a key target for money laundering across West Africa. However, while countries such as Sierra Leone and the Gambia have very few legal regulations for the sector, the sector appears to be better regulated in Ghana, Nigeria and Senegal.

Many regulations have been developed across the countries in West Africa to regulate the activities of accountants and legal professions in economic and financial transactions. It is also instructive to note that bar associations and accounting firms exist and are well organized in all the countries in the region. They are involved in assisting or representing clients in the purchase and sale of goods, commercial enterprises or goodwill; handling of money, securities or other assets belonging to the client and performing other financial transactions.

Challenges Encountered in Regulating and Supervising the Operations of DNFBPs

West African economies are characterized by large informal sectors. These, coupled with the low capacity of regulatory agencies, provide an enabling environment for criminals to conduct illicit transactions without detection. The key challenges encountered in the DNFBP sectors are discussed below:

V.5 Weak Legal and Institutional Frameworks

The effectiveness and efficiency of laws and institutions are largely dependent on their design and scope. Indeed, weak laws and lack of clarity in some of the laws largely account for the implementation failure of anti-money laundering and counter-financing of terrorism laws in the region. For instance, in Cote d'Ivoire, the legal framework regulating the activities of DNFBPs suffers from many deficiencies. There is a lack of liability of accountants and chartered accountants in the anti-money laundering and counter-financing of terrorism; absence of formal obligations regarding the implementation of FATF Recommendations 5, 6, 8-11 to the DNFBPs; absence of specific obligations relating to procedures vis-à -vis the Politically Exposed Persons (PEPs); absence of legal requirement for casinos to identify the beneficial owner and take reasonable measures to verify the

identity of the beneficial owner; and, a lack of explanatory guidelines for the implementation of the Recommendations in relation to DNFBPs.

In the case of Nigeria, the rule governing the supervision of the operations of DNFBPs is unclear. It did not give power for the establishment of a 'supervisor' regulator for the effective supervision of DNFBPs, but rather designated the power of enforcing the Money Laundering Prohibition Act (MLPA) to the Minister responsible for Commerce. Also, there is no provision in the legal framework for penalizing DNFBPs for non-compliance with provision of the MLPA.

In Ghana, most legislations do not incorporate provisions on the anti-money laundering and /counter-financing of terrorism in their laws. The Bar Association, and the Institute of Chartered Accountants do not have provisions on anti-money laundering and counter-financing of terrorism compliance in their laws or charters.

Regardless of the type and size of DNFBP, country experts have complained that there is no regulatory guideline for compliance with laws relating to anti-money laundering and /counter-financing of terrorism. There is almost no control of DNFBPs in the real estate industry where many operators have no authorization to transact business.
Low Level of Knowledge about money laundering and terrorism financing

The ineffectiveness in implementing anti-money laundering and counter-financing of terrorism laws in the DNFBPs within the region is also due to the low level of knowledge on money laundering and terrorist financing in the sector. Evidence from the countries shows that, though there were efforts to educate the public on the dangers of money laundering, only few people operating in the DNFBPs sector know about the anti-money laundering and counter-financing of terrorism law. Regulatory authorities responsible for regulating DNFBPs have inadequate level of understanding of anti-money laundering and counter-financing of terrorism laws and the FATF Recommendations. Many of these authorities have little or no idea of their obligations under these laws. Consequently, the extent to which these authorities reach out to DNFBPs, in terms of guiding them on how to meet their anti-money laundering and counter-financing of terrorism requirements, is very low. Though there are various forms of media sensitization, there is still a wide gap in knowledge on money laundering and terrorist financing.

V.6 Lack of Compliance by DNFBPs

DNFBPs such as lawyers and real estate agents have little or no incentive to ensure compliance with anti-money laundering and counter-financing of terrorism laws and regulations when carrying out transactions on behalf of their clients. In Ghana, for example, supervisory bodies such as the Ghana Bar Association (GBA), Institute of Chartered Accountants of Ghana (ICAG), Gaming Commission, GREDA and Auctioneer Association lack the power to sanction members for non-compliance. Lawyers often fall on ethical codes, such as the attorney-client privilege, which permits them to keep information about their clients confidential, irrespective of whether such information points to criminality or illegality on the part of their clients. Thus, lawyers cannot divulge confidential information without the consent of their clients. Such confidentiality, however cannot subsist when compelled to do so by order of court or enactment or if the

circumstances give rise to a public duty of disclosure or the protection of the legal practitioner's professional integrity.

Indeed, most anti-money laundering and /counter-financing of terrorism laws in the region provide that no secrecy or confidential provision in any other enactment shall prevent a reporting entity from fulfilling its obligations under the law. In Nigeria, DNFBPs, such as legal practitioners and real estate agents have little or no incentive to ensure compliance with anti-money laundering and counter-financing of terrorism laws and regulations when carrying out transactions on behalf of their clients.

Lack of Mandatory Associations to Coordinate DNFBPs

The absence of self-regulatory bodies for certain types of DNFBPs – dealers in precious metals and dealers in precious stones in particular – adds to the challenges encountered in regulating, supervising, and monitoring their operations. This is especially significant in view of the fact that these DNFBPs conduct transactions involving large sums of cash and are extremely vulnerable to corruption. In Senegal, the absence of self-regulatory bodies makes it difficult to regulate and supervise the operations of casinos and accountants. In the Gambia, DNFBPs are required to file Suspicious Transaction Reports (STRs) with the relevant authorities. However, the lack of a specific agency to coordinate compliance and effective supervision has made it very difficult to enforce the law.

Lack of Appropriate Information Technology Infrastructure

Information technology software helps to effectively analyze large data quickly. It also helps to bring out variances for further analysis, which may result in the detection and filling of suspicious transactions. In all the countries covered by the study, state and non-state regulatory bodies complained that they did not have appropriate software to coordinate and regulate the activities of DNFBPs. The cost of this infrastructure is high and beyond the reach of most small and medium scale institutions. Coupled with cost is the lack of the know-how to operate and manage such software. Where advanced information technology infrastructures have just been installed, as in the case of Ghana's judiciary system, lack of expertise in the use of the software has meant that these softwares do not operate optimally to the benefit of the institutions. Moreover, there must be a prescribed reporting template for the DNFBPs to report STR, cash transactions, and electronic transactions.

V.7 Training of Regulatory Agencies Challenge

Due to the vast number of institutions under the DNFBPs, identifying the relevant persons and offering them training is sometimes cumbersome and problematic. In certain groups, such as car dealers, travel agencies and real estate companies, it is sometimes difficult to identify the correct umbrella body to train. A major regional challenge is the lack of effective law restricting cash-based transactions. This invariably weakens effective enforcement and monitoring of the DNFBPs in member states, posing a threat to the economy as well as creating avenues for laundering money or terrorist financing.

VI. Conclusion

DNFBPs play critical roles in economic and financial transactions in West Africa. There is no doubt that DNFBPs have created many jobs for citizens in West Africa and

they contribute to the GDP of the countries. However, because most DNFBPs operate mainly in the informal sector, they have become easy channels for money launderers, terrorist financiers and their appendages to use in a number of economic and financial transactions. They could collaborate with people to launder criminal proceeds or move and conceal terrorist funds.

Regulation, supervision, and monitoring of the operations of DNFBPs in the region remain poor. This is because the existing frameworks – legal, institutional, operational, among others – for regulating DNFBPs are either weak or poorly defined and do not impose compliance obligations. There also exist knowledge gaps among stakeholders in the fight against money laundering and terrorist financing, weak enforcement of the relevant laws by the various supervisory authorities, lack of cooperation from the DNFBPs. The sub-region's predominantly cash-based economy makes it difficult to track criminals who are involved in money laundering and terrorist financing. This study thus concludes that the governance regime in the sub-region in relation to money laundering and terrorist financing is quite liberal. The existing institutional framework is inadequate and lacks effective enforcement.

It is therefore imperative that the loopholes identified in the legal and institutional framework for each country should be addressed. There should be clear guidelines to law enforcement agencies relating to the legal regulation and enforcement of money laundering and terrorist financing. Moreover, the application of penalties for infringements of the provisions of the law relating to anti-money laundering and /counter-financing of terrorism would be crucial. There is the need to strengthen the capacity of the supervisory institutions to ensure effective monitoring, detecting, investigating and imposing of sanctions against criminal activities.

A network of regional supervisory bodies is also recommended. The enforcement agencies and other competent authorities must be sensitized on their roles and responsibilities in the fight against money laundering and terrorist financing. Some entities in the DNFBP sector are well organized and structured while others are not., Therefore, concerted efforts are required to organize the operations in the DNFBPs sector under umbrella bodies. The cooperation of the leadership of these bodies can be sought and mobilized for sensitization and training programs. This will invariably increase their level of knowledge about anti-money laundering and /counter-financing of terrorism as well as the implementation of the appropriate laws.

127 YEARS AFTER THE ENACTMENT OF THE CRIMINAL CODE OF 1892

Henrietta J.A.N Mensa-Bonsu* and Abdul Baasit Aziz Bamba♦

I. Introduction

Until 1894 the criminal law of the Gold Coast Colony was exclusively based on the English common law as modified by statutes of general application.[1] In 1892, a Criminal Code was enacted for the very first time but it did not come into force until 1894.[2]About 45 years ago, Morris provided an account of the process by which the Criminal Code of 1892 was introduced in the Gold Coast Colony.[3] His survey offered a vivid chronicle of the zeal of colonial administrators, government law officers, judges and magistrates for "essential measure of reform"[4] in criminal law against skepticism by the local intelligentsia who were "bitterly opposed to, and deeply suspicious of, such a policy".[5] To the local intelligentsia a "criminal code suggested… the imposition of a harsher body of law which would impose heavier penalties and give the authorities greater opportunity for arbitrary action."[6] Moreover, they wondered why the British were eager to introduce a codified body of criminal law to replace the English common law and statutes of general application when the " British authorities… had no wish to enjoy its benefits in their own country".[7]

Undeterred by local opposition to its efforts, the Colonial Office pressed on with the reform effort and sought the advice of Fitzjames Stephen, an eminent jurist, who thought that "the judges in the Gold Coast should administer as Substantive Law such principles of natural justice as thought applicable to the circumstances of the cases coming before them, being guided as to the formal part of the law by Codes of Procedure which he thought might be founded on the Indian Civil and Criminal Procedure Codes".[8] But the Colonial Office viewed the matter differently as it thought the Jamaican Criminal Code could be adopted for the Gold Coast. This code was however rejected by Jamaica, but adopted in St. Lucia and British Honduras.[9] In the view of the Colonial Office the enactment of the Criminal Code of 1892 would serve the practical purpose of having the law of crimes contained in one document and further addressing the difficulties encountered by local judges in applying common law offences in an environment without

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[1] H. F. Morris, A History of the adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935,18 J. Afr. L. 6 1974, pp.6-23.
[2] Ibid.
[3] ibid., , pp.6-23.
[4] Ibid., p. 6.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid.,p.7.
[9] Ibid.,p.8.

ready access to cases decided by the English courts.[10] In time, local opposition to the introduction of a codified criminal code withered and the Criminal Code of 1892 based on the St. Lucia model was enacted into law. The Criminal Code (No. 12 of 1892) which later became the Criminal Code (Cap 16) and finally the Criminal Code (Cap 9) operated in the Gold Coast until 1960 when it was replaced and repealed by the Criminal Code, 1960 (Act 29).[11]

Since then Act 29 has been amended, consolidated and revised, creating significant differences between the original content of the Criminal Code of 1892 and the current Act 29. It is accordingly of interest to note that the history of criminal law in Ghana is primarily the history of the British encounter with the former Gold Coast Colony and due to this colonial encounter, Ghana's legal system is heavily influenced by the English legal system, and this influence is particularly conspicuous in the domain of criminal law, where the foundational principles of English law still hold sway.

The striking conceptual similarities between the two legal systems aside, the corpus of Ghanaian criminal law has been the subject of numerous major and piece-meal changes by way of amendments, especially since Ghana attained independence, aimed at bringing the criminal justice system of Ghana in line with social changes and current trends and shifts in the philosophies, assumptions and contours of the criminal law. These changes have included new dimensions in the commission of crime both nationally and internationally, and the story about these changes is also a narrative of the social, economic and political changes that have occurred in Ghana since the adoption of the Criminal Code of 1892.

This article does not aim to conduct a detailed analysis of the statutory provisions, social and legal context of the Criminal Code of 1892 together with all amendments, its effects or explain in causal terms the various changes to the Code since 1892 to date. While these are fruitful areas for analysis, they are beyond the scope of this article, which primarily seeks to provide a historical account of the evolution, key developments or phases in Ghanaian criminal law from 1892 to the present. In so doing, it briefly looks at the nature and functions of criminal law, how human rights and constitutional law principles have affected foundational principles of Ghanaian criminal law as they existed from 1892 to 1992, broad changes to the Criminal Code from 1892 to 1992 as well as recent legislative amendments to the Criminal Code since the inception of the 4th Republic on 7th January 1993.

The paper is divided into six parts. Part I is the Introduction. Part II provides a brief account of the nature and functions of criminal law to set out a basis for assessing to what extent the conceptual underpinnings of Act 29 reflect those of the common law and the Criminal Code of 1892. Part III examines how human rights and constitutional law principles have affected foundational principles of criminal law as they existed in 1892. Part VI discusses at a high level of generality changes to the Criminal Code from 1892 to 1992 while Part V focuses on legislative changes to the Criminal Code since the inception of the 4th Republic on 7th January 1993. Also, in Part V, the article will examine some of

[10] Ibid.,p. 6.
[11] Hereinafter as "Act 29".

the legal, social and political realities that have necessitated amendments to Act 29 since the inception of the 4th Republic while making forecasts of the future evolution of Act 29. In Part VI, the Conclusion, the paper summarizes the main issues discussed with some concluding observations..

II. Overview of the Nature and Functions of Criminal Law

Criminal law, it is generally acknowledged, serves as a necessary check on conduct that violates personal liberty; seeks to protect property rights; and helps to promote the general interests of the State in ensuring safety and "ordered liberty".[12] In this connection, criminal law partakes in the general functions of law "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others."[13] In its avowed aim "to protect the citizen from what is offensive or injurious", criminal law could be theorized as representing a loose but effective approximation of the "practical-socio-moral consciousness" of the State, a consciousness the State considers essential to its existence, and precisely for this reason, the State is ready and willing to deploy criminal law as an instrument to register its disapproval or disapprobation of conduct it deems dangerous to this consciousness.[14]

It is therefore obvious that the State is at the centre of the criminal law. Indeed "The theory of crime is that crimes are wrongs against the State which ought to be prosecuted by the state itself"[15]. The justification of this view of criminal law rests on contractarian theories of the State[16] which posit that the individual has "divested himself of his natural liberty, and puts on the bonds of civil society agreeing with other men to join and unite into a community, for their comfortable, safe and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it".[17] By giving up part of our freedoms and joining in the collective effort to live in "ordered liberty", a crime against one is a crime against all. As such, it is in the public interest of ensuring ordered liberty that the State marshals its resources through the criminal justice process to confront anyone who commits crimes against any of us.

In particular, as violations of the criminal law are considered public wrongs, criminal proceedings are invariably instituted in the name of the State or Republic. In Ghana, article 88(5) of 1992 Constitution requires that "all offences are to be prosecuted at the suit of the Attorney-General or any other person authorized by [her] in accordance

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[12] Henrietta Mensah-Bonsu, The General Part of Criminal Law- A Ghanaian Casebook, Vol. 1, Black Mask, Accra, 2001, pp. 26-27.

[13] The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution (New York: Stein and Day, 1963), p. 23.

[14] Ibid.

[15] Amissah, Criminal Procedure in Ghana,Sedco,Accra:1982 p.27

[16] See, for example, Rousseau, The Social Contract, at http://www.constitution.org/jjr/socon.htm accessed on 28th June 2019.

[17] John Locke, An Essay Concerning Human Understanding in Classics of Western Thought (Charles Hirschfield(ed.), Harcourt, Brace & World Inc., 1964,p.126.

with any law". It is also instructive to note that at different times in Ghana's political history since 1892, crimes have been prosecuted in the name of the British King or Queen (Rex or Regina),[18] the State,[19] Commissioner of Police,[20] the People,[21] and the Republic.[22] During Ghana's colonial era crimes were prosecuted in the name of the British monarch as the head of state and the symbol of royal sovereignty over Ghana. After Ghana attained independence, crimes were prosecuted in the name of the State or the Commissioner of Police as the representative of the State. When Ghana attained a republican status with popular sovereignty residing in the people of Ghana crimes began to be prosecuted in the name of the Republic. Furthermore, with the introduction of the public tribunal system in 1984 crimes were prosecuted in the name of the People to reflect partly the revolutionary ideals of the government of the Provisional National Defence Council to bring government to the doorsteps of the people. Quite clearly, the prosecution of crimes at different times in the name of Rex or Regina, the State, Commissioner of Police, Republic and People reflect the nature of government and the ultimate source of political authority at the relevant time.

Although the interests and objectives of Ghana's colonial powers and post-independent governments appear to be different the post-colonial Ghanaian State remains at the heart of the Ghana's criminal law. Just like the colonial powers, post-colonial governments in Ghana have sought to use the criminal law in the same way used by colonial governments to protect personal liberty, property,[23] and in other cases to serve political, economic or other interests.[24]

III. Conceptual Innovations in Criminal Law Since 1892 - Intrusion of Human Rights and Constitutional Law

Prior to the enactment of the Criminal Code in 1892 Ghanaian criminal law was based exclusively on the English common law as modified by statutes of general application.[25] The Criminal Code of 1892 sought to codify the principles of the common law for practical reasons[26] and partly as a result of the general trend towards codification of the common law in the 19th century.[27] It needs to be noted that the English common law

[18] See for example, Rex v Frimpong 3 WACA 1936-37, 153.
[19] See for example, Serechi v The State [1962] 2 GLR 531.
[20] See for example, Commissioner of Police v. Bonney & Ors. [1959] GLR 237 CA.
[21] Under the Public Tribunals Law, 1984 (P.N.D.C.L. 78) criminal prosecutions were conducted in the name of the "People".
[22] See for example, Republic v Yiadom [2001-2002] 1GLR 558 HC.
[23] H.J.A.N Mensa-Bonsu, " Political Crimes" In the Political History of Ghana: 1948-1993 in Ghana Law since Independence: History, Development and Prospects (Law Faculty Publication on the 50th Anniversary of Ghana's Independence),(eds.) Prof Henrietta Mensa-Bonsu e tal) (pp. 239-307)
[24] Ibid.
[25] Supra, note 1.
[26] Ibid.
[27] Gunther A. Weiss, The Enchantment of Codification in the Common-Law World, 25 Yale J. Int'l L. (2000),pp 437-532, at 480-490

is highly regarded as a bastion for the protection of property and individual freedom. Consequently, the English jurist, William Blackstone, has noted that it is "Better that ten guilty persons escape than that one innocent suffer" attesting to the procedural safeguards that the common law accords criminal defendants.[28] It is also instructive to note that as at 1892 all the standard safeguards recognized in English law for the protection of criminal defendants, including the presumption of innocence, freedom against self-incrimination, the observance of rules of natural justice and more besides, formed part and parcel of the criminal laws of Ghana. In addition, foundational principles of criminal law such the concepts of actus reus and mens rea constituted essential components of Ghanaian criminal law as at 1892.[29]

The rationale for the preceding protections and safeguards for criminal defendants is not far-fetched. Criminal defendants, as members of the polity, require protection in much the same way, if not more than the alleged victims of crimes. Consequently, whenever the State deems it appropriate to pit itself against criminal defendants in any criminal proceedings they are entitled to certain procedural and substantive safeguards.[30] Indeed, the protections the common law offers criminal defendants have a philosophical foregrounding influenced by philosophical treatises such as John Stuart Mill's *On Liberty*[31] which for centuries and of now, have influenced ideas about the criminal law in the common law tradition. These substantive and procedural safeguards designed by the common law to protect the rights of criminal defendants have remained an integral part of Ghanaian criminal law since 1892. [32]

Following the coming into force of the 1992 Constitution of Ghana on 7th January 1993, these traditional safeguards for criminal defendants have been furthered supplemented and bolstered by constitutional provisions on the right to fair trial. The recognition, acceptance and ascendency of international human rights norms and their constitutionalization in many post-1945 Constitutions, including the 1992 Constitution of Ghana, have elevated the right to fair trial to a new level of international and national protection. These new facets of safeguards for criminal defendants provided by human rights norms obviously did not exist in 1892 when the Criminal Code was first enacted.

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[28] 4 William Blackstone, Commentaries (London: A Strahan, 1825)*358.

[29] H.J.A.N Mensa-Bonsu, supra note 10, ,p225. The Principle of Legality has the following minimum postulates: that crimes should be applied prospectively and not retrospectively; crimes should be clear and easily ascertainable; and a person cannot be convicted of an offence unless it was a prohibited act by law with prescribed punishment at the time of the act.

[30] See the fair trial standards stated in article 19 of the 1992 Constitution. For a detailed discussion of fair trial standards under article 19 of the 1992 Constitution and international law, see A. Aziz Bamba, *Scandalizing the Courts and Ghana's International Law Obligations on the Right to Fair Trial,* LEJIAD, Vol. 9.No. 1,pp.1-22.

[31] C.L Ten, On Liberty, Lanham, Md. : Rowman & Littlefield Publishers, c2005, passim.

[32] Supra, note 28.

III.1 Principle of Legality and Doctrine of Void-for–vagueness

One of the new protections and safeguards afforded criminal defendants in the 4th Republic pursuant to the constitutionally guaranteed right to fair trial[33] is the incorporation into Ghanaian criminal jurisprudence of the principle of legality and the doctrine of void – for-vagueness. In *British Airways v. Attorney-General*,[34] Acquah JSC (as he then was) noted that "Now, by the principle of legality as explained by Glanville Williams in his book, Criminal Law General Part (2nd ed.) –the individual must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for breach of that law is purposeless cruelty. Punishment, in whatever form it takes, is a loss of rights or advantages consequent on a breach of law. When it loses that quality, it degenerates into an arbitrary act of violence that can produce nothing but bad social effects".[35]

Furthermore, Dr. Bimpong-Buta in commenting on the decision in Martin Kpebu(No.1) v Attorney-General(No.1)[36] has noted that Article 19(11) of the Constitution "reinforces the well-known legality principle…expressed in two formulations by the Latin maxims " nullum crimen sine lege… nullen poena sine lege….The principle is the moral principle in criminal law and international law that a person cannot or should not face criminal punishment except for an act that was criminalized by law before he/she performed the act"[37]

Another critical issue that has arisen in the Ghanaian courts in the 4th Republic with regards to the principle of legality is whether criminal statutes can be construed with necessary modifications. This issue is pertinent in view of article 11(6) of the 1992 Constitution which provides that "The existing law shall be construed with such modifications, adaptations, qualifications and exceptions necessary to bring it in conformity with the provisions of this Constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this Constitution". At issue in the case of *Tommy Thompson & Ors v. The Republic*[38] was the constitutionality of section 185 of Act 29 on criminal libel. By majority decision of four to one, the Supreme Court of Ghana upheld the constitutionality of the section. Although that case did not specifically touch on the legal implications of article 19(11) of the Constitution, two of the judges, based on articles 1(2) and 11(6) of the Constitution, introduced a modification approach to the interpretation of criminal legislation. In propounding and justifying the use of this approach, Amuah JSC declared that: :

> "Section 185, no doubt, is part of the existing law: see article 11(4) and by article 11(6), it should be construed with such modifications and adaptations necessary to bring it in conformity with the Constitution. So construed, the section simply

[33] supra, note 30.
[34] [1996-7] SCGLR 547 at pp. 560-561.
[35] Ibid.
[36] [2015-2016] SCGLR 143 at 149.
[37] Ibid.
[38] 1996-97] SCGLR 804.This case will hereinafter be referred to as the "Tommy Thompson Case"

> means that: a person who publishes a false statement or report which is likely to injure the credit or reputation of Ghana or the Ghana Government and which he knows to be false, commits an offence. I find that if the court has adopted this procedure and arrived at a form, the particulars of which were acceptable to both parties, the reference of the aforesaid issues to this court for determination would not have delayed the hearing of the case before the circuit court. For a precedent, see Archibold Criminal Pleading Evidence and Practice (36th Ed.) at page 1319".[39]

For her part, Akuffo JSC (as she then was) after quoting articles 1(2) and 11(6) of the Constitution noted thus:

> "My understanding of these two provisions is that where a law is found to be inconsistent with the Constitution, it is void only to the extent of such inconsistency. Any part of such law that is not inconsistent remains in effect. In the case of laws that were in existence before the promulgation of the Constitution, they may be brought into conformity with the Constitution through the application of the necessary modifications, adaptations, qualifications and exceptions. Of course if no amount of modification etc in the latter case is capable of bringing such a law into conformity with the Constitution, then such a law cannot stand. Consequently, it is my view that, to the extent that section 185 unreasonably and unjustifiably restricts the individual' freedom of speech, it is inconsistent with article 21(1) (a) and the spirit of the Constitution and, therefore, void. However since the section forms part of a law that was in existence immediately before the coming into force of the Constitution, it must be modified and qualified by the limitation of its coverage to false statements and reports placed in the public domain"[40]

The adoption of a modification approach to construe criminal legislation based on articles 1(2) and 11(6) of the 1992 Constitution presents normative and conceptual difficulties, particularly when there is a *material substantive change* in the essential ingredients of an offence on the face of the criminal statute, and the *modified essential ingredients* as subsequently pronounced upon by a court. It is plainly an act of injustice for an accused person to be convicted and punished for a crime whose essential ingredients appear to vary between the time of the alleged conduct of the accused and the time of trial, conviction and sentence.

