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A note from the Editor-in-Chief

The 2023 GSL SRC Editorial Board is thrilled to introduce its maiden digital journal.

The journal comprises 13 well-written articles on a myriad of themes and a foreword by Mr. Bobby Banson– a distinguished legal practitioner and lecturer at the Ghana School of Law.

Besides being the maiden digital journal, it is the VIII Issue.

This digital journal prides itself on a partnership with the Ghana National Folklore Board.

The journal is designed with adinkra symbols that represent knowledge; justice; supremacy or superiority; seal of law and order; and courage and hard work – a worthy indication that the tenets of justice have a dominant place in Ghanaian culture.

The articles presented in this issue have been carefully selected and have undergone rigorous review processes for close to a year.

They contribute to new and emerging areas of law, critique judicial decisions and present new insights.

It is noteworthy that the articles in this issue are the views of the respective authors, which views may not necessarily represent the views of the Editorial Board.

Given the ubiquity of the internet, this journal promises to be far reaching– one of the authors whose article is reflected herein is Zimbabwean.

Bassirou Diomaye Faye gained the continent's admiration for winning the just-ended presidential election in Senegal at the young age of 44. This feat generated buzz on social media. Opinion polls revealed that most Africans prefer having youthful Presidents. Nana Nti Ofori-Debrah, in the opening article, **'"Not too young to run, but can be too old to play": a case for rethinking the minimum and maximum age limits for the office of Ghana's presidency'**, champions Ghana's version of the *Not too young campaign* which culminated in the promulgation of the Not too young to run Act in Nigeria. Find out from the article if a good case is made for rethinking the minimum and maximum age limits for the office of Ghana's presidency.

The Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021, which awaits presidential assent evoked discussions in the media on topics such as human rights, western imperialism, among others. David-Kratos Ampofo's article, '**Where heartstrings tug at legalities: Ghana's constitutional stance on LGBTQ+'** presents interesting finds and admonishes the legislature to consider equality and human rights ultimately.

'Unmasking the paradox of universal values: revisiting the universality debate in human rights' by Diane E. Kaye is revealing– the UDHR not as universal as it has been

portrayed by the West given the non-inclusion of the cultures of non-Western states in the making of "the universal document".

Joel Telfer's article, '**Unravelling the snare: dissecting the interplay of entrapment in investigative journalism and its repercussions in Ghana's criminal justice system'** offers an in-depth analysis of the legal and ethical ramifications of entrapment within Ghana's legal framework.

There is a plethora of medical negligence cases the world over, however, what standard should the Ghanaian courts apply? Samuel Kwame Kumi and Joel Tetteh, in their article, '**Common sense, Bolam or Montgomery? In search of an "appropriate" standard for assessing consent-related medical negligence in Ghana'** sufficiently examine three contrasting standards available to the Ghanaian courts for the assessment of medical negligence claims that turn on patient consent– common sense, Bolam and Montgomery. The authors, thereby, recommend that the Ghanaian courts lean favourably toward the sound principles enunciated in Montgomery's case as they observe that it is yet to receive judicial blessing in Ghana.

The courts in Ghana are inundated with cases on the daily. There is, thus, advocacy and resort to Alternative Dispute Resolution ("ADR") methods such as Arbitration. The vision of the Honourable Chief Justice of the Republic of Ghana dubbed the LEADing Justice Initiative which was launched on 8 April 2024, highlights the relevance of court-connected ADR, among others. Prince Kanokanga and Regina Apaloo's article titled, '**Is an arbitration management conference mandatory or directory? An analysis of section 29 of Ghana's Alternative Dispute Resolution Act, 2010 (Act 798)'** digests arbitration management conference evincing its true effect.

Taking cognisance of the objectives of the High Court (Civil Procedure) Rules, 2004, Richmond Agbelengor, in his article, '**Failure to amend after grant of leave: a mere or a fundamental irregularity? the case of *Akufo v Catheline*'** argues that the effect that follows, where a party fails to amend after obtaining leave to amend, is no longer sacrosanct.

Expressed in the article titled '**Presumption or proof: examining the role of a jurat in establishing the validity of wills'**, is the current position of the law regarding the use of jurats in determining the validity of wills in Ghana. Vanessa Naa Koshie Thompson explores the significance of a jurat in determining the validity of wills and its evidential value within Ghana's legal landscape.