Another constitutional protection afforded criminal defendants in the 4th Republic is contained in the doctrine of void-for-vagueness which clearly did not exist under our laws as at 1892. Rule of Law concerns have fostered additional protections against vagueness in criminal legislation. In keeping with modern trends, the Ghanaian courts appear to have accepted the doctrine of void-for vagueness as an essential component of

[39] Ibid., at p.874.
[40] Ibid at pp.889-890.

the principle of legality[41] pursuant to article 19(5) and (11) of Ghana's 1992 Constitution. This article states in clauses 5 and 11 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" and "No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed in a written law".

In *Tsatsu Tsikata v. The Republic* [42] the Ghanaian courts were presented with the opportunity to examine the doctrine of void-for-vagueness. In that case, the appellant had raised issues about the constitutionality of section 179A (3) (a) of Act 29, arguing that the section contravened article 19(11) because there was "no written law definition" of the ingredients of the offence. The Supreme Court following its decision in *Ali Yusuf Issa No. (2) v The Republic [No.2]*[43] saw the doctrine of void-for-vagueness as "a legitimate standard under the 1992 Constitution for judicial review".[44] The court went further by a four-to-one majority to hold that article 19(11) of the Constitution required the "creation of crimes in a written form"[45] but did not require a "written law definition"[46] of all words used in a criminal provision. Significantly, the inclusion or recognition of the doctrine of void-for-vagueness in Ghana's criminal jurisprudence has afforded further protection to criminal defendants and raised the bar as to what should be considered acceptable criminal legislation.

As developed by the American courts, the void-for vagueness calls for sufficient clarity in the definition of a criminal offence.[47] A criminal provision is void-for-vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application".[48] This means that the legislation lacks clarity as to its scope of application and the nature of the conduct that has been forbidden by the State. Again, criminal legislation is void-for-vagueness if it is unclear as to what punishment it imposes on offenders.[49] Yet the void-for-vagueness doctrine is not only about the protection of liberty, it is also about the prevention of arbitrary and discriminatory law enforcement. When criminal legislation is vague, the executive through its law enforcement agencies can arbitrarily and discriminatorily fix the contours within which to apply the law; this implicates the separation of executive power from legislative power.[50] In US constitutional law jurisprudence, a successful invocation of the doctrine results in the statute in question being declared invalid.[51]

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[41] Ibid.
[42] [2003-2004]SCGLR 1068
[43] [2003-2004] SCLR 174
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Connally v General Construction Co., 269 US 385, 391 (1926)
[49] Ibid.
[50] Smith v. Goguen 415 U.S. 566 (1974)
[51] See Gooding v. Wilson 405 U.S. 518 (1972) ;Dombrowski v.Pfister,380 U.S 459 (1965);Broadrick v. Oklahoma, 413 U.S 601 (1973);Ashcroft v.Free Speech Coalition,535 U.S. 234(2002).

It should be noted that clarity and precision are essential to criminal legislation, and the doctrine of void-for-vagueness concerns the need to have clear and precise criminal legislation to avert citizens falling victims to judicial or legislative ambush or arbitrary law enforcement. The protection of the liberty of citizens demands that they are forewarned through law of impermissible conduct as a prerequisite for imposing punishment for breaches of the criminal law. Additionally, criminal legislation as a form of mass or public communication is not a puzzle for educated guesses; thus prior notification of conduct that will constitute an offence is essential to protecting personal liberty. If legislation is an exercise in public communication, then for its message to be communicated to citizens effectively, it must through the use of clear and concise language save the citizen the trouble of speculating on its meaning and scope of application. Therefore, the rationale for the acceptance of the void-for vagueness doctrine by the Ghanaian courts appears to hinge on the constitutional requirement that crimes must be defined and further rests on the notion that a vague offence is nothing more than a trap for the unwary, and fails to provide adequate notice to citizens as to what conduct has been proscribed by the State. While aspects of the principle of legality existed in Ghanaian criminal law as at 1892[52] it is obvious that the doctrine of void-for vagueness as explained above is a recent import into Ghanaian criminal jurisprudence.

IV. Historical Evolution of the Criminal Code

Prior to the introduction of British jurisdiction in modern-day Ghana, what may be considered "criminal offences" were tried in accordance with customary law and practice in the various communities in the country at the behest of chiefs or traditional leaders or under their auspices.[53] In his article on "Customary Offences and the Courts", Justice Acquah cites Casely Hayford who had observed that " The king is the Chief Magistrate of the community…"[54] However, the role of chiefs as judges and the ability of chiefs to exercise "a sort of patriarchal rule" [55] over their subjects began to change after the British gradually introduced the principles of the English common law and the doctrines of equity pursuant to the British Settlement Act of 1843.[56] Section 1 of the British Settlement Act had mandated the British Crown to "establish such laws, institutions and ordinances, and to constitute such courts and offices as may be necessary for the peace, order and good government"[57] of the territories concerned. A year after the enactment of the British Settlement Act of 1843, the British through Captain Hill signed the Bond of 1844 with the coastal local chiefs, who by the terms of the treaty were

[52] Supra, note 28.
[53] P.K Twumasi, Criminal Law in Ghana, Ghana Publishing Company, 1996, pp. 21-23.
[54] G.K. Acquah, 'Customary Offences and the Courts' [1991-92] Vol. XVIII *Review of Ghana Law,pp.* 36-67
[55] Ibid.
[56] Ibid.
[57] See section 1 of the British Settlement Act, 1943. See also, V.Essien, Researching Ghanaian Law, January 2012, available at http://www.nyulawglobal.org/globalex/ghana1.htm. Last visited on 30th June 2019..

required "to submit serious crimes such as murder and robberies to British Jurisdiction".[58] More specifically, paragraph 3 of the Bond of 1844 read thus:

> "Murders, robberies, and other crimes and offences will be tried and inquired of before the Queen's judicial officers and the chiefs of the districts, molding the customs of the country to the general principles of British law".[59]

The Bond of 1844 provided the legal basis for the operation of English law alongside customary law and marked the beginning of formal collaboration between the British and coastal chiefs in the administration of criminal law. Acquah notes that by the Bond of 1844 " the chiefs thus rid themselves of jurisdiction to try and punish capital and other serious offences and reserved for themselves jurisdiction in lesser offences".[60]

Notably, between 1876 and 1884 the Supreme Court Ordinance of 1876 and Native Jurisdiction Act of 1883 were enacted with designated chiefs given authority to enact bye-laws and try people for breaches of those bye-laws. Over time, through various Native Court Ordinances, chiefs continued to administer justice in native courts and by 1950 native tribunals in Ghana had been granted jurisdiction to try certain customary offences such as:(a) putting a person to fetish; (b) offences against swearing an oath contrary to custom;(c) insulting a chief and breach of allegiance of a sub-chief to the head-chief;(d) destroying fish in private water;(e) receiving;(f) fraud;(g) drunken and disorderly behavior; and (h) cruelty to animals.

In 1958, the Local Courts Act[61] abolished the native tribunals and chiefs were stripped of the power to try criminal offences.[62] Subsequently, chiefs were granted limited jurisdiction to try customary offences, specifically defined and provided for under legislative instruments passed under the provisions of the Chieftaincy Act, 1971(Act 370)[63] to be administered and enforced by the regular courts. As the law stands now, chiefs do not have the legal authority to try any customary offences because they lack the legal mandate to do so as far back as 1958. Nor are customary offences part of the criminal laws of Ghana.[64]

From the preceding discussion, it is clear that the power of chiefs to try criminal cases has gone through phases of general, complete and exclusive jurisdiction reliant on customary law, through shared jurisdiction with colonial authorities, to the present state of controlled and restricted jurisdiction exercisable in relation to customary offences

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[58] Ibid.,p.4.
[59] Supra note 23, at p.21.
[60] Supra note 24, p.6.
[61] No. 23 of 1958
[62] Supra, note 53, at p.22.
[63] See sections 41 to 47 of Act 370 for the procedure on how rules of customary law, including customary offences, could be enacted into law. See also Debrah v The Republic [1991] 2 GLR 517
[64] Section 8 of Act 29.

expressly provided for by statute.[65] Currently, original jurisdiction in criminal cases is limited to the District Courts,[66] Circuit Courts,[67] the High Court[68] and Regional Tribunals[69] whereas the High Court,[70] Court of Appeal[71] and the Supreme Court[72] exercise appellate jurisdiction in criminal cases.

IV.1 The Criminal Code from 1892 to 1992

As previously noted, the Criminal Code of 1892 was the very first criminal statute in the Gold Coast Colony, enacted on 31st October 1892 as No. 12 of 1892 by the Governor of the Gold Coast Colony, with the advice and consent of the Legislative Council. Structurally, it was divided into books, parts and titles covering matters such as general provisions, introductory provisions, general and special rules of criminal law, inchoate offences, punishment, summary offences, offences against the person, offences against property, offences against public order, health and morality, indictable offences, offences against the person and reputation, criminal harm to the person, criminal homicide and similar offences, offences against the public peace, perjury and obstructions of public justice, offences relating to public offices and to public elections, bigamy and similar offences, public nuisances and slave dealing.[73]

The Criminal Code, 1892(No. 12) has been variously reenacted as No. 5 of 1893,No. 16 of 1898, No. 15 of 1901,No. 3 of 1903, No 24 of 1903,No. 8 of 1907,Nos. 7 and 12 of 1909,No. 8 of 1910,No. 12 of 1917,Nos. 21 and 38 of 1918, No. 13 of 1919,Nos. 11 and 19 of 1920,No. 24 of 1921,No. 4 of 1923,Nos. 3 and 38 of 1924,Nos. 22 and 26 of 1925, No. 24 of 1926, No. 8 of 1927, Nos.6 and 33 of 1928, No. 19 of 1929,No. 21 of 1934, No.17 of 1935,No. 19 and 40 of 1936, No. 7 of 1939,No. 5 of 1941, No.7 of 1943, No. 16 of 1945, No. 27 of 1946, No.25 of 1947,Nos. 11and 24 of 1948,No. 24 of 1949,Nos.1 and 54 of 1950, Nos. 21 and 37 of 1951, No. 50 of 1952 and No. 9 of

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[65] Ibid. In particular, the learned judge in Debrah v The Republic [1991] 2 GLR 517 noted that "[I]n order not to sin against section 8 of Act 29, whenever a traditional area is of the view that certain particular conducs are offences against their custom and tradition, and that such offences ought to be punished, the traditional area in question should take steps to have those offences together with the appropriate sanctions spelt out and presented to the National House of Chiefs. The latter after due investigations and consideration would present a draft to that effect to the Head of State who shall after consultation with the Chief Justice make a legislative instrument giving effect to such customary offences and sanctions. This is the procedure laid down in sections 41-47 of Act 370."

[66] Courts(Amendment) Act, 2002(Act 620)

[67] Ibid.

[68] See article 140 of the Constitution.

[69] See article 143 of the Constitution. The Regional Tribunals are now practically defunct.

[70] Supra, note 36.

[71] See article 137 of the Constitution.

[72] See articles 129 and 131 of the Constitution.

[73] Criminal Code, 1892.(No. 12)

1954.[74]Subsequently, it was revised under the Revised Edition of the Laws Ordinance, 1951, by Sir Patrick Francis Branigan, Q.C.[75] In 1960, it was repealed and reenacted as the Criminal Code, 1960 (Act 29).

As previously indicated, it is not the focus of this article to conduct an analysis of the provisions of Criminal Code of 1892 together with its amendments, social and legal context from 1892 to date. The details of the various amendments to the Criminal Code from 1892 to 1954 are contained as footnotes or marginal notes in the Criminal Code (No. 9 of 1954) as revised under the Revised Edition of the Laws Ordinance, 1951, by Sir Patrick Francis Branigan, Q.C.[76] Similarly, the various amendments to Act 29 from 1960 to 2005 are captured as footnotes in Act 29 and future academic studies could explore specific aspects of these amendment provisions, their social and legal context from 1960 to 2005 when Act 29 was revised by the Statute Law Revision Commissioner pursuant to the Laws of Ghana (Revised Edition) Act 1998(Act 562)

However, it may be useful to comment at a high level of generality, hoping that future studies on the evolution of criminal law in Ghana will take on the task of considering specific aspects of Ghanaian criminal law from 1892 to the present, on some similarities and differences between the Criminal Code of 1892 and Act 29. Indeed, a close and careful analysis of the two enactments reveals that Act 29 has maintained and retained in a substantial manner the original provisions of the Criminal Code, 1892. In this vein, it is significant to note that both Criminal Code of 1892 and Act 29 have the same conceptual framework anchored on foundational principles of the English common law. Furthermore, the rules of construction of the two enactments have remained the same;[77] both enactments exclude the operation of common law offences;[78] the rules on intent as a form of mens rea have remained unchanged;[79] likewise, the rules on negligence,[80] causing an event,[81]consent,[82]claim of right,[83] fraud,[84] threats,[85] incapacity on the basis of

[74] See the Criminal Code (Cap 9) 1954 Rev., p. 276.
[75] See the Laws of the Gold Coast, Revised Edition in four volumes, enacted on 31st December 1954. London, 1956. The Criminal Code, 1892(No. 12) has been variously reenacted as No. 5 of 1893,No. 16 of 1898,No. 15 of 1901,No. 3 of 1903, No 24 of 1903,No. 8 of 1907,Nos. 7 and 12 of 1909,No. 8 of 1910,No. 12 of 1917,Nos. 21 and 38 of 1918, No. 13 of 1919,Nos. 11 and 19 of 1920,No. 24 of 1921,No. 4 of 1923,Nos. 3 and 38 of 1924,Nos. 22 and 26 of 1925, No. 24 of 1926, No. 8 of 1927, Nos.6 and 33 of 1928, No. 19 of 1929,No. 21 of 1934, No.17 of 1935,No. 19 and 40 of 1936, No. 7 of 1939,No. 5 of 1941, No.7 of 1943, No. 16 of 1945, No. 27 of 1946, No.25 of 1947,Nos. 11and 24 of 1948,No. 24 of 1949,Nos.1 and 54 of 1950, Nos. 21 and 37 of 1951, No. 50 of 1952 and No. 9 of 1954. See the Criminal Code (Cap 9) 1954 Rev., p. 276.
[76] Ibid.
[77] Section 7 of the Criminal Code of 1892 and section 4 of Act 29.
[78] Section 12 of the Criminal Code of 1892 and section 8 of Act 29.
[79] Section 14 of the Criminal Code of 1892 and section of 11 Act 29.
[80] Section 15 of the Criminal Code of 1892 and section 12 of Act 29.
[81] Section 16 of the Criminal Code of 1892 and section 13 of Act 29.
[82] Section 17 of the Criminal Code of 1892 and section 14 of Act 29.

infancy,[86] ignorance of law and mistake of fact,[87] justifiable use of force,[88] provocation and the principles and circumstances for reducing murder to manslaughter.[89]

There are however ostensible and significant differences between the Criminal Code 1892 and Act 29. The age for consent, for example, has changed from the original 7 years in the Criminal Code, 1892, to 12 years in Act 29, and 16 years for sexual offences;[90] the age for incapacity to commit a crime on the basis of infancy has also changed from 7 to 12 years;[91] the forms of punishment and rules for imposing punishment contained in the Criminal Code of 1892 have been moved to the Criminal Procedure Act, 1960 (Act 30).[92] Other substantial differences between the two enactments include: the exclusion in Act 29 of the punishments of "whipping" and "flogging" which were acceptable forms of punishment for offences under the Criminal Code, 1892,[93] and the introduction of an array of new crimes, the focus of the next part of this article, in Act 29 such as causing financial loss and sexual exploitation that did not exist under the Criminal Code, 1892.[94]

Finally, Act 29[95] unlike the original Criminal Code, 1892, adopts a modern style of legislative drafting; it is easier to read as long sections have been subdivided into subsections;[96] plain English has replaced legalese;[97] provisos have been reworked and deleted as necessary,[98] and the general reorganization of the sections has made Act 29 much more accessible and user-friendly. A general review of the two enactments shows that the structure of Act 29 is less complicated than pertained under the Criminal Code, 1892.

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[83] Section 18 of the Criminal Code of 1892 and section 15 of Act 29.
[84] Section 19 of the Criminal Code of 1892 and section 16 of Act 29.
[85] Section 20 of the Criminal Code of 1892 and section 17 of Act 29.
[86] Section 52 of the Criminal Code of 1892 and section of 26 Act 29.
[87] Section 55 of the Criminal Code of 1892 and section of 29 Act 29.
[88] Sections 56-73 of the Criminal Code of 1892 and sections of 30-45 Act 29.
[89] Sections 231-236 of the Criminal Code of 1892 and sections of 52-56 Act 29.
[90] Section 17 of the Criminal Code of 1892 and sections 14 of Act 29.
[91] Section 52 of the Criminal Code of 1892 and section of 26 Act 29.
[92] Section 74 of Criminal Code of 1892 and section 294 of the Criminal Procedure Act 1960(Act 30)
[93] Section 74 of the Criminal Code of 1892.
[94] Sections 179A – 179D of Act 29.
[95] As revised by the Statute Law Revision Commissioner pursuant to Laws of Ghana (Revised Edition) Act 1998(Act 562).
[96] Compare provisions of the Criminal Code of 1892 with those of Act 29. See supra notes 41-53.
[97] Ibid.
[98] Ibid.

IV.2 Legislative Changes In Act 29 Since The Inception Of The 4th Republic

In this Part of the article, we examine amendments to Act 29 since the coming into force of the 1992 Constitution alongside the legal and social context of these amendments. New legal, political and social realities consequent upon the coming into force of the 4th Republic Constitution have necessitated amendments to Act 29. In tracing the revisions or changes to Act 29 since the inception of the 4th Republic on 7th January 1993 we shall consider the Laws of Ghana (Revised Edition) Act 1998(Act 562), the Criminal Code (Amendments) Act 1993 (Act 458), the Criminal Code (Amendments) Act 1994 (Act 484) the Criminal Code (Amendment) Act, 1998(Act 554), the Fines (Penalty Units) Act, 2000 (Act 572), the Criminal Code (Repeal of the Criminal Libel and Seditious Laws) (Amendment) Act, 2001 (Act 602), the Criminal Code (Amendment) Act, 2003(Act 646) and the Criminal Offences (Amendment) Act 2012(Act 849)

IV.2.1 Laws of Ghana (Revised Edition) Act 1998(Act 562)

In 1998, Parliament passed the Laws of Ghana (Revised Edition) Act 1998(Act 562) with the primary objective of revising the laws of Ghana.[99] By the provisions of Act 562, the President of Ghana in consultation with the Council of State and the Minister for Justice was mandated to appoint a Commissioner to be known as the Statute Law Revision Commissioner ("Commissioner") to prepare a Revised Edition of all Acts and subsidiary legislation in force on 1st January, 1999.

Under section 2 of Act 562, the Commissioner has the mandate, in preparing the Revised Edition, among others, to make adaptations of and amendments to Acts in order to bring those Acts into conformity with the Constitution of Ghana, 1992; and to alter the short title of an Act or add a short title to an Act which may require a short title. The Commissioner could also correct all grammatical, typographical and similar errors in the Acts and for that purpose effect such alterations that are necessary whilst not affecting the meaning of any Act.[100] By section 3 of the Act, the powers of the Commissioner exclude the power to make alterations or amendments in the matter or substance of an Act. And where the Commissioner considers that an alteration or amendment in the matter or substance of an Act is desirable or that an Act requires considerable alteration or amendment involving the entire recasting of the Act, the Commissioner shall prepare a bill setting out the alteration or amendment or the recasting of the Act for introduction into Parliament.[101]

Pursuant to his powers under Act 562 the Commissioner has introduced numerous changes to Act 29. The Criminal Code, 1960 (Act 29), for example, has now become the Criminal Offences Act, 1960 (Act 29). As an additional matter, the Commissioner has

[99] See in particular the long title of the Laws of Ghana (Revised Edition) Act 1998(Act 562). Hereafter referred to as "Act 562".

[100] Section 2 of Act 562.

[101] Section 3 of Act 562.

amended "crime" in Act 29 to read "criminal offence".[102] The Commissioner has also modified the definition of "crime" in the old Criminal Code from "an act punishable by death, imprisonment or fine" to "criminal offence has the meaning assigned to it by article 19 of the Constitution" although article 19 of the Constitution has not assigned any specific meaning to the expression "criminal offence".[103]

In some cases, the Commissioner appears to have made substantive amendments to existing provisions of Act 29 contrary to his legal mandate under Act 562.

(a) Section 42(g) of Act 29

Section 42(g) of the old Act 29, for example, had provided that "the use of force against a person may be justified on the ground of consent but a person may revoke any consent which he has given to the use of force against him, and his consent when so revoked shall have no effect for justifying force; save that the consent given by a husband or wife at marriage, for the purposes of marriage, cannot be revoked until the parties are divorced or separated by a judgment or decree of a competent Court."[104](*our emphasis*)The Commissioner, however, has omitted the above underlined exception in the new Act 29 on the basis that the exception is "unconstitutional".[105]

(b) Section 23 of Act 29

Another example of a substantive amendment to provisions of Act 29 by the Commissioner is the amendment of section 23 of Act 29 on the crime of conspiracy. Previously, the crime of conspiracy consisted of where two or more persons agree or act together to commit or abet the commission of a crime. Now this provision has been amended to read "where two or more persons agree to act together…." to commit or abet the commission of a crime thus giving conspiracy a narrower scope than is suggested by the expression "agree or act together".

In the case of *Ekone Anozie v The Republic,*[106] the Supreme Court of Ghana implicitly endorsed, by dismissing an appeal against the decision of the Court of Appeal, the view that the current rendition of the section 23 of Act 29 by the Commissioner had not changed the previous state of the law on conspiracy. In other words, according to the Supreme Court, despite the substitution of the disjunctive "or" in the old Act 29 with the conjunctive "and" in the revised section 23 of Act 29 by the Commissioner, no substantive change had been effected in the essential ingredients of the crime of

[102] Section 1 of Act 29.
[103] Article 19(21) of the 1992 Constitution.
[104] Section 42(g) of Act 29.
[105] See the Commissioner's comments on the new section 42 of Act 29.
[106] Unreported judgment of the Supreme Court dated 13th May 2015 cited in Kpebu (No. 03) v Attorney General(No. 03)[2015-2016] SCGLR 511 @ 530.

conspiracy and the previous position of law on conspiracy still represented the current state of the law.

Indeed, the constitutionality of the authority of the Commissioner to amend the substantive content of Act 29 came up for consideration by the Supreme Court in the case of *Martin Kpebu v Attorney Genera*l.[107] There, it was contended that the decision of the Commissioner to delete the proviso to section 42(g) of Act 29 which provided that "save that the consent given by a husband or wife at marriage, for the purposes of marriage, cannot be revoked until the parties are divorced or separated by a judgment or decree of a competent Court" was unconstitutional. The Supreme Court disagreed, holding that once the Commissioner's "seven volumes of the Laws of Ghana (Revised Edition) [had] received the necessary parliamentary approval and adoption every statement of law therein contained is the correct position thereof unless pronounced otherwise."[108]

The court went further to state that its decision in *Ekone Anozie v The Republic* was given per incuriam as the court "utterly failed to consider whether the changes resulting from the Commissioner's adaptations/amendments on the law of conspiracy fell within the mandate granted him, and thereby fell into the error of merely upholding the decision of the Court of Appeal without due consideration and thus endorsing the impression that the Commissioner's amendments were void".[109] The Supreme Court further upheld the view of the law expressed in the High Court decision in *Republic v Augustine Abu,*[110] that "the new formulation [of section 23 of Act 29] by the Commissioner had changed the old law on conspiracy such that proof of prior agreement to act together with a common purpose is now a new and necessary ingredient that must be proved by the prosecution, failing which the charge must fail".[111]

It is, with respect, suggested that the view that the new rendition of section 23 of Act 29 requires "proof of prior agreement to act together with a common purpose" as "a new and necessary ingredient that must be proved by the prosecution" on a charge of conspiracy is not persuasive. This is because it has the effect of rendering the phrase "whether with or without previous concert in section 23(1) of Act 29 a surplussage contrary to the principle of interpretation that words in an enactment must be construed as a whole giving effect to each expression in the enactment as necessary.[112] Despite the change of language in

[107] Kpebu (No. 03) v Attorney General(No. 03)[2015-2016] SCGLR 511.
[108] Ibid.
[109] Ibid. pp. 528-529.
[110] Ibid.p. 530.
[111] Ibid.
[112] McMonagle v Westminster City Council [1990] 2 AC 716, HL. In this case, Lord Bridge quoted with approval at p. 726 of the report Brett J's statement in *Stone v Yeovil Corporation* (1876) 1 C.P.D 691 that: 'It is a canon of construction that, if it be possible , effect must be given to every word of an Act of Parliament or other document; but that, if there be a word or a phrase therein to which no sensible meaning can be given, it must be eliminated e" and " I recognise that... the presumption that every word in a statute must be given some effective meaning is a strong one,

section 23 of Act 29, upon a consideration of the entire provisions on conspiracy it is doubtful that the intention of the Commissioner was to change the previous state of the law on conspiracy. This view is further fortified by the fact that the old illustrations to section 23 of Act 29 were not changed by the Commissioner and the position taken by the Supreme Court goes contrary to the illustration on section 23 (1) which states that "If a lawful assembly is violently disturbed (section 204), the persons who take part in the disturbance have committed conspiracy to disturb it, although they may not have personally committed any violence, and although they do not act in pursuance of a previous concert or deliberation"(*Our emphasis*).

This illustration negatives the need for an actual prior agreement, i.e, "previous concert or deliberation", in order to sustain a charge of conspiracy.[113] Nonetheless, the new change is likely to make it much more difficult to prove conspiracy since as Afreh JSC noted in *Republic v Ibrahim Adam & Ors,*[114] it is difficult to prove "prior agreement" by direct evidence so it is the evidence of the subsequent acts of the alleged conspirators in committing the crime which the law uses as a proxy to establish "prior agreement". In particular, His Lordship had noted that "In my opinion, the words "acting together" [in section 23(1) of Act 29] does not create a new species of conspiracy wider in scope and content than conspiracy based on agreement. By using those words section 23(1) of Act 29 merely puts in statutory form, and states as a rule of law what today would or should be regarded as a matter of evidence, i.e, that a previous concert may be inferred from the fact that two or more persons acted together for the common purpose of accomplishing a certain result".[115] It is respectfully submitted that the Commissioner exceeded his mandate and acted ultra vires Act 562 when he amended sections 42(g) and 23 of Act 29. Section 3(1) of Act 562 in clear and unambiguous terms denies the Commissioner the power to effect a substantive change in the law, and where he desired to do so, he is required to introduce a bill for that purpose for approval by Parliament.[116]

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but the courts have on occasion been driven to disregard particular words or phrases when , by giving effect to them, the operation of the statute would be rendered insensible, absurd or ineffective to achieve its evident purpose

[113] It needs to be stressed that although the illustrations in Act 29 are not supposed to change the effect and meaning of provisions of the Act the illustrations to section 23 of Act 29 may help to explain the absence of intent by the Commissioner to change the previous state of the law on conspiracy.

[114] [2003 – 2005] 2 GLR 661

[115] Ibid., pp. 689-690.

[116] See section 3 of Act 562. This section provides that "3(1) The functions of the Commissioner contained in section 2 does not include any power to make alteration or amendment in the matter or substance of an Act.(2)Where the Commissioner considers-(a) that an alteration or amendment in the matter or substance of an Act is desirable; or (b) that an Act requires considerable alteration or amendment involving the entire recasting of the Act, the Commissioner shall prepare a Bill setting out the alteration or amendment or the recasting of the Act for introduction into Parliament."

IV.2.2 Criminal Code (Amendments) Act 1993 (Act 458)

Following the new democratic dispensation that was ushered in by the 1992 Constitution of the Fourth Republic of Ghana, the year 1993 saw sweeping and major amendments to Act 29. The object of the changes to the Act 29 as stated by the then Attorney-General, Anthony Kofi Forson, was to "include in the code the offences of genocide and hijacking and related punishments and to provide for other special offences; to increase penalties currently attached to sexual offences such as rape, defilement of a female under 14 years of age and carnal knowledge of a mentally handicapped female; and to provide for other miscellaneous matters."[117]

a) Offences of Genocide and Hijacking and related Punishments

Under section 51(4) of the old Courts Act 1971 (now section 56(4) of the Courts (Amendment) 2002 (Act 620), courts in Ghana had the power to punish any person who committed outside Ghana certain specified offences which if committed in Ghana would have been punishable. The offences of genocide, hijacking and attacks on international communication systems, canal and submarine cables, though indicated in section 56 of the Courts Act 1993 (Act 459) as offences, did not have punishments attached to them.[118] Thus in view of Article 19(11) of the 1992 Constitution which requires that:

> *No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law*

there was the need to amend Act 29 to provide appropriate punishments for the offences of genocide and hijacking. Therefore, the Criminal Code (Amendment Act) 1994 (Act 458) inserted section 49A which provided that:

> *Section 49A-Genocide.*[119]
>
> *(1) Whoever commits genocide shall on conviction be sentenced to death.*
> *(2) A person commits genocide where with intent to destroy, in whole or in part any national, ethnical, racial or religious group he-*
> *(a) kills members of the group;*
> *(b) causes serious bodily or mental harm to members of the group;*
> *(c) deliberately inflicts on the group conditions of life calculated to bring its physical destruction in whole or in part;*
> *(d) imposes measures intended to prevent births within the group; or*
> *(e) forcibly transfers children of the group to another group.*

[117] Memorandum accompanying Amendments to Criminal Code 1960 (Act 29), 27th May 1993.
[118] Ibid.
[119] Ibid.

The nature of the offence was deemed so inimical to the well-being of society that a death penalty was considered as the only adequate punishment.[120]

On the issue of Hijacking, Section 5 of the Criminal Code (Amendment) 1994 (Act 458) inserted a new section- section 195- which states that:

> *Section 195-Hijacking and Attack on International Communications.*[121]
> *(1) Whoever hijacks any aircraft commits an offence and shall be guilty of a first degree felony and liable on conviction to imprisonment of not less than five years.*
>
> *(2) A person commits an offence under subsection (1) of this section where he unlawfully interferes with, damages, destroys, seizes or wrongfully exercises control of an aircraft (other than an aircraft used in military, customs or police services) or does any other unlawful act likely to jeopardize the safety of persons or property in, or the good order and discipline on board the aircraft.*
>
> *(3) Any person who attacks or destroys any international communications system, canal or submarine cable commits an offence and shall be guilty of a second degree felony and liable on conviction to imprisonment for a term of not less than two years*

b) Punishment for Specific Sexual Offences against Females

The 1993 Bill on the amendment of Act 29 sought to make some changes to the provisions relating to sexual offences especially the provisions on rape, defilement and carnal knowledge of a female idiot. Sentences under the then existing Criminal Code 1960 (Act 29) for these crimes were considered rather lenient in view of the trauma that the victims of such crimes suffer. The Criminal Code (Amendment) Act 458 revised the penalties for these sexual offences. Another major amendment introduced by Act 458 was the removal of the distinction between the defilement of a girl of age 10 and a girl of age 14 that existed under the old Act 29. This distinction between the defilement of a girl aged 10 and a girl aged 14 was said not to be justified considering the damage that could be done to the child."[122]Further, apart from the offence of rape, Act 458 kept the other sexual offences as second degree felonies. These offences were "deliberately kept as second degree felonies in order to make it possible for offenders to be tried summarily by lower courts or tribunals, otherwise as first degree offences, trials will have to be on indictment at the

[120]Ibid.
[121] Ibid.
[122]Ibid.

Superior Courts, which may often not be the best way of administering justice in the given circumstance."[123]

(c) Special Offences

More significantly, the Criminal (Code Amendment) 1993 (Act 458) inserted a new Chapter on Special Offences. Act 29 was amended by the insertion after section 179 of the provision in section 3 of Act 458. These special offences, economic in nature, included causing loss or damage or injury to public property, importation of explosives, and using public office for profit. Some of these offences were first introduced into our legal system by the Public Property Protection Act 1977[124] and subsequently enacted under the Public Tribunals Law, 1984[125] Upon the coming into force of the Constitution they had to be rephrased to bring them into accord with the general philosophy underlying offences under Act 29.

The integration of the Public Tribunals into the traditional court system at the time made it necessary for these offences to be incorporated into Act 29 to enable both the Regional Tribunals and the High Court to exercise jurisdiction over these crimes. Moreover, the introduction of the Special Offences Chapter in Act 29 was aimed at ridding the public sector of the growing levels of corruption, financial misappropriation and other economic crimes.

The text of the Special Offences has the following provisions:[126]

Chapter 4—Special Offences[127]

Section 179A—Causing Loss, Damage or Injury to Property.

(1) Any person who by a willful act or omission causes loss, damage or injury to the property of any public body or any agency of the State commits an offence.

(2) Any person who in the course of any transaction or business with a public body or any agency of the State intentionally causes damage or loss whether economic or otherwise to the body or agency commits an offence.

[123] Ibid.
[124] SMCD 140.
[125] PNDCL 78 .
[126] The original "Section 179D has been affected by The Fines (Penalty Units) Act, 2000 (Act 572). The penalty for an offence under Chapter Four of the Criminal Code 1960 (Act 29) was either a fine of fifty million cedis or imprisonment not exceeding 10 years or both."
[127] Chapter Four of Act 29

(3) Any person through whose willful, malicious or fraudulent action or omission—
(a) the State incurs a financial loss; or
(b) the security of the State is endangered, commits an offence.

(4) In this section "public body" includes the State, Government of Ghana, public board or corporation, public institution and any company or other body in which the State or a public corporation or other statutory body has a proprietary interest.

Section 179B.—Import of Explosives.

(1) Any person who without lawful authority (proof of which shall be on him) imports into Ghana any explosives, firearms or ammunition commits an offence.
(2) For the purpose of this section explosives, firearms or ammunition shall have the same meaning as provided under section 192 of this Code.

Section 179C—Using Public Office for Profit.

Any person who—
(a) while holding a public office corruptly or dishonestly abuses the office for private profit or benefit; or
(b) not being a holder of a public office acts or is found to have acted in collaboration with a person holding public office for the latter to corruptly or dishonestly abuse the office for private profit or benefit, commits an offence.

Section 179D.—Penalty

A person convicted of a criminal offence specified in this Chapter is liable to a fine of not less than two hundred and fifty penalty units or to a term of imprisonment not exceeding ten years or to both the fine and the imprisonment.

The special offences introduced by Act 458 have been the subject of varying judicial interpretations which have generated critical academic commentary. Among the criticisms of the special offences are that they are badly drafted and nebulous in scope.[128]

[128] See, Aziz Bamba, *Willfully Causing Financial Loss to the State: A Critique of Republic v. Ibrahim Adam & Ors* 2002-2004 UGLJ, Vol. 22,pp. 237-249; Aziz Bamba, *The Law of Willfully Causing Financial Loss to the State: Is it a Good Thing or a Bad Thing*? The New Legon Observer, Vol. 2. No. 12, 2008, pp. 24-29.

Finally, Act 458 introduced a new section - section 183B - to satisfy the provisions in article 105 of the 1992 Constitution that Parliament shall prescribe a penalty for a person who knowingly or without reasonable grounds for knowing that he is not entitled to sit and vote in parliament, does so.[129]

IV.2.3 Criminal Code (Amendments) Act 1994 (Act 484)

In the year 1994, as compared to the year 1993, the amendment to Act 29 was not robust. However, there was an ancillary amendment to the provisions on sexual offences with the insertion after section 69 of a section that seeks to "include in the Criminal Code, the offence of female circumcision and for connected purposes."[130] This amendment had become necessary because of the persistent incidence among some ethnic groups in Ghana of the practice of female circumcision or clitoridectomy. In its various forms, the practice of clitoridectomy consists in some cases in the cutting off of the clitoris apparently as a calculated design to deprive women of sexual pleasure and thus assure their chastity. In some cases, it involves cutting off the labia and tightly sewing the vaginal orifice in order to make sexual intercourse a painful experience or actually impossible for the female involved until a larger opening is subsequently cut at the time of marriage.

The offence of female circumcision as codified in section 69A has the following provisions:

Section 69A.-Female Circumcision.[131]

> *(1) Whoever excises, infibulates or otherwise mutilates the whole or any part of the labia minora, labia majora and the clitoris of another person commits an offence and shall be guilty of a second degree felony and liable on conviction to imprisonment of not less than three years.*
>
> *(2) For the purposes of this section "excise" means to remove the prepuce, the clitoris and all or part of the labia minora; "infibulate" includes excision and the additional removal of the labia majora.*

It was the expectation of the Government that the criminalization of female circumcision will eradicate or at least minimize the incidence of this harmful cultural practice among some ethnic groups in Ghana.

(d) CRIMINAL CODE (AMENDMENT) ACT, 1998(ACT 554)

In the year 1998, the Criminal Code 1960 (Act 29) saw nineteen (19) amendments under the Criminal Code (Amendment) Act 1998 (Act 554).The long title to Act 554 states "An

[129] See, Article 105 of the Constitution
[130] Introduction to the Criminal Code (Amendment) Act, 1994, Act 484
[131] See section 69A of Act 29.

Act to amend the Criminal Code 1960 (Act 29) to increase the age of criminal and sexual responsibility; to include the specific offence of indecent assault; to revise provisions on sexual offences; to abolish customary or ritual servitude, to revise fines and values and to provide for connected purposes."[132] These amendments were mostly repeals of illustrations and insertion of new ones and most extensively the repeal of Chapter 6 of Part II on Sexual Offences.

Sections 1 of Act 554 repealed paragraph (b) of the illustration to section 13 of Act 29 and the insertion of the following-

> *"(b) A. induces a child under twelve years to steal a thing for him. A has stolen the thing.*"[133]

Section 2 of Act 554 further repealed paragraph (a) of the principal enactment in section 14 of Act 29 and inserted a new paragraph (a) that read;

> *"(a) a consent is void if the person giving it is under twelve years of age, or in the case of an act involving a sexual offence, sixteen years, or is, by reason of insanity or of immaturity, or of any other permanent or temporary incapability whether from intoxication or any other cause, unable to understand the nature or consequences of the act to which he consents"*.[134]

Moreover, sections 3-4 of Act 554 made amendments to section 14, 26, 71 and 79 of the Criminal Code 1960 (Act 29). Noteworthy among the amendments is the age of criminal responsibility for children in section 26 and the illustration to the provision in section 26 of Act 29. The amended text of section 26 reads as follows:

Section 26-When a Child is Incapable of Committing Crime.[135]

> *Nothing is a crime which is done by a person under twelve years of age.*
>
> *Illustration*
>
> *A., aged eleven years administers poison to B. A. is deemed not criminally responsible and considered incapable of understanding the consequences of his actions from a legal perspective.*

The provisions on the criminal offence of abduction as contained in sections 91 and 92 of Act 29 had significant changes made to them by sections 7 and 8 of Act 554. For

[132]Introduction to the Criminal Code (Amendment) Act, 1998 (Act 554)
[133] Ibid
[134] Ibid
[135]Ibid

instance, the principal enactment in section 91 of Act 29 was repealed with the insertion of the following-

> "Whoever is guilty of an abduction of any child under eighteen years of age shall be guilty of a misdemeanour."[136]

The Criminal Code (Amendment) Act, 1998 (Act 554) also made some inroads into the provisions in sections 93 and 95 of Act 29 dealing with Child-stealing and Special provisions as to child stealing and abduction respectively. Section 9 of Act 554 amended the principal enactment in section 93 by the substitution of "twelve years" for fourteen years.[137]

Further, section 95 of Act 29 was amended "by the substitution for "twelve or eighteen years" in paragraph (e) of "fourteen or eighteen years" in that paragraph.[138] A major revision introduced by the Criminal Code (Amendment) Act 1998 (Act 554) was the repeal of Chapter 6 of Part II and the insertion of a new Chapter on Sexual Offences. The changes were primarily a revision of the provisions on sexual offences with an increase of the age of sexual responsibility to sixteen years.[139]

The revision of the sexual offences in Chapter 6 by Act 554 saw the insertion of a new sexual offence-"Indecent Assault."[140] Section 103 thus provided that:

> *"Whoever indecently assaults any person shall be guilty of a misdemeanour and shall be liable on conviction to a term of imprisonment of not less than six months."*[141]

The section further states that "*A person commits the offence of indecent assault if, without the consent of the other person he-*

> *(a) forcibly makes any sexual bodily contact with that other person; or*
> *(b) sexually violates the body of that other person in any manner not amounting to carnal knowledge or unnatural carnal knowledge."*[142]

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[136] Section 7 of Criminal Code (Amendment) Act, 1998, Act 554
[137] Section 9 of Criminal Code (Amendment) Act, 1998, Act 554
[138] Section 10 of Criminal Code (Amendment) Act, 1998, Act 554
[139] There was the need to harmonise national laws with Ghana's international treaty obligations, particularly the Convention on the Right of the Child, 1989, and the African Charter on the Rights and Welfare of the Child. For the text of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. see http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx and http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf. Last accessed on 30th June 2019.
[140] Section 103 of Criminal Code (Amendment) Act, 1998, Act 554.
[141] Ibid.

Furthermore, Act 554 in section 13 amended the principal enactment by the repeal of section 273 of Chapter 7 of Part IV of Act 29, which deals with offences against public morality and the insertion of a new provision which reads as follows: "Whoever, having the custody, charge or care of a child under the age of sixteen years, allows that child to reside in or frequent a brothel shall be guilty of a misdemeanour."[143]

Moves to make sexual offences against minors gender-neutral resulted in the adoption of gender-inclusive language to offer protection to boys as well. Sections 15 and 16 of Act 554, made an imperative insertion in sections 279 and 296 of Act 29 with the deletion of "female of her body" in the definition of prostitution and the insertion of "person of his body"[144] and the amendment of the principal enactment by the deletion of "female" and the insertion of "person of his body."[145]

Another principal insertion introduced by Act 554 was the provisions on the prohibition of customary servitude.[146] This provision was in line with the agenda to criminalize the practice of Trokosi and other practices which take the form of customary servitude. The law therefore provided thus;

Section 314A-Prohibition of Customary Servitude.[147]

> *(1) Whoever-*
> *(a) sends to or receives at any place any person; or*
> *(b) participates in or is concerned in any ritual or customary activity in respect of any person with the purpose of subjecting that person to any form of ritual or customary servitude or any form of forced labour related to a customary ritual commits an offence and shall be liable on conviction to imprisonment for a term not less than three years.*
>
> *(2) In this section "to be concerned in" means-*
> *(a) to send to, take to, consent to the taking to or receive at any place any person for the performance of the customary ritual; or*
> *(b) to enter into any agreement whether written or oral to subject any of the parties to the agreement or any other person to the performance of the customary ritual; or*
> *(c) to be present at any activity connected with or related to the performance of the customary ritual.*

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[142] Sub-section 2 of 103 of Criminal Code (Amendment) Act, 1998, Act 554.
[143] Section 273 of Criminal Code (Amendment) Act, 1998, Act 554.
[144] Section 15 of Criminal Code (Amendment) Act, 1998, Act 554.
[145] Section 16 of Criminal Code (Amendment) Act, 1998, Act 554.
[146] Section 17 of Criminal Code (Amendment) Act, 1998, Act 554.
[147] Section 314A of Act 29.

Finally, the 1998 amendments introduced by the Criminal Code (Amendment) Act 554 dealt with revision of fines and values[148] and the repeal of section 2 of the Criminal Code Amendment Act, 1993 (Act 458).[149]

IV.2.4 Fines (Penalty Units) Act, 2000 (Act 572)

Act 572 amended Act 29 by the introduction of a system of penalty units in place of specific amounts often stipulated in criminal legislation as payable by way of fines. Act 572 averts the need to consistently change fines in Act 29 and other criminal statutes to keep up with inflation. A penalty unit has its corresponding values in Ghanaian cedis, and this can be changed from time to time through subsidiary legislation to keep up with inflation.[150]

IV.2.5 Criminal Code (Repeal Of The Criminal Libel And Seditious Laws) (Amendment) Act, 2001 (Act 602)

The period 2001 witnessed significant amendments to Act 29 with the aim of improving the criminal justice system and the expansion of the boundaries of the right of freedom of expression and the media as contained in the 1992 Constitution. The memorandum accompanying the bill seeking to repeal the criminal libel and sedition laws presented to Parliament stated that "[D]esigned to frustrate our freedom and perpetuate our servitude, these laws should have been repealed at independence. Unfortunately they were maintained and, in some cases, actually extended, especially during the period of the First Republic, and have up to date remained on the statute books… The laws are unworthy of a society seeking to develop on democratic principles, on the basis of transparency and accountability in public life."[151]

Act 602, amended the Criminal Code, 1960 (Act 29) by the repeal of Chapter 7 of Part II on libel (sections 112-119); section 182A on the power of the President to ban organizations; section 183 on the power to prohibit importation or publication of newspapers and sedition; section 183A on defamation of the President and section 185 on communication of false reports injuring the reputation of the State, in order to bring the laws on expression and the media into conformity with the provisions of the Constitution.[152]The amendments introduced by Act 602 also made provisions for the

[148] Section 18 of Criminal Code (Amendment) Act, 1998, Act 554.
[149] Section 19 of Criminal Code (Amendment) Act, 1998, Act 554.
[150] Presently, one penalty unit amounts to GHS 12.
[151] Memorandum accompanying the Criminal Code (Repeal of Criminal Libel and Seditious Laws) (Amendment) Bill, 7th June 2001.
[152] Introduction to the Criminal Code(Repeal of Criminal Libel and Seditious Laws) (Amendment) Act, 2001, Act 602.

cessation of proceedings and actions brought under the repealed sections on the coming into force of the Act.

IV.2.6 Criminal Code (Amendment) Act, 2003 (Act 646)
In the year 2003, there was an auxiliary but important amendment made with the introduction of the Criminal Code (Amendment) Act, 2003, Act 646. The object of the amendment of the Criminal Code 1960, Act 29 by Act 646 was to enable the offence of robbery to be tried either on indictment or summarily.

The introduction of the amendment in Act 646 was due to the "incessant complaints from the general public that the indictment processes, which all robbery cases have to be taken through, cause inordinate delay in delivering justice".[153] Proponents of the Bill stated that it was not always justifiable to try robbery on indictment. They contended that the justice system should make room, given the circumstances of each case of robbery, for the Attorney-General to determine whether a specific act of robbery should be tried summarily or on indictment.[154] It was further stated in the memorandum that the proposal for the offence of robbery to be tried summarily is not intended to give lenient sentences for robbers since Act 646 imposes a minimum sentence of 10 years whether the offence is tried summarily or on indictment and where an offensive weapon is used to commit the offence a minimum penalty of 15 years.[155] Where death occurs in the course of the robbery, the offender is charged for murder under the Criminal Code.[156]

Currently, the provisions on robbery under section 149 state as follows:

Section 149-Robbery[157]

> *(1) Whoever commits robbery is guilty of an offence and shall be liable, upon conviction on trial summarily or on indictment, to imprisonment for a term of not less than ten years, and where the offence is committed by the use of an offensive weapon or offensive missile, the offender shall upon conviction be liable to imprisonment for a term of not less than fifteen years.*
>
> *(2) For the purposes of subsection (1) the Attorney-General shall in all cases determine whether the offence shall be tried summarily or on indictment.*
>
> *(3) In this section "offensive weapon" means any article made or adapted for use to cause injury to the person or damage to property or intended by the person who has the weapon to use it to cause injury or damage; and*

[153] Memorandum accompanying the Criminal Code (Amendment) Bill, 17th March 2003.
[154] Ibid.
[155] Memorandum accompanying the Criminal Code (Amendment) Bill, 17th March 2003.
[156] Ibid.
[157] Section 149 of Act 29.

"offensive missile" includes a stone, brick or any article or thing likely to cause harm, damage or injury if thrown.

IV.2.7 Criminal Offences (Amendment) Act 2012(Act 849)
Act 840 amended Act 29 to criminalize the unlawful use of human parts, enforced disappearance, sexual exploitation, illicit trafficking in explosives, firearms and ammunition, organized criminal groups and racketeering. Under the Act the severest punishments are meted out to organized criminal groups. Experiences from the other countries such as Mexico, United States and Nigeria indicate that the activities of organized criminal groups pose a serious threat to public safety and order. It was therefore necessary to have specific criminal provisions on organized criminal groups.

As regards the unlawful use of human parts, Act 849 provides that a person commits the crime of unlawful use of human parts if that person without lawful authority, the proof of which lies on that person:

"(a) engages in the removal of human parts;
(b) is in possession of human parts;
(c) engages in the draining of human blood; or
(d) is in possession of human blood

The punishment for these offences ranges from a minimum penalty of five years imprisonment to a maximum penalty of life imprisonment.

In respect of enforced disappearance, the crime is committed when it is established that a person has arrested, detained, abducted, kidnapped or by any other means restricted the freedom of movement of another person by confining that other person in a manner that:

(a) deprives that other person, of that other person's liberty;
(b) conceals the fate or whereabouts of that other person; or
(c) places that other person outside the protection of the law.

The Act defines the crime of sexual exploitation as the use of a person for sexual activity that causes or is likely to cause serious physical and emotional injury or in prostitution or pornography. As stated earlier, Act 849 reserves the severest forms of punishment, of a maximum penalty of death, for organized criminal groups, which is defined as a structured group acting in concert with the aim of committing a serious offence, and racketeering. Under the Act, racketeering is the operation by a structured group of an unlawful activity that involves fraud, deceit, extortion, intimidation, violence or any other unlawful method in the execution of the activity. These unlawful methods include bribery, prostitution, and the exploitation of children, gambling, narcotic drug offences, money laundering and human trafficking.[158]

[158] See section 5 of Act 849.

The preceding description and analysis of the various amendments to Act 29 together with their legal and social context since the inception of the 4th Republic to date invite further comments on the evolution of the Criminal Code, 1892. First, it is self-evident from the analysis that the post independent Ghanaian State has been slow to abandon or carry out a complete overhaul of the Criminal Code, 1892. Act 29 in its current state is not substantially different in form, structure, philosophy and outlook from the Criminal Code of 1892. Perhaps, the adherence of Act 29 to the Criminal Code, 1892, is the natural result of Ghana being a part the common law tradition.

Second, there appears to be dearth of academic commentary on the effects of the various amendments to Act 29 since January 1993 and to what extent the amendments have accomplished their legislative objectives. Besides the special offences that appear to have attracted critical academic commentary[159] there are hardly any systematic academic studies on the extent to which these amendments have achieved their legislative aims. It may therefore be of interest for legal and other academics to undertake future studies on the connection between the implementation and effects of these amendments and their anticipated legislative purposes.

Third, a close scrutiny of all the amendments to Act 29 since 1993 reveals the primary factors that seem to drive changes to Act 29. The bulk of the changes are in respect of genocide, hijacking, sexual offences, property offences, economic crimes and financial malfeasance, harmful cultural practices and organized crimes.