'**The current legal framework for surrogacy in Ghana and the inherent need for comprehensive legislation on same'** by Benedicta Fosuhene Agyen makes a clarion call for comprehensive legislation on surrogacy in Ghana as those provided by the Registration of Births and Deaths Act, 2020 (Act 1027) are insufficient given the proliferation and complexities of surrogacy practices in Ghana.

It is noted from clause 856 of the Budget Statement and Economic Policy of the Government of Ghana for the 2024 Financial year that the Office of the Attorney-General through the Legislative Drafting Division, is working in collaboration with other Ministries, Departments,

and Agencies (MDAs) to enact the Property Rights of Spouses Bill. This aligns with the erstwhile Editor-in-Chief of the GSL Journal, Juliet Buntuguh's proposal for the enactment of legislation in her article, '**Tracing the development of spousal property rights in Ghana: an examination of Ghanaian judicial decisions and a proposal for legislation in that regard'**, to specifically regulate the distribution of spousal property in Ghana as prescribed by Article 22(2) of the 1992 Constitution.

David-Kratos Ampofo, in another article titled '**The resilient minority: the evolution of Ghana's company law from Foss v Harbottle onwards'** navigates Ghana's corporate law trajectory. The article accentuates the challenges and strengths of balancing the **Foss v. Harbottle** rule with contemporary requisites and the necessity of ensuring equity while facilitating corporate growth.

Frederick Agaaya Adongo in his case note titled '**Whispers of an errant gavel: unravelling the denial of justice in Edmund Addo v The Republic'** contends that the meaning placed on the saving provisions in the Interpretation Act, 2009 ("Act 792") by the Supreme Court in the case of **Edmund Addo v The Republic, Criminal Appeal No. J3/04/2022 dated 31st May, 2023 (Unreported),** contravenes established principles and precedent, in the result, creating tension between the application of the general saving provisions in the Act and the constitutional rights of accused persons.

In July 2022, Ghana introduced plea bargaining to its laws– the promulgation of the Criminal and Other Offences (Procedure) (Amendment) Act, 2022 (Act 1079). Daniel Arthur Ohene-Bekoe and Emmanuella Okantey's article, '**Plea bargaining, plea of guilty and confessions – investigating the triangular relationship'** evaluates plea bargaining, plea of guilty, confessions and their nexuses.

You may access each article in downloadable format via http://www.gsljournal.org/.

Enjoy the read.

Joyann Obeng
Editor-in-Chief
2023

FOREWORD

Sometime in 2011, Mr. Frank Nimako Akowuah (now partner at Bentsi-Enchill, Letsa & Ankomah) encouraged me to submit an article for publication in the Journal of the Ghana School of Law. I submitted a paper titled "The Rule in Foss v Harbottle- Dead or Alive". Reading these 13 articles brought back nostalgic memories of the efforts a law student would have to put in to come up with such wonderful piece of legal work. To all the contributors, I say Kudos.

This collection of articles touch on a wide range of legal areas. From Arbitration to Civil Procedure; and from Constitutional Law to Company Law. The articles touch on topical issues being discussed in the current legal space. Topics such as criminalisation of LGBTQ, medical negligence and surrogacy were dissected instructively by the authors.

The Authors were bold and incisive in their analysis of the law and did not shy away from controversial conclusions. I have no doubt that any person who reads these articles will find them worthy of his or her time.

I wish to congratulate the editorial team and all contributors for contributing their quota to legal scholarship and adding a layer of intellectual material to areas of law, yearning for such efforts.

Well done!!

Bobby Banson
Lecturer, Civil Procedure
Ghana School of Law
April 2024.

THE EDITORS

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Diane E. Kaye

Frederick Agaaya Adongo

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Without the vision of the immediate past President of the GSL SRC, Odupong Agyapong Atta-Agyapong; the diligence of the 2023 SRC; the unwavering support of the 2023 Editorial Board; and all cherished authors/ contributors, this journal could not have been published.

The 2023 GSL SRC Editorial Board is grateful.