Fourth, crimes such as organized crimes and causing financial loss are direct responses to local concerns about increase in criminal behavior, sophistication in criminal methods and growing levels of corruption and abuse of office, especially by public officers. The general sense deducible from the expansion in the content and scope of Act 29 since the inception of the 4th Republic is that the State still considers the criminal law as a useful tool to address pressing societal concerns.

V. Conclusion

In this article, we have provided a historical account of the evolution, key developments or phases of the current Act 29 from 1892 to the present. In so doing, we briefly examined the nature and functions of criminal law, how human rights and constitutional law principles have affected foundational principles of Ghanaian criminal law as they existed from 1892 to 1992 as well as recent legislative amendments to the Criminal Code since the inception of the 4th Republic on 7th January 1993. Although we did not set out to conduct a detailed analysis of the statutory provisions, social and legal context of the Criminal Code of 1892 together with all amendments, its effects, or explain in causal terms the various changes to the Code since 1892 we examined all amendments to Act 29 since the inception of the 4th Republic on 7th January 1993. In doing so, we briefly considered the broader legal and social contexts of the amendments and have

[159] Supra, note 132..

called for further academic studies to examine the extent the amendments have accomplished their legislative purposes

Our discussion, overall, reveals that the evolution of Act 29 starting with the Criminal Code of 1892 was naturally influenced by political, social, political, cultural and other forces that have and continue to shape Act 29. And we expect these forces to continue to exert continuous influence on future development of Act 29. Our analysis further indicates that for Act 29 to stay relevant to modern realities and concerns, it must continuously undergo a process of reevaluation and assessment by relevant stakeholders. While there appears to be a popular belief that the insertion of new crimes in Act 29 is the appropriate response to any matters that give rise to grave social concerns, we observe that there is the need for smart criminal legislation, avoiding the present proliferation of crimes as a panacea to any pressing social concerns. Perhaps, the current trend towards the proliferation of criminal offences or increasing punishment for criminal conduct needs to be re-examined in favour of a move towards the decriminalization of certain offences, especially petty crimes. Policymakers and legislators could tap into work done by organizations such Commonwealth Human Rights Initiative, a non-governmental organization, on the decriminalization and declassification of petty offences in Ghana.[160] In a seminal research report on the matter, the Commonwealth Human Rights Initiative has recommended a number of measures including the decriminalization of nuisance offences and further recommends that "where decriminalisation is not possible…the offence in question is declassified and operable within the scope of bye-laws passed by Metropolitan, Municipal and District Assemblies (MMDAs).

We anticipate that Act 29 will be amended further to provide for alternative forms of punishment such as community service, suspended sentences, and delayed trials Ghana. Finally, it is also likely that in time, international pressure, changes in social mores and new understandings of the imperatives of international human rights will present substantial challenges to the continued criminalization of certain types of victimless offences as provided for by Act 29. Altogether, the Criminal Code of 1892, now Act 29, has survived for over a century and appears to be still going strong.

[160] A Research Report by the Commonwealth Human Rights Initiative, Decriminalizing and Declassifying Petty Offences in Ghana. Available at https://www.humanrightsinitiative.org/publication/decriminalising-and-declassifying-petty-offences-in-ghana. Last accessed on 30th June 2019.

ACCESS TO BAIL PENDING TRIAL: ADDRESSING THE PROCEDURAL CHALLENGES FACED BY DETAINED SELF-REPRESENTED ACCUSED PERSONS IN GHANA

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Abstract

The criminal procedural regime of Ghana guarantees a presumption of bail in respect of all criminal charges, following the recent abolition of the concept of 'non-bailable' offences by the Supreme Court as being in violation of the right to presumption of innocence. Despite the attendant liberalisation of the right to be considered for bail in the wake of this decision, there are lingering and legitimate procedural concerns regarding the statutory procedures for accessing bail as far as self-represented accused persons remanded in custody pending trial are concerned. The reason is deep-seated in the nature of the procedural regime, which largely operates on the back of the presumption that accused persons will be represented by counsel during proceedings.

This paper investigates the suitability of the governing procedural regime for accessing pre-trial bail, particularly in proceedings involving remanded self-represented accused persons. It argues that self-representation in the criminal adjudicatory system of Ghana which is adversarial in nature exposes remanded accused persons to a number of procedural and technical challenges. In addition to their lack of competency to formally apply for bail, detained self-represented accused persons are in dire straits, in the face of the inter-court referral procedures that impose an obligation on such accused persons to apply for bail in forums other than the courts before which they ordinarily appear. These concerns are in turn compounded by the lack of institutional support for such undefended accused persons. Findings from the study consequently show that the right to be considered for bail suffers diminished enforcement in cases of self-representation. The paper advocates a policy of deepened judicial engagement and pro-activeness in securing the realisation of the due process rights of self-represented accused persons including the right to be considered for bail, and in bridging the procedural gap emanating from the absence of defence counsel.

I. Introduction

The legal system of Ghana is striving to advance the frontiers of its constitutional and criminal jurisprudence in terms of giving pragmatic effect to the rights and liberties of the individuals facing criminal proceedings. Various measures have been instituted to bring criminal statutes in line with the constitutional requirement of rule of law and guarantee of due process rights. These include the recent abrogation of the concept of 'non-bailable' offences from the Ghanaian criminal jurisprudence as being in violation of the right to presumption of innocence.[1] Accordingly, all criminal offences in Ghana are

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[1] See *Martin Kpebu (No.2) v Attorney-General (No.2)* [2015-2016] 1 SCGLR 171.

bailable and every accused person reserves the right to be considered for bail irrespective of the nature of the offence charged.

In the practice and workings of the law however, it is one thing to provide an entitlement to pre-trial release within the spectrum of due process protections of accused persons; it is yet another thing to have a reliable and responsive procedure that guarantees access to bail to all accused persons regardless of their status of representation.[2] In an adversarial system like that of Ghana in particular,[3] the regime of criminal procedure largely rests on the assumption that accused persons will be represented by counsel tasked to secure their rights and interests throughout the proceedings.[4] Thus, where legally unskilled accused persons are detained and self-represented[5] in criminal trials including bail application proceedings, legitimate concerns arise in respect of their competence to personally enforce their rights and cope with the legal niceties attendant upon the adversarial adjudicatory process. They are in such cases comparable to blindfolded lame athletes on a hurdles tract.

This paper presents a critical review of the procedural regime for securing bail pending trial as it applies to proceedings involving self-represented accused persons remanded in pre-trial custody. It is argued that the current statutory procedures for securing bail pending trial are ill-suited to cases of self-representation, especially due to the lack of practical interventions to fill the gap created by the privation of defence counsel. Consequently, emphasis is put on the need to deepen the concept of judicial engagement in a more pragmatic context in order to mitigate the procedural challenges arising from self-representation in bail applications. After this introduction, the legal framework of bail in criminal proceedings is generally discussed in Part 2. This is followed by an in-depth exposition of the key procedural challenges associated with the

[2] Where the context requires, the use of 'accused persons' also includes 'suspects of crime' amenable to bail pending investigations.

[3] The adversarial system of Ghana puts the parties in charge of actively defending their respective interests before a relatively passive and neutral decision-maker. See, eg *Republic v Adu Boahen* [1993 - 1994] 2 GLR 324, 341 (SC); *Sasu v Amuah-Sekyi* [1987-1988] 1 GLR 294, 296 (SC).

[4] In effect, the logic of this presumption is grounded in the well-nigh impeachable theory that a person not learned in the law faces an uphill task in coping with the highly complex legal manoeuvres at play in an adversarial trial. Though this procedural reality is hardly proclaimed in the legal environment of criminal proceedings in Ghana, the American Supreme Court long delivered a classical representation of this fact in its seminal decision in *Powell v Alabama* 287 U.S 45 68 - 69 (1932) (Sutherland J) that '[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.'

[5] Self-representation is contextually defined to refer to accused persons or suspects of crime who represent themselves in criminal proceedings either wilfully or otherwise constrained by financial and other reasons from hiring the services of a lawyer.

current processes of securing bail in cases of self-representation in Part 3. Part 4 explores a number of procedural and policy adjustments to ensure effective realisation of the right to be considered for bail pending trial for the benefit of self-represented accused persons, while part 5 concludes with a summary of the arguments.

II. Fundamentals of bail in the criminal justice system of Ghana

The reason for seeking bail pending a criminal trial is to simply restore the personal liberty of the accused until s/he is otherwise found guilty of the crime charged and consequently convicted.[6] Essentially, bail operates as a procedural mechanism through which the criminal adjudicatory system precludes pre-conviction punishment of the accused. The main idea centres on preserving the right to personal liberty and guaranteeing the individual's entitlement to physical freedom.[7] The prominence of the right to personal liberty, from a pragmatic theory of human rights enforcement, lies in its pivotal role in securing the full gratification of all the other rights and freedoms guaranteed under the Constitution.[8] But like many other constitutionalised rights, the enjoyment of the right to personal liberty is not absolute.[9] Its realisation is balanced against the legitimate interests of the community, with particular regard to the protection and safety of the general public.[10] As a result, the provisions of article 14 permit deprivation of the liberty of the individual based on a number of constitutional considerations relevant for specific judicial and social purposes.[11] Among them is clause 1(g) of article 14, which particularly sanctions deprivation of the individual's personal liberty 'upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana.' Resultantly, state investigative agencies and the courts are vested with authority to detain and remand accused persons and suspects of crime in custody, in appropriate cases pending criminal investigations, arraignment and/or trial.

In principle, the exercise of this power to restrict the liberty and freedom of movement of accused persons pending trial and before their conviction is in turn gauged against certain fundamental principles undergirding the system of criminal adjudication. The revered right of accused persons and suspects of crime to be presumed innocent until they have pleaded or been found guilty of the offence charged after a trial remains a key

[6] *Mireku v The Republic* [1997-98] 1 GLR 915, 916 (HC). For the criminal suspect, it equally aims at restoring his or her personal liberty pending investigations.

[7] It is guaranteed under the Ghana Constitution 1992, art 14(1), which provides in part that '[e]very person shall be entitled to his personal liberty.'

[8] See Bamford-Addo JSC in *British Airways v Attorney-General* [1997-1998] 1 GLR 55, 65 (SC). The same observation is made by the Human Rights Committee, *General Comment 35, CCPR/C/GC/35* (2014) para 2.

[9] This fundamental trait of the right to personal liberty is expressly recognised under international law. See, eg Human Rights Committee (n 8) para 10.

[10] See Ghana Constitution, art 12(2), providing that '[e]very person in Ghana (…) shall be entitled to the fundamental human rights and freedoms of the individual contained in this chapter but subject to respect for the rights and freedoms of others and for the public interest.'

[11] See clause 1 of art 14 generally.

procedural safeguard in that regard.[12] Within the framework of due process protections in criminal proceedings, the presumption of innocence provides the needed precautionary measure that seeks to obviate punishment before conviction.[13] To this end, the criminal justice system applies bail as a medium to connect accused persons to criminal trials, while ensuring that their personal liberty is not unduly restricted so as to connote pre-conviction punishment. An ample definition of bail within the legal environment of criminal proceedings in Ghana is given by Amissah as follows:

> A person in custody is said to be allowed bail, if he provides surety to those by whose authority he is in custody, binding him to appear before that authority or some other authority at a given time and place, and on that account, he is set at liberty until the day appointed for his appearance. Strictly speaking, bail is the surety or sureties who procure the release of a person under arrest, by becoming responsible for his appearance at the time and place designated, and submit himself to the jurisdiction and judgment of the court.[14]

Two heads of law govern the regime of bail under the constitutional framework of due process protections in Ghana. The first, which also provides the general state of the law on pre-trial release, describes bail in terms of a procedural privilege subject the discretionary powers of the courts, rather than a right of the accused. Bail as a discretionary privilege derives from the cumulative effect of article 14(1) of the Constitution which guarantees the right of every person to his or her personal liberty,[15] and article 14(3) which requires accused persons who, upon arrest, are not released within 48 hours, to be brought before the court.[16] The duty of the court in bail proceedings held under this head of law is to assess the legality of the detention of the accused, and the need or otherwise for his or her continuing incarceration pending trial.[17] This constitutional mandate underlies the power

[12] See Ghana Constitution, art 19(2) (c), which is a ratification of art 14(2) of the International Covenant on Civil and Political Rights, (ICCPR), and art 7(1) (b) of the African Charter on Human and People's Rights (ACHPR).

[13] *Martin Kpebu No.2* (n 1) 197, where Benin JSC adds another feature to the effect that the presumption of innocence acts as 'a preventive measure against the state from successfully employing its vast resources to cause greater damage to a person who has not been convicted than he can inflict on the community.'

[14] ANE Amissah, *Criminal procedure in Ghana* (Sedco Publishing Ltd 1982) 181. See also *Republic v Gorman* [2003-2004] SCGLR 784, 796 - 97 stating that 'the issue of bail primarily addresses the freedom or lack thereof of the accused to "walk the streets" after being charged with an offence and it is principally associated with the pre-trial phase, although it has obvious consequences for the liberty of the accused during the trial.'

[15] Ghana Constitution (n 7).

[16] This provision implies the power of the courts to *suo motu* consider bail for such accused persons brought before them. Discussed below at 3.1.

[17] The obligation of courts under this provision is provided under international law. See eg Human Rights Committee (n 8) para 34.

of the Judiciary as an independent, objective and impartial institution to evaluate the legitimacy of pre-trial detentions, for purposes of ensuring a fair adjudicatory procedure.[18] Though the grant or refusal of bail in this context is generally discretionary,[19] the law delimits the bounds of exercising this judicial authority. Particularly, the criminal procedural system adopts a constitutional presumption of bail, which requires courts to be disposed to granting bail irrespective of the nature and seriousness of the offence charged,[20] unless there are good reasons falling within certain defined exceptions which justify a refusal of bail.[21] To that effect, the exercise of judicial discretion to grant or refuse bail is fettered by relevant provisions of the Criminal and other Offences (Procedure) Act (COOPA).[22] In determining whether or not to grant bail, section 96 of the COOPA provides a legal matrix governing the grant or refusal of bail by listing a range of factors to be taken into account, which essentially structure the exercise of the court's discretion.[23] A factor or combination of factors may justify a denial or grant of bail, depending on the weight of persuasion that a trial court attaches to the facts of the case and personal circumstances of the accused.[24] In practice however, few would doubt the truth of the proposition that the fetter on the exercise of discretion is lax, as judges exercise wide discretion in establishing the factors justifying the grant or refusal of bail, in the absence of detailed guidelines regulating the standards and strategies for assessing them. It is therefore not surprising that in regular trials, many courts go beyond the matrix

[18] Ibid, para 32, stating that the right seeks to 'bring the detention of a person in a criminal investigation or prosecution under judicial control.'

[19] *Gorman* (n 14) 797.

[20] This is the general position of the law following the abolition of the concept of non-bailable offences which conversely imposed a presumption against bail in cases of terrorism, treason, subversion, murder, robbery, narcotic offences, hijacking, piracy, rape, defilement, escape from lawful custody, extradition. See Criminal and other Offences (Procedure) Act 1960 (COOPA 1960), s 96(7) as amended.

[21] *Gorman* (n 14) 797.

[22] Act 30 of 1960. The COOPA generally legislates the procedural regime governing the conduct of all criminal trials in Ghana. See Preamble.

[23] COOPA 1960, s 95(6) guarantees the power of the court to refuse bail upon being satisfied of the likelihood that the accused person (a) may not appear to stand trial; (b) may interfere with a witness or the evidence, or in any way hamper police investigations; (c) may commit a further offence when on bail; or (d) is charged with an offence punishable by imprisonment exceeding six months which is alleged to have been committed while he or she was on bail. In determining or assessing the risk of flight probability, the court shall consider (a) the nature of the accusation; (b) the nature of the evidence in support of the accusation; (c) the severity of the punishment which conviction will entail; (d) whether the [accused person] having been released on bail on a previous occasion has willfully failed to comply with the conditions of the recognizance entered into by the [accused] on that occasion; (e) whether or not the accused has a fixed place of abode in the Republic, and is gainfully employed and (f) whether the sureties are independent, of good character and of sufficient means. See COOPA 1960, s 95(6).

[24] The ultimate test in support of granting bail is the likelihood that the accused person when granted bail may appear to stand trial. See *Republic v Registrar of High Court, Ex p Attorney-General* (1982-83) GLR 407, 417 (SC); Amissah (n 14) 183.

of statutory factors to deny bail on extraneous grounds, including for example, the widely used pretext of the prosecution that 'investigations are still on-going.'[25]

Where accused persons are denied bail and remanded in custody pending trial, the law imposes a duty to uphold their constitutional right to a fair trial within reasonable time.[26] This procedural requirement establishes the second head of law on bail in the form of a direct constitutional right to pre-trial release, when accused persons who are kept in pre-trial detention are not tried within a reasonable time. According to article 14(4) of the Constitution:

> Where a person is arrested, restricted or detained [(a) for the purpose of bringing him before a court in execution of an order of a court, or (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana] is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

The Supreme Court, in the case of *Martin Kpebu v Attorney-General*[27], underlined the essence of the right to bail in this context, as providing 'the principal antidote against lengthy pre-trial incarceration periods, which unavoidably are a restriction on liberty, and which also militate against the presumption of innocence.'[28] This procedural right to bail under article 14(4) imposes a duty[29] on all trial courts to automatically grant bail where criminal proceedings suffers unreasonable delay.[30] The sole criterion for admitting accused persons to bail in furtherance of this right rests on the courts' determination of the likelihood that the trial cannot be had within a reasonable time, taking into account the peculiar circumstances of each case.[31] Once this factor is positively determined, the grant

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[25] In fact, it is said that a person may simply be denied bail where public confidence in the administration of justice may be disturbed by freeing him or her pending investigation, trial and sentence. See Adinyira JSC in *Martin Kpebu No.2* (n 1) 272.

[26] This is guaranteed under Ghana Constitution, art 19(1). It provides as an element of the right to a fair trial that 'a person charged with a criminal offences shall be given a fair hearing within reasonable time by a court.'

[27] (n 1).

[28] Ibid 218.

[29] See, eg Hohfeld on the Jural Correlatives. The correlative of duty is right. WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 Yale LJ 16, 32. For a short introduction on Hohfeld, see P Eleftheriadis 'The analysis of property rights' (1996) 16 Oxf. J Leg. Stu. 31.

[30] *Okyere v The Republic* [1972] 1 GLR 99 104 (HC); See also Human Rights Committee (n 8) para 37.

[31] See, eg the common law position adopted in Ghana and enunciated by Lord Herschell L.C in *Hick v Raymond & Reid* [1893] AC 22, 29: 'I would observe (…) that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances (…) the only

of bail is almost certain and definite. Consequently, the discretion of the judge to refuse bail remains fundamentally restrained in bail applications made to enforce the right to a speedy trial within reasonable time.[32]

In all cases however, the reasonableness or otherwise of the length of the trial is determined by reference to the actions of state agencies responsible for the swift and timeous prosecution of criminal offences, namely the prosecution and the courts.[33] The power to determine which period of time is reasonable within the circumstances of each case is vested in the courts. Of note, there are no definitive legislative or judicial guidelines governing the determination of the question of 'unreasonable time'.[34] This state of the law also presents a fundamental gap in the law which resultantly leaves the courts with a great amount of discretion.

Despite the relatively plain rules establishing the heads of bail in criminal matters, the general procedures governing bail applications are only known in vague outlines.[35] The rules of criminal procedure stop short of particularising the manner in which bail applications are to be made to the courts or the procedure for seizing the jurisdiction of the court to consider bail. They do not provide any clear or detailed guidelines on the roles and responsibilities of accused persons, the prosecution and judges in considering bail applications. In the context of this paper, the processes for invoking the courts' power to consider bail pending criminal proceedings are examined from the perspective of self-represented accused persons within the current procedural framework which is largely designed to rely on legal assistance for the accused.

III. Current practices for securing bail in cases of self-representation

The procedure for enforcing the right to personal liberty through the grant of bail in adversarial criminal proceedings generally envisages legal assistance for accused persons in custody.[36] However, the legal regime governing the processes for securing bail in Ghana gives no special consideration to self-represented accused persons, and very little effort is made to address the procedural gap created by the absence of defence counsel in trials of such accused persons. This is regardless of the procedural complexities and physical restrictions attendant to the procedure for applying for bail, when accused

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sound principle is that the "reasonable time" should depend on the circumstances which actually exist.'

[32] *Okyere* (n 30) 104. See also Modibo Ocran JSC, quoting with approval Taylor J in *Okoe v The Republic* [1976] 1 GLR 80, 95-96 (HC) in *Gorman* (n 14) 799.

[33] *Brefor v The Republic* [1980] GLR 679 702 (HC).

[34] See *Clarke & Garrison v Attorney-General* [1960-93] GR 448, stating that 'what is reasonable time' cannot be prescribed but must be determined from case to case'. Cited with approval by Adinyira JSC in *Martin Kpebu No.2* (n 1) 274.

[35] The legal framework of bail generally consists of the Constitution 1992, art 14 and COOPA 1960, s 96. Together, they merely enunciate the power of courts to grant bail, as well as the broad factors that may justify the grant or refusal of bail.

[36] Human Rights Committee (n 8) para 34, emphasising that 'In the hearing that ensues, and in subsequent hearings at which the judge assesses the legality or necessity of the detention, the individual is entitled to legal assistance, which should in principle be by counsel of choice.'

persons are remanded in custody and act without legal assistance. There is a uniform procedural regime for bail applications for all accused persons, whether acting through defence counsel or representing themselves during the trial. Evidently, accused persons appearing through counsel are in practical terms better placed to overcome the procedural hurdles and matters of personal competencies arising from the complexities of the law and inherent in the processes of bail applications in Ghana. Contrariwise, in cases of self-representation, the procedural benefits associated with legal representation are excluded.[37] Notwithstanding these procedural realities, the status of self-representation has not been deemed deserving of peculiar attention.

In practice, the duty to apply for and secure bail in all instances of self-representation lies primarily with the accused person who is desirous of securing his or her pre-trial release, though a core obligation to consider and grant bail at the court's own motion is also inferred from the powers of judicial officers in criminal proceedings. In other words, the modes of accessing bail in cases of self-representation are expressed in the power of the court to consider bail for an accused person either *sua sponte*[38] or pursuant to an application for bail made by or on behalf of the accused.

III.1 Courts' sua sponte authority to consider bail for unrepresented accused persons

The power of trial courts to consider bail on their own motion when accused persons first appear before them or at any time in the course of proceedings is not explicitly prescribed. It is however implied in the joint effect of the provisions of article 14(3) of the Constitution and section 96 of the COOPA discussed above.[39] Section 96(1) of the COOPA guarantees the power of the court to grant bail to any 'person who appears or is brought before it on a process or after being arrested without a warrant.' Though stopping short of detailing the nature of the procedure by which bail may be considered, the substance of the provision implies a process of bail consideration, either pursuant to a motion for bail filed by or on behalf of the accused person or a *sua sponte* determination of bail by the court, generally upon the first appearance of the accused. Consequently, courts do sometimes consider bail for accused persons in the course of proceedings at their own behest.

The lack of express statutory duty of the courts to consider bail for accused persons, on their own motion and on the merits of each case, has contributed to the diminished judicial responsibility in terms of ensuring that every accused person is duly considered for bail at the first appearance in court. To some extent, the rhetoric of bail in this context is immerged in the over-pontification of the discretion of the judge which reduces bail to a matter of 'favour' or 'grace'. It is not uncommon for some judges in trial courts to perfunctorily deny bail even in deserving cases at the first appearance of accused persons

[37] 'When an accused manages his own defence, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.' *Faretta v California* 422 U.S. 806, 836 (1975).

[38] It stands for 'of its own accord'. It is used interchangeably with '*suo motu'* which stands for 'on its own motion'.

[39] See n 15, n 16 & n 23 above.

in court, and to offer to consider bail upon formal application being made by remanded accused persons in subsequent adjournments. The high number of remanded accused persons, in both prison and police custody, attests in part to this widespread disposition of some courts.[40] It is equally worth noting that there are no statutory guidelines or regulations that mandate courts to make a definitive determination of bail and give reasoned rulings on their decision granting or refusing bail *sua sponte* at the first appearance of self-represented accused persons who fail to apply for bail.

In fact, stakeholders in the administration of criminal justice in Ghana are aware of this procedural concern and the attendant hardship that it brings to bear on self-represented accused persons seeking bail, especially while remanded in pre-trial custody.[41] To that effect, the Criminal Bench Book[42], which guides District Courts[43] Magistrates in criminal trials, partially addresses the problem. Among other guidelines, it directs District Magistrates to *suo motu* consider bail for self-represented accused persons upon their first appearance before the court.[44] There is no clear directive for the implementation of this support system before the Circuit Courts and High Court, which also have original jurisdiction in criminal trials. This vacuum does not however detract from the practice whereby some trial judges in the circuit courts and High Court resolutely exercise their power to *suo motu* consider and grant bail to deserving unrepresented accused persons who are otherwise unable to enforce their rights in person.

It is also noted that these trial guidelines in the Criminal Bench Book of the District Courts are not binding. They therefore stop short of imposing a legal obligation on trial magistrates presiding over proceedings involving self-represented accused persons. Furthermore, the guidelines do not vest self-represented accused persons with a right to be automatically considered for bail, breach of which may entail special legal remedies for affected and disgruntled accused. There are thus no legal consequences for failure of the District Courts, and any other courts for that matter, to consider bail for self-represented accused persons on their own motion. The only relief for such accused persons seeking pre-trial release is to take steps to personally apply for bail (self-application).