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"NOT TOO YOUNG TO RUN, BUT CAN BE TOO OLD TO PLAY": A CASE FOR RETHINKING THE MINIMUM AND MAXIMUM AGE LIMITS FOR THE OFFICE OF GHANA'S PRESIDENCY

Nana Nti Ofori-Debrah*

ABSTRACT

This article expounds on the age requirements for the office of Ghana's presidency. Specifically, it addresses both the minimum and maximum age limits for eligibility into the office. With regard to the minimum age limit which is presently set at 40 years, the author takes the view that it is discriminatory and contravenes the rights of 55.1% of Ghanaian adults to stand for elections. Concerning the absence of a maximum age limit from Ghana's constitutional framework, the author is of the opinion that it is degenerating Ghana's democracy into a gerontocracy. Further, the author argues that the absence of a maximum age limit exposes Ghana to the possibility of having an inefficient president whose stay in office would be averse to the interest of Ghanaians and Ghana's socio-economic development. The author concludes by proposing an amendment to article 62(b) of the Constitution of Ghana, 1992—reducing the minimum age limit from 40 to 35. Additionally, a proposal is made for the establishment of a maximum age cap beyond which a person should not be allowed to contest for Ghana's presidency.

* BL Candidate (Ghana School of Law); LL.B (*cum laude),* Kwame Nkrumah University of Science and Technology; Alumnus, Ghana's Youth Leaders Academy (2022).

1.0 INTRODUCTION

This article is primarily about the struggles Ghana's youth face in their quest to participate in national politics. Specifically, it relates to the constitutional barrier inhibiting persons below 40 years from contesting for Ghana's presidency, 22 years after becoming eligible to vote.[1] This constitutional barrier is article 62(b) of the 1992 Constitution[2] which provides that 'a person shall not be qualified for election as the president of Ghana unless he has attained the age of forty years'.[3]

The Committee of Experts ("Committee") in their report did not justify their decision to set the minimum age for presidential candidacy at 40 years.[4] In paragraph 29 of the report,[5] it was only stated that the Committee endorsed the provision as was found under article 49(b) of the 1979 Constitution. Unfortunately, existing literature does not account for why the framers of the 1979 Constitution themselves adopted the 40-year minimum eligibility age.[6] One may suppose that reference was made to the 1969 Constitution, where the minimum age requirement of 40 years was first stated.[7] Unfortunately, the drafters of the 1969 Constitution did not provide justification for their recommendation of a 50-year minimum age requirement, which was later reduced to 40 years.[8] It appears from the literature that the drafters of the 1969 Constitution set a limitation to ensure that only "experienced" and "mature" individuals have the opportunity to contest for and assume Ghana's highest seat. What initially seemed like a reasonable qualification has, in present day, become a tool to exclude young, qualified citizens from running for Ghana's presidency.[9] Consequently, 55.1% of registered voters in Ghana representing a total of 9,375,520 persons out of the 17,027,650 registered voters are barred from contesting for the presidency.[10]

Is it the case that all of these 9,375,520 young registered voters in Ghana are inexperienced and immature? The late Queen Elizabeth II who assumed the highest throne in England and Wales at age 25,[11] would have in present-day Ghana been considered too young, inexperienced and immature to be put at the helm of affairs. H.E Emmanuel Macron of France who became president at age 39 would have also been considered too young to run for

[1] Constitution of Ghana 1992, Article 42.
[2] Constitution of Ghana 1992.
[3] Ibid. Article 62(b).
[4] See Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), Para. 29.
[5] Ibid.
[6] See Constitution of Ghana 1979, Article 49(b).
[7] See Constitution of Ghana 1969, Article 40(b).
[8] See Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, para 344. See also Constitution of Ghana 1969, Article 40(b).
[9] Paul R Baier, 'The Constitutionality of Minimum Age Requirements for Public Office: Reading Joseph Story on Constitution Day' [2000] 60(2) LLR; Ibid. (n 5) para. 29.
[10] Doris D Sasu, 'Age Distribution of Registered Voters in Ghana 2020 ' (14 December 2020). Statista < https://www.statista.com/statistics/1193170/registered-voters-in-ghana-by-age/ > accessed 20 May 2022.
[11] J Philpott, 'Britain at Work in the Reign of Queen Elizabeth' (2012) Chartered Institute of Personnel and Development.

presidency in Ghana under the present constitutional order. But for his coup d'état, the late Flt. Lt. Jerry John Rawlings would not have had any legitimate chance to serve Ghana when he first rose to the helm of affairs in 1979 because he was only 32 years old.