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[40] Accused persons remanded in prison custody alone constitute 13.4% of the prison population in Ghana as of January 2018. See 'World Prison Brief Data – Ghana' <www.prisonstudies.org/country/ghana> accessed 01 March 2018.

[41] See eg n 4 above.

[42] Judicial Training Institute of Ghana, *The Judiciary of Ghana – Criminal Bench Book* (2011). It was developed by the Judicial Training Institute on behalf of the Judiciary and the Judicial Service of Ghana.

[43] The hierarchy of the courts with original criminal jurisdiction in Ghana appears in the order of ascendency as follows: The District Court at the bottom, followed by the Circuit Courts, then the High Court and Regional Tribunals.

[44] Judicial Training Institute of Ghana, *The Judiciary of Ghana* (n 42) 9, para 1(f): 'Where the accused pleads not guilty, the accused is admitted to bail upon an application by his lawyer. If the accused person is unrepresented the court on its own motion (*suo motu*) will consider if it is appropriate to admit accused to bail.'

III.2 Self-Application

Self-application is one of the commonest procedures that self-represented accused persons adopt to secure bail pending trial in Ghana. The formality of the bail application process ideally requires legal assistance for persons not learned in the law. In circumstances where the accused is however unrepresented, his or her only procedural choice is to make the application in person.[45] In practice, many accused persons assume the task of securing pre-trial bail in person. The Open Society Foundations' report on the Socio-Economic Impact of Pre-trial Detention in Ghana of 2013 suggested that only 27% of persons detained had assistance of counsel. As a result, many self-represented accused persons are led to handle their bail applications before trial courts by themselves.[46]

An accused person seeking to be released on bail either makes an oral application or files a motion supported by an affidavit, deposing to the facts leading to his or her arrest, the nature of the offence charged, and the preparedness of the accused person to give bail. Oral pleas for bail made in court by self-represented accused persons are generally taken as bail applications. Invariably, a formal application is more desirable and the norm. This assists the court to keep full records of the grounds of the application, the respective arguments of the parties, while reinforcing the duty of the court to give a reasoned ruling on the motion. In practice, all bail applications initiated by self-represented accused persons, like any other motion for bail led by counsel, are generally responded to and contested by the prosecution. The duty of the court in considering bail applications is to do justice between the prosecution and the accused, while balancing the right to personal liberty of the accused against the general public interest and safety.[47]

In hearing bail applications instituted by self-represented accused persons, the courts usually adopt a less rigid procedural posture, devoid of the technicalities associated with the core partisan adversarial argumentation. An example of such judicial practice is exhibited in the case of *Abiam v The Republic*.[48] The accused who was charged with the offence of attempted murder of his wife was detained in custody pending trial. He made an oral application on the day that he was unrepresented in court, to be admitted to bail on ground of ill health pending the determination of the case. The application was contested by the prosecution, which erroneously argued that the offence of attempted murder was of the same nature as the offence of murder for which bail must be denied. In pursuance of its duty to ensure a fair consideration of the matter, the court eschewed the raw argumentative procedure associated with adversarial contests where both parties are legally represented. The trial judge rather delved into the substance and merits of the application by refuting the legal basis of the prosecution's submissions in opposition to the application. He paid due regard to the facts before him and the applicable law, the opposing arguments of the prosecution, the fact that the trial could not be conducted within a reasonable time, as well as the status of the unrepresented accused. Eventually,

[45] Amissah (n 14) 183.
[46] Commonwealth Human Rights Initiative, UNDP & Open Society Justice Initiative, *Socio-Economic Impact of Pre -Trial Detention in Ghana* (2013) 35.
[47] Ghana Constitution, art 12(2). See also, Wood JSC in *Martin Kpebu No. 2 (*n 1) 223.
[48] [1976] 1 GLR 270 (HC).

upon satisfying himself that the accused person would appear to stand his trial, the court admitted him to bail with 2 sureties to be justified and conditioned upon a weekly report to a police station until the final determination of the case. This ruling accords with a principle regarding bail considerations as enunciated by Anin J in the case of *Issah Amadu v. The Republic*.[49] The learned judge in this case underscored the fact that all bail applications must be considered by the court 'in the light of the facts presented, the relevant law and *the circumstances of the accused*, as the court is able to ascertain upon interaction with the accused or his counsel'.[50]

Beyond this liberal procedure however, practical issues attendant to the competencies of self-represented accused persons to formally file a motion for bail together with its supporting affidavit in line with laid down procedural requirements inhibit the realisation of the right to bail. In most cases, unrepresented accused persons demonstrate abject ignorance of their right to be considered for bail and exhibit manifest incompetence in initiating bail proceedings on their own. To such self-represented accused, the procedure for applying for bail may be as complex as determining the particular stage of the proceedings in court, at which bail applications are made. The magnitude of the procedural challenges is amplified by the lack of institutional support for self-represented accused persons in criminal proceedings. It is commonplace for self-represented accused persons to call upon lawyers at random in court in plea of assistance. A good number of them appeal to lawyers present at the bar during proceedings to seek bail on their behalf.[51] The spontaneity of the call and the fact that the solicited lawyer has very little or no knowledge of the substance of the case and the accused person in distress make the procedure unattractive to members of the Bar. There are, however, few human rights lawyers and organisations dedicated to the mission of providing in-court assistance to self-represented accused persons during bail applications.[52] Undoubtedly, these laudable efforts of private persons and civil societies do not go far enough to deal with the magnitude of the problem across all courts and jurisdictions where a great number of accused persons do not have the benefit of legal assistance.

III.3 Other common procedural difficulties affecting self-represented accused persons

Certain practical difficulties also arise from the statutory procedures that govern the process of bail application in cases of self-representation. These are more apparent in situations where self-represented accused persons on remand are required to seek bail in courts other than those before which they are arraigned. Two procedures are identified with this practice. The first applies to bail applications during committal proceedings in

[49] [29/01/2008] Case No. D16/04/08 (unreported) (HC).

[50] ibid. Emphasis added.

[51] See observation by Suurbaareh J in *Mywill Limited v Issah Abdulai* [25/02/2008] No. E12/38/07(unreported) (HC).

[52] See eg HelpLaw Ghana, an NGO of lawyers headed by Delanyo Alifo, Esq. in Ghana dedicated to assist indigent self-represented accused persons in criminal proceedings. Other programmes of intervention include the Access to Justice Project run by the African Center for Law and Ethics in Accra and the Justice for All Programme instituted by the Government of Ghana.

trials on indictment, while the second relates to review applications of orders made by either the Police or District Court in considering bail for suspects or accused persons.

III.3.1 Procedures for bail application during committal proceedings

Trials on indictment involve a highly formalized procedural regime usually applicable to proceedings involving serious offences.[53] All offences tried on indictment begin with committal proceedings which take the form of a preliminary hearing before the District Court.[54] The purpose of the committal proceedings is to determine whether the prosecution has a case for which the accused person must be made to stand trial.[55] They precede the actual trial before the Circuit Court or the High Court. In practice, only persons charged with the offence of murder, among the list of offences triable on indictment, are automatically assigned defence counsel at the trial stage.[56] Thus all first degree felonies not punishable by life imprisonment do not automatically entitle the accused person to legal aid.[57] There are no judicial directives requiring persons tried on indictment for offences not punishable by death to be mandatorily assigned counsel during committal proceedings.[58] As a result, a number of accused persons appear unrepresented by counsel at this preliminary stage of the proceedings.

A District Court Magistrate presiding over committal proceedings has no jurisdiction to consider bail applications regarding the offences for which the accused person is indicted.[59] Unrepresented accused persons in committal proceedings, who desire bail pending trial, must apply to the Circuit Court or High Court with competent jurisdiction to try the substantive offence charged. Similarly, all bail applications made on the ground that committal proceedings have unreasonably delayed must be made before the Circuit Court or High Court. For an accused person remanded in custody pending committal proceedings, the practical utility of this procedure for bail application presents serious operational challenges. In such instances, the processes involved in preparing a bail application, the filing of the processes, the choice of appropriate forums, and the identification of the rightful parties to the application are all shrouded in legal procedures and technicalities beyond the reach of legally unskilled accused persons acting without

[53] They are conducted by a judge with the assistance of a jury or assessors. See COOPA 1960, ss 204, 242 - 262. All first degree felonies are tried on indictment. They generally include all offences designated by the enacting statute as first degree felonies. Where the punishment is not specified, a first degree felony may carry a sentence of up to life imprisonment. See ibid, s 296(1). All capital offences are also tried on indictment. ibid, s 2(2). In addition, the Attorney-General may decide to try on indictment any offence for which the mode of trial is not specifically prescribed by the enacting statute. See ibid, s 2(3).

[54] See COOPA 1960, ss 181, 44(1) & 2(4) (a).

[55] COOPA 1960, s 184(4).

[56] See MK Amidu, 'The right to state appointed counsel in criminal justice administration under the Constitution, 1992' (1992) RGL 159, 167; Amissah (n 14) 207.

[57] An example includes the offence of rape which is a first degree felony punishable by a term of imprisonment of up to 25 years. See Criminal Offences Act 1960 (COA 1960), s 97.

[58] See eg Amidu (n 56) 167.

[59] Benin & Dotse JJSC in *Martin Kpebu No.2* (n 1) 208 & 234 respectively.

legal assistance. In addition, the process of filing bail applications before courts other than the remanding court adds to the complexity of the procedure. Without institutional assistance, the practicability of the bail application process is hindered by the physical restriction of the self-represented accused.

III.3.2 Procedural constraints to triggering the supervisory power of the circuit court and high court in bail matters

Section 96(2) of the COOPA gives the Circuit Courts and High Court of Ghana concurrent jurisdiction to review orders imposed by District Courts and the Police, either refusing bail or granting bail on excessive terms.[60] It is essentially a supervisory jurisdiction pursuant to which the Circuit Courts and High Court directs the District Court or the Police to either grant bail or fix a reasonable amount of bail.[61]

In fact, the power of the Police to grant bail to suspects of crimes pending criminal investigations is recognised in Ghana.[62] The Constitution and the COOPA give the Police authority to detain suspects of crime for a period not extending 48 hours for purposes of crime investigations.[63] Where investigations are unlikely to be completed within the stated period after arrest, the Police have the option to grant bail to the suspect to appear at some specified date, time and place pending investigation.[64] Thus, a suspect in the hands of the Police or an accused person brought before the District Court for trial, whether represented by counsel or not, reserves the right to apply to the Circuit Courts or High Court to challenge either an order refusing bail or the excessiveness and unreasonableness of the amount of bail granted.[65]

The supervisory jurisdiction of the Circuit Courts and High Court is officially triggered by filing a formal application seeking a review of the orders of the Police or District Court.[66] At this stage, the misfortunes of self-represented suspects in police detention or self-represented accused persons remanded in custody arise. Similar to the procedure in committal proceedings, this mechanism of bail involves invoking the jurisdiction of a court other than the court or body before which the detained self-represented accused person or suspect originally makes his or her appearance. Consequently, the same procedural challenges arising in bail applications by self-represented accused persons in committal proceedings apply.

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[60] It provides in material part that 'the High Court or a Circuit Court may direct that a person be admitted to bail or that the bail required by a District Court or police officer be reduced.'

[61] See *obiter dictum* of Mensa Boison J in *Boateng v The Republic* [1976] 2 GLR 444, 446 (HC).

[62] In the domestic legal jargon and criminal jurisprudence, this process is referred to as 'police enquiry bail'.

[63] See Ghana Constitution, art 14(3) (b) and COOPA 1960, s 15(1), as amended by the Criminal procedure Code (Amendment) Act 2002 (Act 633 of 2002), s 2. The same power is given to other state investigative agencies including the Bureau of National Investigations (BNI) and the Economic and Organized Crime Office (EOCO).

[64] Ghana Constitution, art 14(3) (b) and COOPA 1960, s 15(1).

[65] COOPA 1960, s 96(2).

[66] ibid. See also Amissah (n 14) 184.

Twumasi J in *Marfo v The Republic*[67] broadly interpreted this supervisory power and reaffirmed the authority of the court to *suo motu* engage this process of bail consideration where necessary. He ruled that the Circuit Courts and High Court, in appropriate cases, could exercise their supervisory powers under section 96(2) of the COOPA, on their own motion, where they are informed that the District Court has or the Police have improperly withheld or granted bail on unconscionable terms. This principle of judicial interventionism stands to relieve accused persons who are unrepresented by counsel and who are incompetent to surmount the procedural hurdles associated with the process, from the burden of having to initiate the bail review procedure by themselves. The lingering snag, despite these efforts and goodwill of the courts, relates to the lack of institutional support and prescribed procedures to direct how such facts are brought to the notice of the Circuit Courts or High Court, when the self-represented accused is remanded in custody.

The various procedural limitations affecting self-represented accused persons' right to access bail are manifest in the mundane practices of courts. It is not uncommon to find accused persons remanded in police and prison custody for unreasonably long periods of time and sometimes 'forgotten' and 'abandoned' mainly due to their inability to formally apply for bail in person. Usually, it takes the support of lawyers and other benevolent human rights institutions to assist unrepresented accused persons in enforcing their right to bail in deserving cases.

Francis Agyare v The Republic[68] remains a sensational case that exposed the phenomenon of unreasonable detentions of accused persons and unreasonable delays in criminal proceedings in Ghana. The accused person unrepresented by counsel was arrested on January 5, 1994, in a police swoop and was remanded by the District Court in prison custody pending investigations. He was not given the opportunity to appear in court again for 14 years, until his release on 29 May 2008, under the Justice for All Programme established by the Government of Ghana to among others assist accused persons on remand. Similarly, in *Barnabas Adjei v The Republic*,[69] the accused/applicant was unrepresented by counsel. He was arraigned before the District Court and remanded in custody upon a charge of possessing narcotic drugs in or around 2001. He spent ten years on remand without trial. It took the intervention of a lawyer to file a motion before the High Court to seek his release under article 14(4) on the ground of unreasonable delay. These are not cases in isolation, as several more self-represented accused suffer the same fate.

There have been no concerted efforts to holistically address the problem of access to bail from the broader ideological perspective of self-representation within the adversarial framework. The lack of institutional support for self-represented accused persons in the criminal justice system of Ghana remains the overriding concern. The public legal aid

[67] [1981] GLR 722, 725 (HC).
[68] 2014 (unreported) (HC).
[69] [30/03/2009] Suit No. E12/32/09 (unreported) (HC).

schemes have also been of little assistance to financially deprived accused persons.[70] They have simply not been efficient enough to provide the needed assistance to accused persons in need of legal representation.[71] The more readily available system of court-appointed counsel has generally not been utilised by the courts to assist self-represented accused persons during court proceedings, especially in bail applications.[72] This is despite the wide powers that this legal aid scheme vests in judges to assign counsel to deserving accused persons who appear unrepresented at trial.[73] Unfortunately, the Judiciary has not been sufficiently proactive in ensuring the full implementation of this authority.

IV. Easing up the process of accessing bail for self-represented accused persons

The constitutional presumption of bail in respect of all offences charged and the guarantee of the right to bail in trials which suffer unreasonable delays will be mere rhetoric, if the law does not provide the means to their realisation, especially in cases of self-representation. The need to secure a workable procedure through which all self-represented accused persons can effectively benefit from the guarantee of the right to pre-trial release is imperative. Any deprivation of the opportunity to apply for or to be considered for bail for any reasons, including lack of defence counsel, occasions an infringement of the accused person's right to bail, and invariably of the rights to personal liberty and presumption of innocence. For unrepresented accused persons not learned in the law and unable to personally apply for bail, reliance on the pro-activeness of the court to consider bail on their own motion provides the needed procedural relief. The decision to remand accused persons pending trial is a judicial one and rests at the doorstep of judges and magistrates.[74] Consequently, the ultimate responsibility regarding the usefulness and legitimacy of pre-trial detentions of accused persons must equally rest with them. Furthermore, the need for an effective institutional support system for unrepresented accused persons is indispensable to deal with the internal procedural challenges arising from inter-court referrals for bail applications in committal proceedings and bail review applications.

[70] There are basically two public systems of legal aid, being the Ghana Legal Aid Scheme established under the Legal Aid Scheme Act 1997 and the Court-Appointed Counsel Scheme established under section 114 of the Courts Act 1993.

[71] There are only 23 lawyers under the Ghana Legal Aid Scheme for a population of 28 million people. <www.amnesty.org/en/countries/africa/ghana/report-ghana/> accessed 24 February 2018.

[72] Courts Act 1993, s 114(1) provides that 'The Supreme Court, the Court of Appeal, the High Court or Regional Tribunal may assign a lawyer by way of legal aid to any party to any proceedings before the Court or Tribunal where the Court or Tribunal is of the opinion that it is desirable in the interest of justice that the party should have legal aid and that he is financially unable to obtain the services of a lawyer.' The same power is given to the District Courts and Circuit Courts to assign counsel to indigent accused persons subject to the Chief Justice's approval.

[73] ibid.

[74] Benin JSC in *Martin Kpebu No.2* (n 1) 199.

IV.1 Making practical sense of self-represented accused persons' right to be considered for bail through judicial engagement

Failing to exercise the duty to *suo motu* raise and re-evaluate the conditions governing the detention of self-represented accused persons, after they have been remanded in custody at their first appearance in court or in the course of proceedings, presumes that the continuing detention is legitimate, at least until the accused makes an application for bail. Unfortunately, this posture of judicial restraint does more harm than good to remanded lay-accused persons who are constrained by their ignorance of the theories and practice of the law from seeking pre-trial bail. The same observation applies even more compellingly in cases of unreasonable delay where accused persons retain an unqualified right to bail. The *Barnabas Adjei* case presents a classic description of the everyday-life of a number of unrepresented accused persons abandoned in custody, in clear cases where trials have unduly and unreasonably delayed. Eventually, the decisive approach to addressing the procedural challenges arising in bail applications by self-represented accused person requires reliance on the pro-activeness of the courts.

Where steps are taken during criminal proceedings which restrict any of the due process rights of accused persons, heightened judicial scrutiny must be triggered. This obligation primarily flows from the constitutional mandate assumed by all officers called to practice as judges and magistrates in Ghana. In their appointment to the office of adjudicators in legal proceedings, magistrates and judges take the 'Judicial Oath' under the Constitution to 'at all times uphold, preserve, protect and defend the Constitution of the Republic of Ghana.'[75] As custodians of the Constitution, they are vested with authority, and also entrusted with the duty to protect and enforce all constitutionally guaranteed rights of the individual. This judicial duty obviously includes the protection of due process rights of accused persons, including the right to personal liberty and the implied right to be admitted to bail in deserving cases.[76] This judicial duty to uphold and guarantee accused persons' due process rights irrespective of their status of legal representation is also reinforced by Article 12 of the Constitution.[77] This is a provision which crystallizes in unambiguous terms, the constitutional mandate of courts to uphold and protect all human rights. The provision, by necessary implication, underlies the overarching responsibility of judges and magistrates to safeguard the rights and interests of accused persons appearing before them in criminal proceedings, especially when unrepresented.

A more ethical duty of judges to enforce the rights of self-represented accused persons and protect their interests arises from their structural position in the adversarial procedure of criminal trial. Sight is not lost of critics that have long underscored the incompatibility of active judicial engagement with the determinative features of party

[75] Ghana Constitution 1992, Judicial Oath.

[76] Ghana Constitution, art 14 generally, as discussed in Part 2 above.

[77] It provides that 'The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies, and where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the courts as provided for in this Constitution.'

autonomy and partisan control of proceedings in adversarial proceedings. Their greatest concern is to insulate the judge from all forms of detractions from their presumed traits of passivity and impartiality.[78] It must however be noted that the rigid conceptualisation of the duty of judge in the adversarial criminal jurisprudence is irresistibly giving way to a more progressive interpretation in modern times.[79] Especially in cases where accused persons are unrepresented in criminal proceedings, the courts in Ghana endorse a practice of heightened judicial engagement for purposes of mitigating the procedural deficiencies arising from the lack of legal assistance for the accused. They have affirmed their role in terms giving full protection to unrepresented accused during trial. Osei-Hwere J long articulated this position in the case of *Adusei II v The Republic* that 'It is without doubt, the role of the judge in the fair administration of criminal justice, to assist an accused person who is not represented by counsel in putting his defence before the court.'[80]

This duty must be reasonably interpreted to include protecting the procedural rights of self-represented accused persons. Consequently, it behoves judges to ensure that unrepresented accused persons are not prejudiced in the course of proceedings, simply by reason of their ignorance of the governing substantive rules and procedural requirements.[81] In practical terms, the courts must ensure that whenever accused persons are unrepresented in the course of proceedings and unable to apply for bail, their right to personal liberty is not curtailed, until the trial judge establishes that the detention is reasonably necessary to secure the attendance of the accused at the trial.[82] This approach implies a duty of courts to always consider bail on their own motion and a rejection of the presumption of legitimate deprivation of personal liberty, in all cases where self-represented accused persons are detained pending trial.

Engaging judges with the overarching responsibility to closely monitor the sequence of detention of self-represented accused persons appearing before them is a compelling tool against unlawful and needless denial of bail. The Human Rights Committee of the United Nations has to that effect determined that a judicial decision to remand accused persons in custody pending trial may be arbitrary, unless it is subject to periodic-re-evaluation of the justification for continuing the detention of accused persons.[83] Where self-represented accused persons are unable to file or apply for periodic review of pre-trial detention orders, the obligation must fall squarely to the courts to pro-actively ensure that such reviews are conducted on behalf of the accused to avert the cycle of unjustified and unwarranted detentions.

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[78] See eg SA Saltzburg 'The Unnecessarily Expanding Role of the American Trial Judge' (1978) 64 VA L Rev 1.

[79] See eg S Landsman 'Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings' (2010) 34 Fordham Urb LJ 273 273.

[80] [1975] 2 GLR 225, 238 (HC).

[81] It is a common duty for all adversarial systems in general. See, eg Landsman (n 79) 276.

[82] This implies a duty of the court to constantly ensure that the standard for the grant or refusal of bail as expressed in n 24 above is met.

[83] Human Rights Committee (n 8) para 12.

IV.2 Dealing with inter-court procedural challenges faced by remanded self-represented accused persons

In addition to reinforcing the commitment of the Judiciary to enforce bail on their own motion when accused persons are self-represented, the internal procedural challenges arising from inter-court referrals for bail applications in committal proceedings and bail review applications also require practical interventions. In such cases, the personal circumstances of lay self-represented accused persons in the adversarial proceedings are literally compounded by their physical detention in custody. A self-represented accused person remanded in custody during committal proceedings before the District Court will find the doors of pre-trial release shut to him or her, in the absence of a procedural mechanism that provides an avenue for automatic consideration of bail before the Circuit Courts or High Court. By virtue of article 14(3) of the Constitution which requires the courts to determine the legality of detention of accused persons beyond 48 hours of arrest, a procedure must be established that ensures that all accused persons in committal proceedings are automatically brought before the Circuit Courts or High Court with jurisdiction to try the substantive offence, for bail considerations. Where the court denies bail at the first appearance, a process of periodic review of the pre-trial detention order must apply till the conclusion of the committal proceedings.

Again, for purposes of engaging the review jurisdiction of Circuit Courts and High Court in respect of bail decisions rendered by the District Court and the Police during investigations under section 96(2) of the COOPA, practical procedural measures are also essential. Already, the Courts Act of Ghana provides a reporting procedure which requires District Court Magistrates to send monthly reports on cases decided or brought before them in any particular month, to the High Court, detailing *inter alia* the offences charged, dates of conviction and sentence, or alternatively dates of acquittal or discharge.[84] The procedure gives the High Court judge, power to vary any sentence or set aside or modify any order of the District Court.[85] The contents of the disclosures to the High Court can usefully be expanded to include orders made by the District Court in respect of bail in cases where the accused is self-represented.

The procedure for reviewing orders made by the Police in respect of bail pending investigation as provided under section 96(2) of the COOPA must be wholly amended to reflect the practical realities of the time. The power of the Police to detain suspects of crime is limited to 48 hours, and an arrested person seeking to challenge a pre-investigation detention must be provided with the opportunity to seek relief within the said period. Thus, a procedure requiring the Police to forward all bail orders to the District Courts within the locality on a daily basis carries a higher prospect of enabling the process of adequate review of bail orders made by the Police during investigations.

Various administrative, financial and logistical supports will be required to implement these remedial actions. For a legal system committed to ensuring the full realisation of due process rights of accused persons, these challenges are not unsurmountable. Furthermore, the value of personal liberty embodied in the idea of bail in

[84] Courts Act 1993, s 52.
[85] ibid.

criminal proceedings is a human rights issue. Consequently, beyond mere judicial directives, the implementation of the remedial measures must be embodied in regulations to give them a binding character. It is only in such circumstances that the entitlement to bail may be fully entrenched under the law, so that its violation may entail the provision of a legal remedy.

V. Conclusion

Attempts by detained accused persons to realise their due process right to be considered for bail without legal assistance face a barrage of technical and procedural difficulties. The existing legal procedures for bail considerations have so far paid little attention to the peculiar status of self-represented accused persons. Generally, beyond their lack of professional knowledge and competencies in asserting their legal rights, the inter-court referrals in bail applications present a number of procedural challenges for such self-represented accused persons. Ultimately, the need to devise a more equitable system of bail administration for self-represented accused persons is crucial and long overdue. The desired remedial mechanism requires a reinforcement of the courts' power to consider bail on their own motion within the broad concept of active judicial engagement. The aim is to surcharge the courts with the ultimate responsibility to determine at periodic intervals in the course of proceedings, the legitimacy of any pre-trial detentions of self-represented accused persons appearing before them. Again, the criminal procedural system needs a reform of the inter-court bail application procedures towards eliminating the various procedural bottlenecks affecting self-represented bail applicants on remand. Self-represented accused persons in adversarial criminal trials deserve peculiar assistance to make up for the absence of defence counsel, and the criminal justice system owes them that, for purposes of realising the values of due process and fair trial.

NON-GHANAIAN CITIZENS WEEP FOR LOSING THEIR LANDS WHILE GHANAIANS LAUGH- 21ST AUGUST 2019: THE DAY OF RECKONING

Dennis Dominic Adjei (JA)*

Abstract

Every person, be he a citizen or not of the Republic of Ghana, has a fundamental human right to acquire property, particularly land, and to use it as an investment, or for residential or agricultural purposes. The 1969, 1979 and 1992 Constitutions guaranteed the right of a person as a legal person to acquire property. However, Article 163 of the 1969 Constitution, Article 189 of the 1979 Constitution and Article 266 of the 1992 Constitution deprive non-citizens of Ghana of their freehold interest or any interest exceeding fifty years in land that they have acquired under the laws of Ghana. It is expected that on 21st August, 2019, the leasehold interests of non-citizens created by the 1969 Constitution shall lapse and they shall be at the mercy of their lessors, being Government of Ghana and those who granted leases to foreigners for over fifty years, for a determination of the nature of their interests, duration, rent to be paid, among other considerations. This article seeks to examine the whole concept of article 266 of the 1992 Constitution, which could be traced back to the 1969 Constitution, regarding compulsory acquisition alien to what is known to the Ghanaian citizenry. The paper will finally consider the interests of those affected, the interests of those who have unjustly benefitted, the lessors and the Government of Ghana, and the legal effect of the compulsory acquisition in disguise. It further seeks to address the impact that the provisions of article 266 on investments in landed property has had in Ghana.

I. Introduction

In ancient times, there were restrictions on land alienation as land was considered as property belonging to the dead, living and unborn from that family or stool which owns the land. The influx of investors in Ghana informed the Ghanaian citizenry and the State to make lands available to strangers and non-citizens. However, there were a few restrictions on non-citizens and strangers. For example, foreigners and strangers who abandoned their land for a considerable number of years would forfeit their interest. With the introduction of Clause 8 of Article 163 of the 1969 Constitution of the Republic of Ghana,[1] already existing freehold interests held by non-citizens were converted to leaseholds of fifty years commencing from the date the second Republican Constitution came into force, that is, 22nd August, 1969. It prohibited the granting of a freehold interest

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[1] '(8) Where, on the coming into force of this Constitution, any person not being a citizen of Ghana has a freehold interest in or right over any land in Ghana, that interest or right shall be deemed to be a leasehold interest for a period of fifty years at a peppercorn rent from such commencement, and the reversionary interest in any such land shall vest in the President in trust for and on behalf of the people of Ghana.'

or any other interest which exceeds fifty years at any one time to a non-citizen of Ghana while cutting short leases of more than fifty years to fifty years. This provision was repeated in Clause 9 of Article 189 of the 1979 Constitution[2] and again in the 1992 Constitution of the Republic of Ghana.

For the purpose of this paper, the writer will focus on the article 266 of the 1992 Constitution.[3] Clause 3 of article 266 speaks about freehold interest whereas clause (5) speaks about leasehold and other interests exceeding fifty years. This paper discusses each clause in turn and identifies attendant problems with article 266 of the Constitution. It is argued that clause (3) of article 266 of the 1992 Constitution amounts to compulsory acquisition and therefore deprives non-citizens of their interest in land. This may serve as a disincentive to investors who wish to invest in the country's economy as investors normally require a reasonable number of years to invest and recoup their investment. Clause (5) of article 266 of the 1992 Constitution on the other hand, does not affect the interest held by non-citizens in the land. It only reduces the period for which the interest is held causing affected non-citizens to apply for renewal. This would subject non-citizens of Ghana who had acquired either freehold interests or interests exceeding fifty years at the time the 1969 Constitution came into force to the dictates of lessors whose bargaining power will dominate future transactions because their interest would lapse on the 21st of August, 2019.

The issue that arises is whether the decision taken by Ghanaians with respect to lands acquired by foreigners violates international relations. Ghana on attaining her independence on the 6th of March 1957 applied to the United Nations to become a member and acquired membership on the 8th of March 1957. Furthermore, Ghana is one of the countries that initiated the Organisation of African Unity now African Union to ensure that African countries help the development of members of the union.[4] The preamble of the 1960 Republican Constitution requires Ghanaians, particularly their representatives at the Constituent Assembly, to help to further the development of African States and also to promote friendship and peace with peoples worldwide.[5] Ghana on becoming a member of the United Nations became bound by the Charter of the United Nations and also the Universal Declaration of Human Rights, 1948. The Universal Declaration of Human Rights, 1948 guarantees the right of individuals to acquire property either alone or in

[2] '(9) Where, on the twenty-second day of August, 1969, any person not being a citizen of Ghana had a freehold interest in, or right over, any land in Ghana, that interest or right shall be deemed to be a leasehold interest for a period of fifty years at a peppercorn rent commencing from the twenty-second day of August, 1969; and the freehold reversionary interest in any such land shall vest in the President in trust for, and on behalf of, the people of Ghana.'

[3] '(3) Where, on the twenty-second day of August 1969, any person not being a citizen of Ghana had a freehold interest in or right over any land in Ghana, that interest or right shall be deemed to be a leasehold interest for a period of fifty years at a peppercorn rent commencing from the twenty-second day of August 1969, and the freehold reversionary interest in any such land shall vest in the President on behalf of, and in trust for, the people of Ghana.'

[4] 1960 Constitution of the Republic of Ghana, Preamble

[5] ibid.

association with others, furthermore no one is to arbitrarily deprive a person of his lawfully acquired property.[6]

Article 57 of the 1969 Constitution enjoined the Government of Ghana to conduct its business in accordance with accepted principles of public international law and diplomacy which is in accordance with the national interest of Ghana. The issue here is, whether Ghana by depriving non-citizens of their interests in land exceeding fifty years acted in accordance with international law and diplomacy and if that is so, would that be consistent with the national interest of Ghana?

II. Historical Background

The Constitutional Commission, chaired by the then Chief Justice, E. Akufo-Addo, who put together the Proposals for the 1969 Constitution taking into account the history of Ghana with respect to the importance of land and the influx of non-citizens who had acquired freehold interest and other interest exceeding fifty years provided measures to protect lands in Ghana being owned by individuals, families, clans, stools or the State. The Commission made the following statement to justify their position:

> "We in Ghana are regarded as having 'a deep-rooted reverence for land as the foundation of community life.' This remark springs from the fact that land has played a very important part in the political and economic history and development of this country. What is regarded as the first organised protest on a national scale started with the creation of the Aborigines Rights Protection Society in 1897. The formation of this Society was the culminating point in a series of agitations against the British Government in respect of its attitude towards land in this country."[7]

This was the general sentiment of the Ghanaian people and at the time as could be seen from the Proposals of the Commission for the 1969 Constitution. The acquisition of lands by non-citizens and their involvement in economic and political activities threatened the very essence of the Ghanaian narrative. The importance of Ghanaian citizenship and the ownership of lands were reiterated in the concluding paragraph of the proposals, that is, paragraph 742:

> "The future of Ghana is in the hands of all of us. Let us at this time of our history take stock and account of all that is Ghana. The achievements have been great. The failures have been many. But, above all, let us in our day respond to the call of unity, peace, progress and prosperity, and hand over to succeeding generations an estate that is strong morally and economically; a land where freedom and justice are the dominant characteristics of everyday life; an estate intact, a land wherein each lives for all and all live for the greater good of Ghana; an estate and

[6] Universal Declaration of Human Rights, 1948, Article 17

[7] Proposals of the Commission for the 1969 Constitution, paragraph 696

> a land where the fear and the love of God animates all our actions and all our being."

It only follows from the above quotation that having attained independence for barely twelve years, it was important to consider how the Republic of Ghana was to be defined and the role of land in that definition. Perhaps, reclaiming control over lands in Ghana from non-citizens was one of the ways of asserting Ghana's independence and safeguarding her self- determination.

It has been argued that the comparative wealth of Ghana in 1969 can be credited to thousands of immigrants from West Africa, particularly, Nigeria.[8] Many Syrians, Lebanese and Indians were included in the thousands of immigrants in Ghana at the time. According to Aremu and Ajayi, the number of Nigerian immigrants in Ghana increased by almost 130,500 people, between the year 1931 and 1963.[9] This caused some Ghanaians to pressurise the government to include more Ghanaians in the country's economy which culminated in the introduction of various policies including the 'Aliens Compliance Order' of 18th November, 1969[10]. This order was enacted by the Ghanaian Prime Minister to compel African and non-African immigrants in Ghana to leave.

The Aliens Compliance Order was described by Margaret Peil as 'the largest case of expulsion of aliens which gave all aliens without residence permits two weeks to obtain them or leave the country.'[11] In her survey on the individual response to this Order, she noted one man's comment to the effect that having expelled the aliens from Ghana, it behoves on the government to ensure Ghana's development.[12]

It was reported in the Daily Graphic of 12th January, 1970 that a Nigerian defended the right of the Ghanaian Government to enforce the Aliens Compliance Order.[13] At the time, it was believed that aliens' involvement in politics undermined the political order in the country.'[14]

Another noticeable intervention policy was introduced by the Ghana Business (Promotion) Act of 1970 (Act 334) which in spirit excluded aliens from particular economic activities reserved for Ghanaians including petty trading, commercial transport, printing, baking and the manufacture of cement blocks.

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[8] Aremu J and Ajayi AT, Expulsion of Nigerian Immigrant Community from Ghana in 1969: Causes and Impact. Developing Country Studies. Vol 4, No.10, 2014.

[9] supra

[10] supra

[11] Margaret Peil, Ghana's Aliens, The International Migration Review, Vol.8, No. 3 International Migration in Tropical Africa (Autumn, 1974)pp 367-381.

[12] supra

[13] This was reported in the Ghanaian Times on the 7th of January, 1970. (Margaret Peil, The Expulsion of West African Aliens , The Journal of Modern African Studies, Vol. 9, No.2 (Aug 1971) 205-229, p 216.

[14] Margaret Peil, The Expulsion of West African Aliens , The Journal of Modern African Studies, Vol. 9, No.2 (Aug 1971) 205-229, p 216.

It is therefore no surprise that the Constitutional Commission speaking on the freedom from discrimination in paragraph 257 of The Proposals of the Constitutional Commission for a Constitution for Ghana in 1968, reported as follows:

> 'We therefore propose that subject to one or two reservations no law should be passed in Ghana which contains any provision that is discriminatory either of itself or in its effect. We propose that no person should be treated in a discriminatory manner by reason of any written law, the performance of the functions of any public officer or any public authority.'

It went on the say in paragraph 258(b) and (e) that:

> 'The only reservations which we would admit so far as our proposals regarding discrimination are concerned would be any provision of any law passed:
> (b) with respect to persons who are not citizens of Ghana
> (e) for the imposition of restrictions on the acquisition of land by, or on the economic and political activities of, any person who is not a citizen of Ghana.'

The combined effect of paragraphs 257 and 258(b) and (e) of the Proposals of the Commission for the 1969 Constitution was that non-citizens of Ghana could be discriminated against on grounds of land acquisition, economic and political activities in the country. The compulsory acquisition introduced under article 163 of the 1969 Constitution to affect only non-citizens was presumably enacted to promote the national interest of Ghana.

Perhaps the interviewee in Margaret Peil's survey was right about the Ghanaian government becoming more concerned about the country's development; and the imposition of restrictions on the acquisition of land by non-citizens may be a clear indication of that concern.

III. Non-Citizens with Freehold Interest from 22nd August, 1969

Clause 8 of Article 163 of the 1969 Constitution of the Republic of Ghana states that:

> '(8) Where, on the coming into force of this Constitution, any person not being a citizen of Ghana has a freehold interest in or right over any land in Ghana, that interest or right shall be deemed to be a leasehold interest for a period of fifty years at a peppercorn rent from such commencement, and the reversionary interest in any such land shall vest in the President in trust for and on behalf of the people of Ghana.'

Clause (9) of Article 189 of the 1979 Constitution of the Republic of Ghana s provides as follows:

> ‘(9) Where, on the twenty-second day of August, 1969, any person not being a citizen of Ghana had a freehold interest in, or right over, any land in Ghana, that interest or right shall be deemed to be a leasehold interest for a period of fifty years at a peppercorn rent commencing from the twenty-second day of August, 1969; and the freehold reversionary interest in any such land shall vest in the President in trust for, and on behalf of, the people of Ghana.’

Presently, this provision can be found in clause 3 of Article 266 of the 1992 Constitution of the Republic of Ghana and reads as follows:

> ‘(3) Where, on the twenty-second day of August 1969, any person not being a citizen of Ghana had a freehold interest in or right over any land in Ghana, that interest or right shall be deemed to be a leasehold interest for a period of fifty years at a peppercorn rent commencing from the twenty-second day of August 1969, and the freehold reversionary interest in any such land shall vest in the President on behalf of, and in trust for, the people of Ghana.’

Meaning and Scope of Article 266(3) Of The 1992 Constitution

Who is a non-citizen of Ghana for the purposes of article 163 of the 1969 Constitution? A citizen of Ghana as of 22nd August 1969 is defined in articles 5, 6, 7 and 8 of the 1969 Constitution as follows:

5. Every person who, on the coming into force of this Constitution, is a citizen by law of Ghana shall continue to be such a citizen
6. Subject to the provisions of this Constitution, every person born in or outside Ghana after the coming into force of this Constitution shall become a citizen of Ghana at the date of his birth if either of his parents is or was a citizen of Ghana.
7. A child of not more than seven years of age found in Ghana whose parents are not known shall be presumed to be a citizen of Ghana by birth.
8. (1) Any woman who, on the coming into force of this Constitution, is or has been married to a person,
   (a) who is or becomes a citizen of Ghana by virtue of the provisions of article 5 of this Constitution, or
   (b) who, having died before the coming into force of this Constitution hold, but for his death, have become a citizen of Ghana by virtue of that article,
   may, upon making an application therefore in such manner as may be prescribed by Parliament, be registered as a citizen of Ghana.
   (2) Any woman who is married to a person who subsequently becomes a citizen of Ghana may, upon making an application therefor in such manner as may be prescribed by Parliament, be registered as a citizen of Ghana.
   (3) Any woman who, after the coming into force of this Constitution, marries a citizen of Ghana may, upon making an application therefor in such manner as may be prescribed by Parliament, be registered as a citizen of Ghana.

(4) Where the marriage of any woman as is referred to in the preceding provisions of this article is annulled, any such woman having registered as a citizen of Ghana by virtue of the said marriage shall cease to be a citizen of Ghana.'

Any person, who fell outside the above definition of a citizen of the Republic of Ghana was, therefore not a citizen of Ghana and could be discriminated against on grounds of land acquisition, economic and political activities.

The Ghana Investment Promotion Centre Act 2013 (Act 865) defines a Ghanaian as follows: "a citizen of Ghana or a company, partnership or association or body whether corporate or unincorporated which is wholly owned by a citizen of Ghana."[15]

For the purposes of investment under the Ghana Investment Promotion Centre Act 2013 (Act 865) the definition of a Ghanaian excludes any business interest where a non-citizen of Ghana has interest. Therefore, all lands acquired by individuals, corporated and unincorporated bodies in which a non-citizen being artificial or natural has interest does not make it a land owned by a Ghanaian and would be affected by the compulsory acquisition.

Citizenship of Ghana was mainly acquired through birth, by virtue of being a foundling, registration and naturalisation. Chapter three of the 1969 Constitution also provided for instances under which a Ghanaian citizen may lose his citizenship as well as how a non-citizen of Ghana may acquire citizenship and also lose it. The categories of persons who could not be deprived of their citizenship are those who acquired same by birth and those who have been classified as foundlings.[16] In all other cases, non-citizens who acquired Ghanaian citizenship could be deprived of such citizenship where the activities of that person were considered to be inimical to the security of the state or prejudicial to public morality or the public interest.[17] A non-citizen who acquired Ghanaian citizenship by fraud could also lose his citizenship when the question of fraud is proved. By voluntary renunciation, non-citizens who acquired citizenship by registration or naturalisation could also lose their citizenship. The process to deprive such people of their citizenship was initiated by the Attorney-General through an application made to the High Court.[18] A Ghanaian citizen who attained twenty-one years on the coming into force of the 1969 Constitution could renounce his or her Ghanaian citizenship and assume citizenship of another country.[19] A citizen of Ghana who lost his citizenship by virtue of marriage to a non-citizen of Ghana may also become a citizen of Ghana on the dissolution of the marriage.[20]

Having identified persons that may be described as non-citizens of Ghana, it is imperative to discuss the types of interest in land such people are prohibited from holding. The non-citizens were prohibited from acquiring any interest exceeding fifty years at any

[15] Ghana Investment Promotion Centre Act 2013 (Act 865), s 43
[16] Article 10(3) of the 1969 Constitution.
[17] ibid.
[18] ibid.
[19] Article 9(2) and (3) of the 1969 Constitution.
[20] Article 9(4) of the 1969 Constitution.

one time or any higher interest; that is, freehold. Freehold interest is defined by the author, Sir Dennis Adjei, as an interest which is not time bound.[21] There are three types of freehold interest known to common law. These are:

1. Fee simple
2. Fee tail
3. Life estate

Fee simple also exists in three forms known as fee simple absolute, fee simple determinable and fee simple subject to a condition subsequent.[22]

Fee simple absolute vests in the grantee absolute interest in the land, free from any conditions. This interest extends to that grantee's assigns and heirs *ad infinitum.*[23]

Fee simple determinable creates an interest not constrained by time but the interest in the land may be lost upon the breach of a specified provision in the conveyance.[24] On the occurrence of such a breach, the grantee's interest automatically reverts to the grantor or the grantor's heirs, where the grantor is dead, by the operation of law.[25]

Fee simple subject to a condition subsequent also remains a perpetual interest subject to a provision in the conveyance conferring a right of re-entry or power of termination on the grantor upon the breach of a condition.[26] Here, the grantee's interest is not automatically lost. The grantor will need to exercise his rights for the interest to revert to him.[27]

Fee tail is created by a lease or a will and it normally specifies the group of people who may inherit after the death of the grantor. In some cases, the persons named as eligible to inherit from the grantee were specific groups of linear descendants.[28]

Life interest is limited to the life of the grantee or some other person or may be lost upon the occurrence of an event which is not certain.[29] A grantee of life interest may use the land in the same way as the holder of a fee simple interest.[30] The only caveat is that the land must be kept in good condition for the reversionary owner.[31] A person who has a life interest in a property is normally referred to as a life tenant.[32] This interest may be created by a deed in a will. A life estate is alienable but any interest created in a life

[21] Dominic Dennis Adjei, 'Land Law, Practice and Conveyancing in Ghana' Second Edition (Accra: Adwinsa Publications (Gh) Ltd, 2017) Pg 6
[22] ibid (n 14) p 13-14
[23] ibid.
[24] ibid.
[25] ibid.
[26] ibid.
[27] ibid.
[28] ibid (n 14) p 20
[29] ibid.
[30] ibid.
[31] ibid.
[32] ibid.

estate shall not exceed that life tenant's interest.[33] The life tenant shall not do anything that will cause waste or damage to the land and shall be liable for any waste caused by him including ameliorating waste.[34] If a person had a life interest as a foreigner the constitutional provisions would not affect his interest even though the person may live over and above fifty years. It is therefore not one of the interests recognisable by the constitution.

On the coming into force of the 1969 Constitution, non-citizens of Ghana who had any freehold interest discussed in the above paragraph would lose the freehold and take in its place a fifty year lease. The acquisition of Ghanaian citizenship by such a non-citizen of Ghana after the coming into force of the 1969 Constitution would not restore his lost interest in the land where the person subsequently acquires Ghanaian citizenship it would be prospective from the date on which it was acquired. Non-citizens of Ghana incurred liability associated with the ownership of land on the 22nd of August 1969 and subsequent acquisition of citizenship would not remedy the right lost. The law provided that once you had an interest exceeding fifty years, the law has reduced it to fifty years at any one time and so if the interest is lost, the grantee would have to negotiate with his grantor for a new grant.

Assuming the same land was a stool land, he could not have a freehold interest because the Constitution forbade the grant of freehold interest in stool land. Instead he would be granted a leasehold which would not be up to a hundred years. On the other hand, if it was a family land, he could reacquire his freehold interest but the date of grant would be the date on which the new allocation was made and would not take into account the time before the new allocation when his interest was lost. However, he may subsequently acquire any interest in land permissible by law by virtue of his Ghanaian citizenship.[35] Where a non-citizen purports to alienate his freehold interest in the land after the coming into force of the 1969 Constitution, such alienation shall be declared void on the principles of *nemo dat quod non habet* and public policy considerations. This is because Article 163 of the 1969 Constitution vests the freehold interest in that land in the President of Ghana and therefore the non-citizen no longer holds the freehold interest. The principle of *nemo dat quod non habet* means that you cannot give what you do not have and so the non-citizen will not be permitted to give the freehold interest which he no longer has. Where he attempts to grant a leasehold exceeding fifty years in the said land, the period beyond fifty years shall be declared void on the same principles by the fact that he lost that interest on the 22nd of August 1969. He may however be able to alienate his fifty year term in the leasehold interest he has acquired because that is what was vested in him by the 1969 Constitution. Non-citizens holding freehold interest or leasehold interest exceeding fifty years in land prior to the 22nd of August, 2019, would become lessees to the Republic of Ghana and shall pay peppercorn rent to the President to acknowledge him as his lessor.

[33] ibid.
[34] ibid.
[35] Interpretation Act 1960 (CA 4), s8

Peppercorn rent seems to be a term of art as the Constitution did not define it and there is no known judicial case precedent emanating from that provision of the Constitution. The author therefore seeks to look elsewhere for proper definition of peppercorn rent. The eighth edition of Black's Law Dictionary explains peppercorn as a small or insignificant thing or amount; nominal consideration. In legal parlance, peppercorn is used metaphorically to refer to a very small payment to represent the value of pepper and corn. This paper shall in the course of the discussion, look at how the Lands Commission acting on behalf of the President of Ghana has construed peppercorn rent.

Article 266(3) of the 1992 Constitution reproduced what was contained in Article 163 of the 1969 Constitution and has affirmed the leasehold between the lessee and the President of Ghana for a period of fifty years at a peppercorn rent commencing from the 22nd day of August, 1969. The reversionary interest of all such lands will become vested in the President on behalf of and in trust for, the people of Ghana on the d 21st day of August, 2019. Therefore, from 22nd August, 2019, the President shall become the freehold owner of those lands and may renew the leasehold for those non-citizens who were affected under different conditions.

The question to pose is why it is the President who becomes the owner of the land that was subject to a freehold interest by a non-citizen on the 22nd day of August 1969 and not the person from whom the land was acquired by the non-citizen. It could be argued that injustice seems to have been caused to the original grantors of the freehold interest who could have benefitted from the land on grounds of abandonment or the grantee's family becoming extinct. The modes by which a grantee could lose his interest include abandonment for a period of time, denial of title and death without a successor. In the case in point, where a non-citizen grantee abandoned a land he acquired from the grantor, the grantor could enter onto the land and exercise ownership rights. The Constitution took away that available right from the grantor and vested same in the President. The right of a grantor to repossess a land already granted in cases of abandonment or extinction of the lessee's family could be likened to the case of Atta v Lagos,[36] in which the High Court discussed some of the grounds under which a grantee of freehold interest may lose his said interest in the land to his grantor and it includes abandonment for a reasonable period of time. Therefore, it could be said that the Constitution denied those grantors their right of re-entry at a future date on grounds of abandonment or denial of title, as the grantees would lose succession or commit a fundamental breach of the terms of the agreement in the case of a fee simple determinable or fee simple subject to a condition subsequent which may seem remote.

It may be argued that the reversionary interest should vest in the original grantor instead of the President by the fact that he was the immediate owner of the land before the creation of a freehold interest in a non-citizen of Ghana. However, the counter argument to this concern could be that the original grantor of the land divested himself of his absolute interest in the land as a result of the freehold conveyance he made to the non-citizen and never anticipated a reversionary interest. However, there are subsequent events

[36] [1960] GLR 42

which may reinvest the grantor of the freehold interest he had created in favour of the non-citizen such as abandonment and denial of title.

The author is of the considered opinion that the reversionary interest to the President of Ghana to hold in trust for the Ghanaian citizenry is preferable as the grantor knew that he had absolutely divested himself of any interest in the land unlike with a lease where the lessor knows that he has a reversionary interest in the land. Moreover, the original grantor of the freehold interest would have been duly compensated by the non-citizen purchaser. On the other hand, can it also be said that the compulsory acquisition by the President affecting only non-citizens is in accordance with international law and diplomacy?

Article 2 of the Universal Declaration of Human Rights, 1948 frowns upon discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 17 of the Universal Declaration of Human Rights, 1948 also prohibits capricious or arbitrary deprivation of a person's right in land. The 1969 Constitution which is the subject matter of this article has a provision on fundamental rights and freedoms of individuals.[37] It provides that no individual shall be discriminated against on grounds of race, colour, place of origin, creed or sex, but it is however limited to rights and freedoms of others and for the public interest. From the point of view of diplomacy and international law,[38] there should not be any discrimination on grounds of nationality or ethnic origin. However it could be seen from the 1969 Constitution that non-citizens of Ghana were discriminated against and the discrimination could be said to be negative. It is submitted that even though the constitutional provision discriminates against non-citizens of Ghana in a limited sense and therefore seems to be in conflict with international law and diplomacy, due to the fact that the Constitution, even though it is the supreme law of the land shall not override principles of international law and diplomacy. It is a well-established principle of public international that on the international plane, a state may not present its municipal law as superior or overriding a rules of customary international law ie in this instance the principles of non-discrimination and the non-payment of compensation to the non-citizen holders of both freehold and leasehold interests in land.