This apparent and institutionalised discrimination against young qualified people has been the subject of a global crusade: the "*Not Too Young to Run*" global campaign. This was a campaign launched by YIAGA Africa, a youth-based civil society organisation based in Nigeria to advocate for a reduction in the age limit for contesting for the seat of Nigeria's presidency.[12] Subsequently, the UN Youth Envoy in partnership with the United Nations Development Program and other organisations joined the campaign and made it a global call for all states to reconsider their minimum age requirement for candidacy.[13] In response to this call, Nigeria, in 2016, passed the "Not Too Young to Run Bill" to amend section 131 of the Nigerian constitution by reducing the minimum age requirement for the presidential candidacy from 40 years to 35 years.[14] This act by the Nigerian government is one worthy of emulation and as such, the author of this article would in subsequent paragraphs make a case for the present proposition.

Further in this article, the author will again highlight the need to have a maximum age limit beyond which a Ghanaian should not be allowed to contest for Ghana's presidency. In this context, the author notes that while there is no law in any of the jurisdictions on earth that sets a maximum age cap for presidential candidacy,[15] it is imperative for states, including Ghana, to adopt a maximum age cap.

To justify this proposition, the author will rely on, among others, a report by the World Health Organisation on ageing and the health situation in Ghana that suggests that the risk of dementia rises sharply with age and persons above 85 years are more likely than not to suffer this.[16] The report lent credence to a study carried out by Joshua Hartshorne and Laura Germine of MIT and Harvard University, respectively. According to their findings, the majority of mental processes such as memory, pattern recognition, and the ability to react quickly in any given situation decline with age.[17] They further noted that older individuals suffer a decline in their ability to pay attention to multiple subjects simultaneously, thereby, making them twice as slow as younger adults.

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[12] ML Krook and Mary K Nugent, 'Not Too Young to Run? Age Requirements and Young People in Elected Office' (2018) 4 Intergenerational Justice Review 60-67.
[13] Ibid.
[14] M.S Temitope, 'The Impact of Not Too Young to Run Law on Nigeria Youth Participation in 2019 General Election' (BSc Dissertation, University of Abuja 2019).
[15] Constitution Review Commission, *Report of the Constitution Review Commission: From a Political to a Developmental Constitution* (*Constitution Review Commission* 2011).
[16] Michael Kpessa-Whyte, 'Aging and Demographic Transition in Ghana: State of the Elderly and Emerging Issues' [2018] 58 Gerontologist 403-408.
[17] Paul Ratner, "Reasons Why There Should Be a Maximum Limit to Run for Presidency" (*BigThink*, 4 August, 2019) <https://bigthink.com/the-present/top-10-reasons-we-need-a-max-age-limit-to-run-for-president/> accessed 6 June 2023.

The author will also delve into the life expectancy of the average Ghanaian, the emergence of gerontocracy within Ghana's constitutional order, and the retirement policy for all public officers. These aspects will be explored to justify the need for a maximum age cap.

2.0 RELEVANCE OF THE PRESENT DISCOURSE

The present article is particularly relevant in these present times because:

i. it highlights the need to amend article 62(b) of the 1992 Constitution to ensure the inclusion of Ghana's youth in presidential races, given their majority representation in the country's population; and
ii. it addresses the normalisation of gerontocracy in Ghanaian politics, the erosion of the sanctity of Ghana's democracy, and how implementing a maximum age limit for presidential office could help rectify these issues.

3.0 REVIEW OF ALL AVAILABLE LITERATURE

In this section, the author analyses available literature on the minimum and maximum age requirements for presidential candidacy. Specifically, the author makes a comparative analysis of the minimum age requirement for presidency in various jurisdictions across the globe, thereafter, reviews the age limit for presidency under all four (4) Republican Constitutions of Ghana since 1960. The Fiadzoe Constitutional Review Research Report on the present issue is also considered extensively.