IV. Who is a Non-Citizen?

A non-citizen is a person who cannot by virtue of their status enjoy the rights and privileges reserved for citizens of Ghana. A non-citizen could be a natural or artificial being. Artificial beings include companies, partnerships, sovereign bodies and other legal entities. A person, for the purposes of the enforcement or interpretation of the Constitution, has been defined under the 1992 Constitution to exclude non-citizens being natural or artificial.[39]

[37] 1969 Constitution of the Republic of Ghana, Article 12
[38] Universal Declaration of Human Rights, 1948, Articles 2 and 17
[39] Sam (No 2) v Attorney-General [2000] SCGLR 42

IV.1 Article 266(3) of the 1992 Constitution as a Form of Compulsory Acquisition

Compulsory acquisition is the power that a government possesses to acquire private lands in the public interest to benefit society. Compulsory acquisition may be explained as lands vested in a person for which an enactment has been made to take it over from that person. Some persons may receive compensation while others may not, depending on the nature of the enactment. Compulsory acquisition in Ghana exists in several forms but the prominent among them are acquisition under the Lands Administration Act 1962 (Act 123) and the State Lands Act 1962 (Act 125). With respect to acquisition under Act 123, government does not pay for the land but pays for any improvement or investment on the land and subsequently pays royalties to the stools whose lands were acquired under the enactment. On the other hand, acquisition under Act 125 is made to acquire the land, everything thereon and compensation is paid at one time. Act 123 requires that compensation is paid for developments on the land and not the land itself that is why annual payments are made to the beneficiary through the stool land administrator for disbursement. On the other hand, government pays for the land itself and anything thereon to the affected person with respect to compulsory acquisition under Act 125. For any acquisition made under either of the Acts, article 18 of the 1969 Constitution requires that payment of compensation may be promptly and also provides an avenue of redress for aggrieved persons.

Article 18 of the 1969 Constitution on compulsory acquisition states that:

> (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired by the State except where the following conditions are satisfied, that is to say,
> (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the developmental utilisation of any property in such manner as to promote the public benefit; and
> (b) the necessity therefore is such as to afford reasonable justification for causing any hardship that may result to any person having an interest in, or right over, the property; and
> (c) provision is made by a law applicable to that taking of possession or acquisition
> (i) for the prompt payment of adequate compensation; and
> (ii) securing to any person having an interest in, or right over, the property a right of access to the High Court of Justice, whether direct or on appeal from any other authority, for the determination of his interest or right, and the amount of any compensation to which he is entitled;
> and for the purposes of obtaining prompt payment of that compensation.
> (4) Any such property of whatever description compulsorily taken possession of, and any interest in or right over property of any description compulsorily acquired in the public interest or for public purposes, shall be used only in the public interest or the public purposes.'

These provisions relate to lands in Ghana not covered by article 163 of the 1969 Constitution which is on compulsory acquisition for non-citizens whose interests in land exceed fifty years. Therefore for an act of the President to qualify as compulsory acquisition, it must satisfy the conditions stated above. These requirements are now codified under Article 20 of the 1992 Constitution.[40]

Admittedly, the provision under article 266(3) is a form of compulsory acquisition but it is not one of those known to our laws in the absence of compensation. The reason is that this provision is applicable to non-citizens who have any interest exceeding fifty years on the coming into force of the 1969 Constitution. It denied them any interest in excess of fifty years effective 22nd August 1969. In effect, if it was not provided for by the Constitution, it would have been treated as a discriminatory provision. It is retrospective, in that it affected rights that have been acquired or accrued before the Constitution came into force. However, being the supreme law of land, its language is final and even though it is retrospective and has affected some rights, it cannot be challenged in any forum because when the Constitution speaks, it puts an end to that matter. The fact that its constitutionality cannot be challenged in any forum does not suggest that it is fair and just and cannot be criticised.

Flowing from the distinction drawn above is a plausible rationale for the proposition that the situation under Article 266(3) is not compulsory acquisition in the strict sense of the concept because the provision under the 1992 Constitution is not a compulsory acquisition unlike the provision under the 1969 Constitution which compulsorily acquired those lands and denied them of their interest. In all recognised forms of compulsory acquisition under the enactments in Ghana, including but not limited to the State Lands Act 1962 (Act 125), the Administration of Lands Act 1962 (Act 123) and the Minerals and Mining Act 2006 (Act 703), compensation is paid to the person who has lost his interest in the land. In the case in point, it is the person who has lost his interest in the land who rather pays rent to the new lessor. After the expiration of fifty years, it is the new lessor who will decide whether to renew or not the lease when the lessor had not paid any compensation to the lessee from whom he compulsorily acquired the land. Ordinarily, land transactions are agreements between the transferor and the transferee and it should be the contracting parties who could take decisions on any breach or variation of the terms of the contract. Nonetheless, the government of Ghana, who was not a party to the land transaction between grantors and non-citizen grantees and in some cases grants made by the Government of Ghana to non-citizens in excess of fifty years, used its power of eminent domain to abrogate the transactions and introduce new terms to benefit the Ghanaian people.

The author is of the considered opinion that article 266(3) is in the nature of compulsory acquisition by the government without paying anything to the non-citizen grantee. It must be emphasised that the constitutional provision is a disincentive to investors and prudent investors will find it difficult investing in a country where you are

[40] Be that as it may, no constitutional provision on compulsory acquisition can be used in respect of a land acquired before the 1992 Constitution came into force. (Okudzeto Ablakwa (No. 2) & Another v Attorney-General & Obetsebi-Lamptey (No. 2) [2012] 2 SCGLR 845.

given only a fifty year lease in land at a time which might be renewed at unreasonable amounts where it is between a clan, family or individual and a non-citizen or may not be renewed at all. However, where the government is the lessor or has become the lessor, the renewal will be based on economic rent and where the lessee cannot pay the economic rent; his interest in the land, coupled with the investment made on it will become extinct.
In determining economic rent, various factors are taken into consideration: the location of the land; the prime nature of the land; availability of amenities of life such as water, electricity etc. and the development pattern of the area. Economic rent could be high depending on the area in question and the rent to be paid may not even be commensurate with the returns the investor would make in a month.

IV.2 The Role of the Lands Commission
Clauses (1) and (5) of article 163 of the 1969 Constitution states that:

> '(1) There shall be a Lands Commission which shall consist of a chairman and not less than five other members.
> (5)The Lands Commission shall hold and manage, to the exclusion of any other person or authority, any land or minerals vested in the President by this Constitution or any other law, or vested in the Commission by any law, or acquired by the Government, and shall have such other functions in relation thereto as may be prescribed by or under an Act of Parliament.'

Clauses (1) and (5) of article 189 of the 1979 Constitution similarly provides that:

> '(1) There shall be established a Lands Commission which shall consist of…
> (5) The Lands Commission shall hold and manage, to the exclusion of any other person or authority, any land or minerals vested in the President by this Constitution or any other law, or vested in the Commission by any law or acquired by the Government, and shall have such other functions in relation thereto as may be prescribed by or under any Act of Parliament.'

The provision in force at the moment can be found in Clause (1)(a) of Article 258 of the 1992 Constitution which provides that:

> '(1) There shall be established a Lands Commission which shall, in co-ordination with the relevant public agencies and governmental bodies, perform the following functions-
> (a) on behalf of the Government, manage public lands and any lands vested in the President by this Constitution or by any other law or any lands vested in the Commission.'

Based on the above provisions, the Lands Commission has the mandate to administer the freehold interest as a leasehold interest and determine the peppercorn rent for the fifty-year period on behalf of the President.

Sub-section (a) of section 23 of Lands Commission Act of 2008 (Act 767) only states that the functions of the Public and Vested Lands Management Division includes managing state acquired and vested lands in conformity with approved land use plans which includes lands acquired by the President in 1969 under article 163 of the 1969 Constitution and article 266 of the 1992 Constitution, respectively. It does not provide any guidelines as to how this process is to be conducted and as such is left to the discretion of the Lands Commission.

The main problem with the provision is that there is no comprehensive record at the Lands Commission of non-citizens who hold freehold interest or any other interest in land exceeding fifty years granted prior to 22nd August 1969 which is the subject matter of Article 266. At the Lands Commission, there are also no laid down guidelines as to what becomes of the freehold deeds held by such non-citizens. Consequently, many people are transacting business with existing freehold deeds and even on expiration of the fifty year term, it will be difficult for the Lands Commission to identify such properties and take possession of same. Seeing as there are no prescribed sanctions for a non-citizen who fails to comply with the provisions of Article 266, this provision is only effective when a non-citizen decides to comply with it or that person is known to be a non-citizen holding such an interest.

In that case, the writer envisions three main scenarios that may arise as a result of the Article 266(3):

1. As a result of the freehold having been converted to leasehold after the expiration of fifty years, a non-citizen who wishes to pay peppercorn rent after the expiration of his fifty-year term.
2. A non-citizen who wishes to extend his tenancy before the expiration of the fifty year term.
3. A non-citizen who wishes to renew his lease before the expiry of the lease on 21st August 2019

In the case of payment of the peppercorn rent, the Lands Commission notes that it is a nominal rent and is calculated as the lowest fraction of the open market ground rent, for instance, two percent.[41] Peppercorn rent is paid in respect of any land owned by non-citizens which article 266 of the 1992 Constitution applies. Take for example half an acre of land in the Adabraka area in Accra which has been developed into a commercial property. Where the lessee is desirous of renewing his lease, in addition to his application, he would attach a valuation report. The valuation report would reveal the fair rent that the property would attract. Supposing the rent is set at twenty-five thousand Ghana cedis, the Lands Commission would then have to assess the open market ground rent. The peppercorn rent is then calculated as a percentage of the open market ground, usually two percent, as previously mentioned.

[41] Questionnaire administered on 3rd June, 2019 to a principal lands officer with the Public and Vested Lands Management Division at the Lands Commission, Accra.

So far, all applications that have been considered by the Lands Commission have been made before expiration…. on the 21st August, 2019.[42] Applications for renewal are almost automatically renewed at an amount to be paid as premium with the first option of renewal for the applicant unless the offer is rejected.[43] This renewal is done after the payment of rent arrears assessed at peppercorn for the lease period commencing 22nd August, 1969. After the payment of the peppercorn rent, the Commission will then, based on the fair rent of the property, assess a premium, which is a lump sum and open market ground rent for the new lease term.

The following illustration of how the premium is calculated would be in reference to the above example where the fair rent of the property was twenty-five thousand Ghana cedis. The Lands Commission by its operational manual has determined a range of between thirty to seventy percent of the fair rental value to be adopted as a basis of determining the premium.[44] Supposing fifty percent of the fair rent is adopted as the basis of computing the premium, the amount of twelve thousand five hundred Ghana cedis will be projected over the proposed term of the lease.[45] The projection is done using a compound interest formula at the current interest rate, to reflect the time value of the money because it is money that ought to be received in the future, to arrive at the amount to be paid as the premium.

Being mindful of the fact that the premium is in lieu of a greater rent annually, the rent for the new lease term is calculated as a percentage of the remainder of the fair rental value which is twelve thousand five hundred Ghana cedis. Again hypothesizing that the Lands Commission will adopt fifty percent as the basis for the computation, the open ground rent for new lease term will then be six thousand two hundred and fifty Ghana cedis.

In cases where the non-citizen does not apply for renewal, the lease expires on the 21st of August, 2019. However, the Lands Commission would consider an application from the lessee after the 22nd of August, 2019 as an application for renewal of the lease and offer the sitting tenant the first option of renewal.[46]

IV.3 Effect of limitation on Peppercorn Rent from 22nd August 1969 to 21st August 2019

In effect, the peppercorn rent becomes a debt to the President of the Republic of Ghana which is claimed by and paid to the Lands Commission. The debt to be recovered is over a fifty year span. However, section 4(1)(f) of the Limitation Act of 1972 (Act 54) provides as follows:

‘4. Actions barred after six years

[42] ibid
[43] ibid
[44] ibid
[45] This cannot exceed a period of fifty years
[46] Questionnaire administered to a principal lands officer with the Public and Vested Lands Management Division at the Lands Commission, Accra.

(1) A person shall not bring an action after the expiration of six years from the date on which the cause of action accrued, in the case of...
(f) an action to recover a sum of money recoverable by virtue of an enactment, other than an action to which sections 2 and 5 apply.'[47]

It can necessarily be argued that the peppercorn rent between 22nd August, 1969 and 21st August, 2013 is time barred. It would therefore not be unfounded for a lessee to refuse to pay the peppercorn rent for the above stated period because an action may still be brought within six years after the cause of action has accrued. It may be argued that this may result in a large number suits being brought against the Lands Commission in respect of the recovery of debt that is time barred.

On the other hand, the Lands Commission may also institute an action against the lessee who refuses to pay the peppercorn rent. In this case, the lessee may plead limitation. Limitation is a right and a person claiming benefit under the law must specifically plead it otherwise that person may be deemed to have waived his right. In the case of Dolphyne (No. 3) v Speedline Stevedoring Co. Ltd (No.3) and Another,[48] the Supreme Court in explaining the requirement that limitations must be specifically pleaded stated that:
'The Limitation Decree, 1972 (NRCD 54), was essentially a special plea which must be pleaded as required by the High Court (Civil Procedure) Rules, 1954 (LN 140 A). If not pleaded, it could not be adverted to in submissions to the court; and the court would not of its own motion take notice that an action was out of time.'
Therefore, in such a case, if the lessee fails to plead limitation, he would have been deemed to have waived that right and the court would not take notice that the action was out of time enabling the Lands Commission to recover the debt for the entire fifty year period.

Whichever party institutes the action, the fact is that there will be a new suit that the courts will be called upon to determine. This is indicative of potentially high rates of litigation in this regard, notwithstanding the fact that the courts are already inundated with cases and may become further overwhelmed by the anticipation of new cases as a result of the provision in article 266(3) of the 1992 Constitution.

IV.4 Non-Citizens With Leasehold Exceeding Fifty Years As At 22nd August, 1969

Again on the 22nd of August, 2019, the interest of any person not being a citizen of Ghana, be it a leasehold interest in or right over any land in Ghana for an unexpired period of more than fifty years will expire.

Clause 10 of Article 163 of the 1969 Constitution of the Republic of Ghana states as follows:

[47] However under section 22(1) of the Limitation Act 1972 (Act 54), where an action is vitiated by fraud or mistake, time shall not run until the plaintiff has discovered the mistake or fraud or when he could with reasonable diligence have discovered it
[48] [1996-97] SCGLR 514

> '(10) Where, on the coming into force of this Constitution, any person not being a citizen of Ghana has a leasehold interest in or right over any land in Ghana for an unexpired period of more than fifty years, that interest in or right over any such land shall be deemed to be an interest in or right subsisting for a period of fifty years from such commencement.'

Clause (11) of Article 189 of the 1979 Constitution of the Republic of Ghana states that:

> (11) Where on the twenty-second day of August, 1969, any person not being a citizen of Ghana had a leasehold interest in, or right over, any land in Ghana for an unexpired period of more than fifty years that interest in, or right over, any such land shall be deemed to be an interest or right subsisting for a period of fifty years commencing from the twenty-second day of August, 1969.

This position is affirmed by the 1992 Constitution clause 5 of Article 266 where it states as follows:

> '(5) Where, on the twenty-second day of August 1969 any person not being a citizen of Ghana had a leasehold interest in, or right over, any land in Ghana for an unexpired period of more than fifty years, that interest in, or right over, any such land shall be deemed to be an interest or right subsisting for a period of fifty years commencing from the twenty-second day of August 1969.'

V. Meaning and Scope of Article 266(5) of the 1992 Constitution

Unlike in the case of clause (3) of Article 266 of the 1992 Constitution, where the nature of the right was completely changed from a freehold to leasehold interest, the nature of the right remains intact except that the period for which it is held is determined. The lessees who had interests in land exceeding fifty years lost the remaining number of years to their lessors. On the 21st of August, 2019, after the effluxion of the lease, those affected non-citizens will have to reapply to the lessors for renewal of their leaseholds with different considerations. Where the lessee acquired the land for a long term project, he may abandon its use for the fact that he could not meet the renewal considerations. A lessee who acquired a land for a factory or as an estate developer may not attain the purpose for which the land was acquired as his strategic plan may have anticipated a period of over fifty years. Some of these non-citizens who held various interests in land were given two weeks to obtain residence permit or leave the country, which might have compelled those who could not renew their residence permits to surrender their unexpired leasehold to the lessors for insignificant amounts as they had lost their bargaining power.

V.1 The Right of Renewal

Here, it is the lessor who is to recover his land, with the buildings or farms thereon on the expiry of the lease term. What is crucial in this case is whether or not the lease contained a provision for a renewal of the lease or not.

The author in his book,[49] states that in a case where the lessee acquired a parcel of land under a lease and developed it with his own money, the lessee may lose his absolute interest in the land including the building on it where the original lease did not have a renewal clause. A lessor who has decided to take over the land and the investment thereon shall not give the lessee the right to renew it unless there is a renewal clause in the lease. On the other hand, where there was a renewal clause in the lease, the lessor may quote an astronomic amount for rent to deter the lessee from renewing it. Traditionally, the lease agreement is prepared by the lessor for the execution by the lessee and the leases do not contain renewal clauses. Where there is included a renewal clause, it is the lessor who would dictate the consideration and the duration of the renewal. It is trite law that in a case where there is ambiguity as to the terms of the lease, it will construed against the lessor.[50] In the case of In re Mireku & Tettey (dec'd); Mireku & Others v Tetteh & Others,[51] the Supreme Court held that failure to provide for a renewal clause in an agreement or lease, prevents the lessee from renewing it as it is not the duty of the court to rewrite agreements for the parties. Therefore where the lessor refuses to renew the lease and recovers the property which had been leased to the lessee, it cannot be considered unconscionable.

However, in the situation envisaged under article 266(5) of the 1992 Constitution, the lessee could not have reasonably expected that his term under the lease would be truncated and therefore if he had contracted for the period within which he would need the land in question, he would not have had within his contemplation the inclusion of a renewal clause. This is a case where by legislative intervention; the sanctity of the contract has been affected. As a consequence it seems unconscionable that the lessor would be permitted to completely renege on his original contract.

There is no statutory body established to regulate leases, their duration and consideration payable. Therefore, the landlords dictate the terms and conditions of leasehold transactions with respect to the question of renewal where the lessee has made substantial improvement to the land. This is not the case under landlord tenancy where the Rent Act, 1963 (Act 220) has established the rent office,[52] with its officers to determine rent payable in respect of a property where the contracting parties are not *ad idem.*[53]

VI. Conclusion

In conclusion, the conversion of leases exceeding fifty years to fifty years, unjustly enriched individuals, families and stools who were lessors to non-citizens of Ghana. A statutory body should be set up to regulate renewal, duration and rent payable in respect of those leases held by non –citizens which were converted to fifty years. This would relieve the lessee, whose knowledge of land law is subpar from the duty of having

[49] Dominic Dennis Adjei, 'Land Law, Practice and Conveyancing in Ghana' Second Edition (Accra: Adwinsa Publications (Gh) Ltd, 2017) Pgs 475-476
[50] Modern Approach to the Law of Interpretation in Ghana p86
[51] [2011] 1 SCGLR 520
[52] Rent Act 1963 (Act 220), s3
[53] ibid (n46) s5

to negotiate for the inclusion of an express covenant on the review of rent, resulting in a less onerous process for contracting a lease.

Furthermore, it will be worth exploring the option of requiring a lessor who is adamant to renew the lease to pay to the lessee an amount that corresponds to the economic value of the development on the land; maybe even legislative intervention to make the renewal clause an implied covenant. The latter may aid in safeguarding the lessee whose right by virtue of inequality of the bargaining power between him and the lessor is likely to be abused.

Ghana as a developing nation cannot in future use its Constitution, the supreme law of the land, to deprive non-citizens of their vested interest in lands they lawfully acquired from the Ghanaian citizenry. It demotivates investors who have already invested in the country because it has affected the lifespan of their businesses and deters others who intend to invest in the country. Such investors may prefer investing in countries where they may acquire freehold interest or leasehold for a reasonable number of years, preferably more than 100 years. Moreover, the Lands Commission must be transparent, objective and candid when dealing with the non-citizens whose lands were affected because it is their own land which is being sold back to them. The Lands Commission shall comply with article 296 of the 1992 Constitution, which governs the exercise of discretionary powers by public authorities, in dealing with those non-citizens affected by article 266 of the 1992 Constitution and shall not dent the good name, reputation and hospitability of the Republic of Ghana.

AN ASSESSMENT OF THE CONTINENT-WIDE TRADE RELATED TO INFRASTRUCTURE FOR EFFECTIVE IMPLEMENTATION OF THE AFCFTA BY GHANA

George Baffour Asare-Afriyie*

Abstract

The Agreement establishing the African Continental Free Trade Area (AfCFTA) which is set to be the world's largest free trade area by merging fifty-five (55) countries into a single market. Once fully established it will permit the free movement of goods and services. In order for Ghana to fully enjoy the benefits of this Agreement, the needed infrastructure to aid international trade must be in place. This paper seeks to shed more light in this sector. There will also be a featured discussion of the efforts made by Singapore and South Africa to promote international trade in their respective States. The paper concludes with possible policy recommendations that the Government of Ghana can adopt to achieve the goal of benefiting from the lucrative AfCFTA.

I. Introduction

The Agreement establishing the African Continental Free Trade Agreement (AfCFTA) entered into force on 30 May 2019 for the 24 countries (which includes Ghana) that had deposited their instruments of ratification. The goal of AfCFTA is to create a single continental market for goods and services which aims at boosting trade between African countries. The AfCFTA is a comprehensive partnership agreement which covers trade in goods, services, investment and intellectual property.

Some of the aims of the AfCFTA with respect to goods include: progressive elimination of tariffs, progressive elimination of non-tariff barriers, enhancing the efficiency of customs, development and promotion of regional and continental value chains as well as socio-economic development. With respect to services, the agreement seeks to enhance competitiveness of services, promote sustainable development, foster investment in addition to accelerating efforts on industrial development to promote the development of regional value chains.

With the object of fully enjoying the benefits of the AfCFTA, it has been discussed at length that there must be macro-policy harmonization particularly in areas such as the industrial, agricultural, fiscal, banking, investment, competition, ICT and telecommunications, transport and even in government procurement. In addition, it has been stipulated that there is a need to harmonize the elements of national law that relate to intra-AfCFTA trade. This includes an upgrade of legal institutions handling potential disputes arising from its implementation.

A trade policy without the right accompanying trade-related infrastructure will not deliver the expected results. The combined efforts of a trade policy with trade-related infrastructure will provide the enabling environment that will generate the benefits of the trade agreement. Based on this background, this article will discuss the steps Ghana can take to facilitate trade specifically through its infrastructure in order to effectively implement the AfCFTA. The First part discusses both the hard and soft infrastructure that

aid trade facilitation. The Second part focuses on an assessment of the efforts taken by Singapore and South Africa. The Third part will detail the steps already undertaken by Ghana. The last part of the paper will highlight the lessons that can be drawn from both Singapore and South Africa.

II. What is Infrastructure

Under this umbrella infrastructure not only refers to the physical infrastructure such as transport systems but also soft infrastructure, such as regulatory policies, enforceable legal provisions and predictable government procedures. Fourie defined economic infrastructure as infrastructure that promotes economic activity, such as roads, highways, railroads, airports, sea ports, electricity, telecommunications, water supply and sanitation.[1] Wilson also identified that hard infrastructure covers ports, airports, roads and rail lines– all critical for connecting a country internally and to the outside world.[2] On the other hand, soft infrastructure constitutes border and logistics management (shipping, air transport, and telecommunications) as well as business environment.

Hard Infrastructure can be classified as the physical systems that make it necessary to run an industrialized nation. Such examples include roads, highways, bridges, airports as well as the harbours and seaports. The main role of infrastructure in facilitating trade is to decrease the cost incurred when moving goods or services from one location (the point of origin) to another (location of final consumption). For instance, air transport is vital for the movement of perishable, non-bulky and high value exports like flowers and fish. Furthermore, air transport plays a significant role in the development of the tourism sector.

Soft infrastructure on the other hand is made up of institutions that help maintain the economy. These usually require human resource and help deliver certain services. An example is custom procedures. The problems that can impede trade facilitation are the traffic on specific routes, the quality of transport infrastructure, and the efficiency of transport related services.

To avert this, transport costs can be reduced by the provision of connected and efficient transport networks (hard/physical infrastructure) and also from reduced transaction costs by the removal of intangible barriers ('soft' component) through the simplification of customs procedures, harmonization or mutual recognition of standards. The success story of Singapore suggests that it is paramount to consider both components together to lower the costs of trading.

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[1]Johan Fourie, 2006. "**Economic Infrastructure: A Review Of Definitions, Theory And Empirics**," South African Journal of Economics, Economic Society of South Africa, vol. 74(3), pages 530-556, September.

[2]*Alberto Portugal-Perez* and *John S. Wilson, 2012 E*xport Performance and Trade Facilitation Reform: Hard and Soft Infrastructure, *World Development*, 2012, vol. 40, issue 7, 1295-1307

Another key infrastructure whose importance cannot be over-emphasized is information technology. Technical systems like networking equipment and servers play a vital function. For example, it provides the convenience of online shopping making traders market their goods across the globe, as well as provide traders with a more systematic management, use real time monitoring of transactions and offer instant customer support.

The key function of infrastructure in facilitating international trade is to decrease the cost of moving goods or services from its origin of production to another location – place of consumption. The reduced costs can be achieved through diminished transport costs by the provision of connected and quality transport networks ('hard' element) and reduced transaction costs through the removal of intangible barriers of exchange ('soft' element). Both hard and soft infrastructural measures tend to be complementary as they positively impact on increasing trade volumes. Mbekeani[3] has aptly described the complementarity between hard and soft infrastructure needed to achieve trade performance. He asserts that even if physical infrastructure is functional, defective regulatory and administrative practices will impede the quality of transport services and will consequently deter trade. On the other hand, where no structural reforms of the policy and institutional environment for trade have been made, existing transport system can only satisfy minimal transit of goods and services without the soft infrastructure of communication needed to connect markets as well.

Therefore, in order to promote international trade within Africa, a structured regional infrastructure (both hard and soft) has to be in place. Regional infrastructure is one that allows trade agents to connect with regional and other international markets along defined routes. It encompasses modes such as regional roads and railways, as well as ports and airports that act as a hub which links the African countries in this region. For example, the Abidjan-Lagos Coastal Corridor Project aims as modernizing the heavily travelled corridor in West Africa geared towards the advancement of trade. It covers Benin, Cote d'Ivoire, Ghana, Nigeria and Togo. Another notable project is the Lamu Port–South Sudan–Ethiopia Transport (LAPSSET Corridor programme). It is East Africa's largest infrastructure project that brings together Ethiopia, Kenya and South Sudan. This mega-project consists of seven key infrastructure projects: a new 32-berth port at Lamu (Kenya), inter-regional highways connecting Ethiopia, Kenya and South Sudan, a crude oil pipeline across the three countries, a product oil pipeline from Kenya to Ethiopia, 1,500 kilometres of interregional standard gauge railway lines through the three countries, three international airports and resort cities (one in each country) and the multipurpose High Grand Falls Dam along the Tana River.

These are steps in the right direction as ample research has shown the positive relationship between infrastructure and the promotion of international trade. Findings have revealed the positive impact that investments in both domestic and international

[3]Kennedy K. Mbekeani, Infrastructure, Trade Expansion and Regional Integration: Global Experience and Lessons for Africa , *Journal of African Economies*, Volume 19, Issue suppl_1, 2010, Pages i88-i113, https://doi.org/10.1093/jae/ejp021

infrastructure have on international trade. Research study by Helble[4] for example, looked at the correlation between international transport infrastructure and bilateral trade in Pacific countries. He examined how shipping and air-cargo connections and its frequency among Pacific countries affect their bilateral trade flows. The results of his investigations suggest that having a direct connection and a high connection frequency has a large and statistically significant impact on bilateral trade flows.

An investigation by Volpe, Carballo and Graziano[5] discovered that trade export values are affected by how the customs functions, particularly the time it takes to clear customs.

In another study, Portugal-Perez and Wilson[6] assessed the impact hard and soft infrastructure have on bilateral trade flows. They found that physical infrastructure was the most robust determinant of bilateral exports, whereas the impact of other variables often changed depending on specifications.

Lall *et al*[7] also examined the causes of high transport costs in Malawi. The focus was on the respective impacts of hard infrastructure (coverage and quality of roads networks) and soft infrastructure (market structure of the trucking industry). It was discovered that both components significantly contribute to transport costs, as the extent of competition among transport providers and scale economies in the freight transport industry affects the cost of moving goods therefore affecting the trade volumes.

Bouët *et al*[8] studied the impact different types of infrastructure have on trade and also highlighted the complementarity among several types of infrastructure. They revealed that poor transport and communication infrastructure accounts for most of Africa's underperformance in trade. Furthermore, investments in infrastructure are likely to have a much greater impact if transport infrastructure development and communication infrastructure development are undertaken jointly. Their key finding is that hard infrastructure accounts for nearly half of the transport cost penalty borne by intra-sub-Saharan African trade thus explaining the underperformance of the continent's trade.

It is refreshing to state that the all-important role infrastructure plays on international trade was taken note of and some key provisions in this area were stipulated in the AfCFTA. However, the agreement focused on the soft infrastructure only. The

[4]Helble, Matthias, 2014. The Pacific's Connectivity and Its Trade Implications. Asian Development Bank Institute working paper 499.

[5]Volpe Martincus, Christian, Jerónimo Carballo, and Alejandro Graziano, 2015. Customs. Journal of International Economics 96, 119-133.

[6]Portugal-Perez, Alberto and John S. Wilson, 2012. Export Performance and Trade Facilitation Reform: Hard and Soft Infrastructure. World Development 40(7), 1295–1307.

[7]Lall, S.V., Wang, H. and Munthali, T. (2009) 'Explaining High Transport Costs within Malawi – Bad Roads or Lack of Trucking Competition?' Policy Research Working Paper 5133. Washington, DC: World Bank.

[8]Bouët, A., Mishra, S. and Roy, D. (2008) 'Does Africa Trade Less Than It Should, and If So, Why? The Role of Market Access and Domestic Factors'. Discussion Paper 00770. Washington, DC: IFPRI.

principal objective of these provisions is to create a single liberalized market for trade in services and goods. For instance, Article 18 of the AfCFTA on the Protocol on Trade in Services, encourage State Parties to undertake successive rounds of negotiations based on the principle of progressive liberalization accompanied by the development of regulatory cooperation, and sectoral disciplines. This should take into account the objectives of the 1991 Abuja Treaty that aim to strengthen integration at the regional and continental levels in all fields of trade, and in line with the general principle of progressivity towards achievement of the ultimate goal of the African Economic Community.

With the aim of liberalizing trade in goods, State Parties signed onto the AfCFTA are encouraged to progressively eliminate import duties or charges having equivalent effect on goods originating from the territory of any other State Party in accordance with their Schedules of Tariff Concessions contained in Annex 1 to this Protocol. This is stipulated in Article 7 of the AfCFTA Protocol on Trade in Goods. In addition, it is stated that any import duties imposed by State Parties should not include any: (a) charges equivalent to internal taxes imposed consistently with Article III(2) of GATT 1994, b) antidumping or countervailing duties imposed in accordance with Articles VI, and XVI of GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures and Article 17 of this Protocol; (c) duties or levies imposed in relation to safeguards, in accordance with Articles XIX of GATT 1994, the WTO Agreement on Safeguards and Articles 18 and 19 of this Protocol; and (d) other fees or charges imposed consistently with Article VIII of GATT 1994. The goal of these GATT and WTO agreements is the promotion of trade liberalization by cutting the tariff rates to benefit of State parties. The measures stipulated in Article 7 of the AfCFTA Protocol on Trade in Goodsare geared towards reducing and ultimately eliminating barriers to Regional trade in the form of import duties.

Quantitative restrictions on trade refers to measures taken by States which involve the placement of limits or quotas on the physical amounts of particular commodities that can be imported or exported for a specified time period. Quantitative restrictions are considered to have a greater protective effect on trade than tariff measures and are more likely to distort free trade. In lieu of this, State Parties to the AfCFTA are required not to impose quantitative restrictions on imports from or exports to other State Parties except as otherwise provided for in this Protocol, its Annexes and Article XI of GATT 1994 and other relevant WTO Agreements. This is spelt out in Article 9 of the AfCFTA on the Protocol on Trade in Goods.

In order to promote cross border movement of goods, State Parties are encouraged to take appropriate measures regarding customs cooperation and mutual administrative assistance in accordance with the provisions of Annex 3 on Customs Cooperation and Mutual Administrative Assistance as provided in Article 14 of the AfCFTA Protocol on Trade in Goods.

Other salient provisions of the AfCFTA Protocol on Trade in Goods include Article 21 which is on the removal of technical Barriers to Trade and Article 15 - Trade Facilitation. State Parties are mandated to take appropriate measures including arrangements towards trade facilitation in accordance with the provisions of Annex 4 on Trade Facilitation.

This particular Article is inspired by the WTO Agreement on Trade Facilitation. The Trade Facilitation Agreement (TFA) contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It further contains provisions for technical assistance and capacity building in this area. Article 7 admonishes Member parties to allow electronic payment of duties, taxes, fees and charges as much as possible. This is geared towards making payment convenient and easier. In addition, Member parties are encouraged to eliminate or reduce regulations or formalities for goods on transit. Furthermore, should a less trade-restrictive solution become available, they should not be applied in a manner that would be a disguised restriction on trade. These are spelt out in Article 11 of the TFA.

Countries with common land borders are also encourage to cooperate and coordinate procedures to facilitate cross-border trade. Article 8 of the TFA requires National border authorities/agencies to cooperate and coordinate with other national border controls and put in place borders procedures that facilitate trade across common State borders.

Another important provision of the TFA is found in Article 10. It encourages Member parties to periodically review the formalities and documentation requirements with a view towards simplifying or reducing them or eliminating them if a less trade-restrictive solution is available. Members are also encouraged to establish a "single window" to which a trader can submit all documents and/or data required by customs and all other border or licensing authorities for the import, export or transit of goods, and from which the trader will receive all notifications.

All these clauses in the AfCFTA, GATT, various WTO agreements discussed above are aimed at cutting down barriers to international trade. In order for Ghana to fully take advantage of the economic benefits of the AfCFTA, the infrastructural system needs to be tailored towards liberalizing trade. To really appreciate the significant role these infrastructure play, a profile of Singapore and South Africa will be discussed in the subsequent sectors.

III. A Profile of Singapore

Despite the land size of Singapore, it is currently the 15th largest export economy in the world and the 4th most complex economy according to the Economic Complexity Index.[9] Singapore's economy has also been ranked as the most open in the world, third least corrupt, most pro-business, with low tax rates according to the Global Enabling Trade Report.[10]

This remarkable achievement by Singapore was attained by intentional and progressive policies and initiatives geared towards building a solid infrastructure to facilitate trade.

[9] https://oec.world/en/profile/country/sgp/

[10] https://www.doingbusiness.org/en/reports/global-reports/doing-business-2012

III.1 Ports and Shipping

The Government of Singapore took several steps to achieve the goal of integrating their seaports. The initial step taken was to expand their port capacity to play an even bigger trans-shipment role and made provision for another 20 berths. The second initiative taken was the introduction of the alternative port, Jurong Port to encourage healthy competition.

Currently, the Port Authority of Singapore (PSA) handles about one-fifth of the world's total container trans-shipment throughput The PSA operates 4 container terminals and 2 multi-purpose terminals and links shippers to an excellent network of 200 shipping lines with connections to 600 ports in 123 countries.[11]

To supplement the current capacity, the Maritime and Port Authority of Singapore is due to hand over the 20 million-TEU (Twenty-foot equivalent unit) first phase of the Tuas complex to the terminal operator, PSA International, in 2021. Tuas which is being built in four phases will be capable of handling 65 million TEU annually when completed by 2040, compared with the current 45 million TEU of capacity at PSA International's existing terminals.

Being an integrated logistics hub, Singapore has a comprehensive range of "soft" services ancillary to the physical handling of cargo, and which cover the entire maritime and logistics value chain, including insurance, brokerage, arbitration and financing. The PSA adopted a remuneration system approach to encourage high productivity and cooperation from port workers. By tying remuneration to performance, the system encourages high productivity and dedication from the workers of the ports.

III.2 Airport

Another strategic asset of Singapore is their airport facilities. In order to strengthen trade links with major world economies, the Singapore government's goal was to augment the Future Air Transport Hub. Singapore's first commercial airport was based at Paya Lebar. However due to its close proximity to residential areas, a new site was chosen at Changi in the 1970s. The Changi site was selected because it was a better airport approach via the sea and also there were less residential areas affected by air and noise pollution. Furthermore, it has better road access and no interruption to air traffic movements from Paya Lebar. Changi Airport has been redeveloped and expanded a number of times, and has been accredited internationally for its high-level services.

III.3 Information Technology

In 1981, the Government of Singapore tasked the National Computer Board (NCB) to coordinate computer education and training aimed at supporting industries with appropriate IT manpower. In1991, the NCB in a bid to solidify its plan to link up the businesses in Singapore with the world a comprehensive information technology plan called "IT 2000" was launched as a framework to guide Singapore IT development into the 21st century. A nation-wide broadband structure called "Singapore ONE" was also undertaken to deliver high-speed internet telecommunications. Presently, the Next

[11] https://www.singaporepsa.com/

Generation National Infocomm Infrastructure was step up in 2012 which is capable of delivering broadband speeds up to 1 Gbps.[12]

IV. A Profile of South Africa

South Africa is currently the 34th largest export economy in the world and the 47th most complex economy according to the Economic Complexity Index (ECI).[13]

IV.1 Ports and Shipping

It is estimated that approximately 96% of South Africa's exports are conveyed by sea. There are eight commercial ports which are the conduits for trade between South Africa and its southern African neighbours. The commercial ports are: Richards Bay and Durban in KwaZulu-Natal; East London, Port Elizabeth and the Port of Ngqura in the Eastern Cape; and Mossel Bay, Cape Town and Saldanha in the Western Cape. In South Africa, the state-owned Transnet National Ports Authority (NPA) manages the ports, while Transnet Port Terminals, formerly known as SAPO, has the responsibility of managing port and cargo terminal operations.

The Port of Ngqura is the deepest container terminal in Africa whiles the Port of Durban is Africa's busiest port and the largest container facility in southern Africa. Furthermore, the Richard's Bay Port is the world's largest bulk coal terminal. The Dube Trade Port was launched in 2012 and it houses the King Shaka International Airport. Operated by the Dube Trade Port Corporation, a state-owned company, the port includes a cargo terminal, trade zone, agrizone and IT and telecommunications platforms.

IV.2 Road Network

South Africa's total road network which is about 750 000km is the longest road network in Africa and the tenth longest network in the world.[14]While the Department of Transport is responsible for the overall policy, road-building and maintenance of the road is under the responsibility of the South African National Roads Agency (Sanral) as well as the nine provinces and local governments. About 19% of the national roads are toll roads, most of which are maintained by Sanral, while the rest have been given as concessions to private companies to develop, operate and maintain.

IV.3 Railway Network

South Africa has an extensive rail network that is the 14th longest in the world and with connections to the sub-Saharan region. South Africa's rail infrastructure links the ports with the rest of South Africa and remarkably represents about 80% of Africa's total railway infrastructure. The rail network is managed by the Department of Public Enterprises under Transnet Freight Rail. Transnet Freight Rail is the largest railroad and

[12]http://www.eria.org/uploads/media/Research-Project-Report/RPR_FY2007_2_Chapter_8.pdf
[13]https://oec.world/en/profile/country/zaf/
[14]https://www.transport.gov.za/roads

heavy haulier in southern Africa, with about 22 000km of rail network. Just over 8 200km of the lines are electrified.[15]

IV.4 Airports

South Africa has 10 airports which handle more than 98% of the country's commercial traffic, with 200,000 aircraft landings and 10-million departing passengers annually. These are Tambo International in Johannesburg, Cape Town International, and the new airport, King Shaka International, outside Durban. In addition, there are seven smaller airports. These domestic airports includes: Port Elizabeth, East London, George and Pilanesberg. The State-owned Airports Company of South Africa (ACSA) is responsible for managing the country's airports and improving productivity of its airports.

V. A Profile of Ghana's Current State and Future Progression

This section focuses on an in-depth discussion of Ghana's present infrastructural state, its on-going projects as well as future progression.

V.1 Airport

Kotoka International Airport which is the only international airport of Ghana is situated in Accra. It has the capacity to accommodate large aircrafts including the Airbus A380. The airport is managed by Ghana Airports Company Limited (GACL), which has its offices on the premises of the airport. The airport consists of two passenger terminals, Terminal 2 and Terminal 3. Terminal 2 serves only domestic flights, while Terminal 3 serves regional, international and long-haul operators. [16] Terminal 1 is presently not in use, but there are plans to redevelop it into a Fixed-Base Operator.

The Kumasi Airport is situated about 3.5 kilometres from Kumasi, the capital city of the Ashanti Region. It currently serves only domestic flights but is now undergoing rehabilitation to upgrade it to international standards. The rehabilitation project includes the construction of a new terminal facility and extending the runway.

The Tamale International Airport is located at Tamale in the Northern Region of Ghana. It also currently serves domestic flights and one international flight to Mecca during the Hajj Pilgrims. In August 2019, the development of Tamale International Airport Phase 2 Project was reported to have commenced. The scope of works for the project includes construction of terminal building with approximately 5,000m^2 expandable in the future as well as modern facilities such as baggage handling system and screening systems. Upon completion, the new terminal will have the capacity to process annual passenger throughput of 400,000 at 300pax/peak hour.

The Takoradi Airport is located at Sekondi-Takoradi in the Western Region of Ghana. It primarily serves domestic flights.

Recently in October 2019, the Wa Airport was officially opened for commercial flight operations. The facility includes terminal building and a perimeter fence. It is aimed

[15] https://www.transport.gov.za/web/department-of-transport/rail
[16] https://www.gacl.com.gh/

at opening up the country by air transport to promote economic development and business activities.

The Government of Ghana also seeks to create another International Airport at the Southern part of the country specifically at Prampram. This idea was developed way back in 1994 but work is still yet to begin. The aim is to build not just an airport, but an aerotropolis. The terminal area of the proposed airport is 45,000 m² and with the cargo throughput of 30,000 tonnes annually. The proposed design also has a cargo warehouse area of 7,000 m² and a carpark area of 42,000 m².

V.2 Ports and Shipping

Ghana has two main ports. The Takoradi Port which is dedicated to exporting resources whilst the Tema Port is mainly focused on imports. The Tema Port is the largest in the country which stretches over 4 million square meters and can accommodate over 800,000 containers. The port is managed by the state and other private companies like Bolloré Africa Logistics. The Government is committed to modernizing the Tema Port to accommodate about 3.5 million containers upon completion of the project. In addition, a new inland port is being constructed at Boankra near Kumasi purposefully to act as a staging post for goods in transit to neighbouring landlocked countries.

V.3 Road Network

Ghana has 109,515 km of roads paved or tarred with 13,787 km being major roads.[17] The major roads are managed by the Ghana Highway Authority. The national roads presently link all of the main cities of the country. This is of prime importance because majority of goods and people are transported by road. One of the most significant highways is the Tema-Accra Motorway. This road network connects the city of Tema, the largest port in the country to the capital Accra. It is currently under construction to widen the axis and create an Interchange at the end of the motorway to facilitate the transit between these two cities. This highway is also part of the network of trans-African roads that connects Mauritania with Nigeria along the Atlantic coast.

V.4 Railway Network

The railway network is operated by the public company Ghana Railway Corporation. Currently there are railway lines that link Accra, Kumasi and Takoradi on a triangular route of 953 km. There are several on-going projects including the Dunkwa to Kumasi Railway line, Western Railway Line (Narrow Gauge and Standard Gauge). The Western Railway Line includes the rehabilitation of 56km of the existing narrow gauge line from Kojokrom to Tarkwa through Nsuta. Eastern Railway Line (Narrow Gauge and Standard Gauge); Kumasi-Paga Line (Central Spine); Tema-Mpakadan (Akosombo) Line; Ghana-Burkina Faso Railway Interconnectivity Project and Accra and Kumasi Metro/Light Rail

[17] http://www.economiesafricaines.com/en/countries/ghana/infrastructures/the-road-network

Transit Systems. In May 2019, the Minister for Railway Development indicated that rehabilitation works on the Achimota–Nsawam section of the line was 95% complete.[18]

V.5 The Rise of Fuel Prices

The cost of fuel in Ghana has been on the rise in the last 5 years due to the foreign exchange rates and the imposition of more taxes. For instance, in December 2015, the Parliament of Ghana passed an Energy Sector Levy Act (2015) that imposed more taxes including 17.5 percent Value Added Tax on petroleum products. There has been a 22% increment in fuel prices in the last five years. For example a gallon of petrol which was selling at GH¢15.85 in May 2016 per gallon is now going for GH¢ 21.36. Diesel which went for GHC15.50 per gallon is presently selling for GH¢ 21.52 a gallon.

A continued increase in fuel prices will not augur well for traders since it directly affects both the cost of production for goods and transportation cost.

V.6 ICT Infrastructure

The infrastructural base in the ICT sector composes of undersea cable connectivity, Private Licensed VSAT Systems, Fixed Wired Line Networks, Public telephones systems, Internet Backbone Connectivity and a number of Mobile Network Operators. The National Fibre Communications Backbone Infrastructure Network for example is aimed at providing open access broadband connectivity which is also being steadily developed.[19] Ghana was ranked the No. 1 destination in West Africa and No. 11 in Africa in the Internal Telecommunications Union's Global ICT for Development Index in 2017. Despite the strides Ghana has made in ICT sector there is still a lot more room for improvement. It has been observed that the sector requires service providers in connecting international voice calls to the local public network.

Furthermore, in October 2019, a 9% levy charge was imposed on mobile phone users as Communication Service Tax. This invariably has increased the cost of trading through telecommunication devices. This is another setback for this sector.

V.7 Common Border Posts

Ghana's border crossing of Elubo located in the Western Region is the main border crossing between Ghana and Cote d'Ivoire to the West. This border deals with a high level of traffic as it is the only crossing point for transit trucks to Ivory Coast. At this border the requirements for customs clearance includes Original Bill of Lading/Airway Bill; Invoice; Packing List; Final Classification and Valuation Report (FCVR); Import Declaration Form (IDF) from the Ministry of Trade and Industry; Tax Clearance certificate from the Domestic Tax Revenue Division issued in the name of the importer or 1% of CIF payment fee; Tax Identification Number (TIN) from the Ghana Revenue Authority; Permit or License from the appropriate Ministry / Agency / Department as applicable for restricted goods and Appropriate letter of Exemption from payment of duty

[18] https://www.businessghana.com/site/news/general/186990/Big-boost-for-the-Ghana-Railways-Masterplan-VIDEO

[19] https://www.gipcghana.com/invest-in-ghana/why-ghana/infrastructure.html

and/or taxes as applicable.[20] As observed the administrative documents covering Customs Clearance is demanding, numerous and not harmonized in a single document or system.

Another example is Ghana's Border Crossing at Sampa in the Brong Ahafo Region and Soko in the Cote d'Ivoire. The post has not yet being computerized and uses manual methods. For instance documents required for exportation encompasses the filling out of a customs form titled 'Non Traditional Export Form'. After which the exporter is expected to make 10 copies of this document for 10 different institutions. The breakdown includes 1 for the exporter, 1 for the Customs, 1 for the Ministry of Trade, 1 for the Ministry of Finance, 1 for the Statistical Services, 1 for the Customs Headquarters and 1 for the Ministry concerned.

In November 2014, the common border post for Ghana and Togo at Noepe was commissioned. This was a strategic move to improve the free movement of goods and people across the two States and to reduce trade logistics costs. The project is sited on 17.7 hectares of land. It is proposed to be sub-divided into zones for passenger transportation, freight handling, and transit and cattle inspection. The project, which cost 10.3 million euros, formed part of the Economic Community of West Africa States (ECOWAS) Transport Facilitation Programme, which is being supported by the European Union (EU). In addition, the Government of Ghana seeks to establish similar common border projects at Noe/ Elubo on the Ghana-Côte d'Ivoire border and Paga/Dakola on the Ghana-Burkina Faso border in the years to come.

VI. Lessons drawn from Singapore and South Africa – Possible Policy Recommendations

1. Hard Infrastructure development combined with public administration development (soft infrastructure) has been the key to Singapore's economic transformation from a Third World to a First World country within 40 years. Singapore's experience has undeniably proved that the development of both hard and soft infrastructure must be undertaken simultaneously.

2. Infrastructure development must be geared towards economically viable projects based on long-term planning and managed on commercial-based practices as well as tying staff's remuneration to their performance.

3. The private sector involvement must be encouraged because they often set the standard of efficiency and benchmarking of quality and competitiveness.

4. Infrastructure development must be operated on the principle of transparency and accountability with respect to public tender for projects and management operation.

5. Master Plan of infrastructure development should be drafted on a long-term strategic objectives based on overall planning, efficiency, competition, cost-

[20] https://dlca.logcluster.org/display/public/DLCA/2.3.2+Ghana+Border+Crossing+of+Elubo

benefit analysis and best-use analysis approach for the selection of a site for a facility.

6. The Single Administrative Document for customs can be adopted in the customs border posts to reduce the cost of moving goods across borders, through a single customs declaration made in the originating country.

7. The Electronic Data Interchange between customs administrations can be adopted to facilitate speedy changes between institutions.

8. The availability of high quality and price competitive trade logistics services (transport, warehousing, distribution, information management) strongly correlates with country competitiveness and efficiency,

9. The development of strategically placed airports and seaports with the accompanying well-ironed soft infrastructure system. The Government of Ghana can seek to expand the capacity of the Tamale Airport to accommodate international cargo shipment and a refuelling capacity.

VII. Conclusion

The importance of developing a solid infrastructural base to facilitate international trade cannot be underscored. Singapore is the perfect example of how an intentionally well-planned and execution of both hard and soft infrastructure development has galloped the country's rank as the Fourth best trader in the world. There are several initiatives that the Government of Ghana has already undertaken to aid the transport of goods and services but several of these projects have either being stalled or yet to begin. It is imperative that if Ghana is to fully take advantage of the AfCFTA, a well-developed long-term strategic plan must be geared towards that specifically in the area of IT infrastructure, single administrative documentation for customs together with the already on-going hard infrastructural projects