3.1 Comparative Analysis of the Minimum and Maximum Age Limits for Presidency in Various Jurisdictions across the Globe.

3.1.1 Minimum Age Requirement for Presidential Candidacy in other Jurisdictions

The minimum age requirement for the office of a state's presidency is a subject on which various jurisdictions across the world have taken varied positions. Whereas some states have lowered it to the barest minimum to commensurate with the minimum age for voting, some other states have pegged it at ages higher than the minimum age for presidency.[18] Below is a table indicating states and the minimum ages for their presidencies.

SRL	COUNTRY	MINIMUM AGE FOR PRESIDENCY
1.	China[19]	45
2.	Albania[20]	40
3.	Czech Republic[21]	40
4.	Chile[22]	35
5.	Angola[23]	35

[18] Constitution Review Commission (n 16).
[19] Constitution of the People's Republic of China 1982, Article 79.
[20] Constitution of Albania 1998, Article 86(2).
[21] Constitution of Czech Republic 1992, Articles 19(2) and 57.
[22] Constitution of the Republic of Chile 1980(rev. 2021), Article 25.
[23] Constitution of the Republic of Angola 2010, Article 110.

6.	India[24]	35
7.	Brazil[25]	35
8.	Cyprus[26]	35
9.	Russia[27]	35
10.	Nigeria[28]	35
11.	Cameroon[29]	35
12..	United States of America[30]	35
13.	Costa Rica[31]	30
14.	Botswana[32]	30
15.	Argentina[33]	30
16.	South Africa[34]	18

All these states set these minimum age limits based on their varying socio-economic backgrounds to suit their varying needs.[35] This global practice is in conformity with International Electoral Standards as submitted by the International Institute for Democracy and Electoral Assistance.[36] According to them, although every citizen of full age and maturity is entitled to vote and to be voted for in all democratic states,[37] such states are allowed to put certain qualifications on the enjoyment of these rights.[38] This notwithstanding, for such qualifications to be consistent with standard democratic practice, the grounds on which such qualifications can be imposed are required to be objective and reasonable.[39] Somehow, states have come up with "young age" as one of such "reasonable" grounds on which all states in the table above (except South Africa) have qualified the right to contest for their respective presidencies. Although many of these states justify that ground with the need for maturity and experience in governance,[40] none of those states have come up with any empirical data to prove that all persons below the minimum age requirements set truly lack the requisite maturity, experience and competencies to become presidents.

[24] Constitution of India 1949, Article 58.
[25] Constitution of Brazil 1988, Article 14(3).
[26] Constitution of Cyprus 1960, Article 40(b).
[27] Constitution of the Russian Federation 1993, Article 81.
[28] Constitution of the Federal Republic of Nigeria 1999 as amended, Section 131.
[29] Constitution of the Republic of Cameroon 1972 as amended in 1996, Article 6(5).
[30] Federal Constitution of the United States of America, Article 2(1).
[31] Constitution of Costa Rica 1949, Article 131(3).
[32] Constitution of Botswana 1966, Section 33(1) (b).
[33] Constitution of Argentina 1853, Sections 55 and 89.
[34] Constitution of South Africa 1996, Section 47(1).
[35] International Institute for Democracy and Electoral Assistance, International Electoral Standards Guidelines for Reviewing the Legal Framework of Elections (Bulls Tryckeri 2002).
[36] Ibid; International Convention on Civil and Political Rights 1966, Article 25.
[37] Ibid.
[38] General Comment No. 25: "The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service" (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments).
[39] Ibid.
[40] Paul R Baier (n 10).

The propriety or otherwise of the minimum age limits, especially under Ghana's democracy, will be considered extensively in this article.

3.1.2 Maximum Age for Presidential Candidacy in Various Jurisdictions

Unfortunately, there is no global democracy with a maximum age for presidential candidates.[41] Even worse is the fact that not much ink has been spilt by academics and experts in democratic governance to attempt either a justification or a criticism of the present norm. The only available literature on this is from the debates ensuing in the United States of America on this subject. There, opinions are split. Whereas the vast majority of those who have so far contributed to the discourse want a maximum age limit beyond which a person should not contest for the presidency or any elected office in the United States,[42] there are a few others on the other side who find such a limitation unnecessary and unconscionable.[43] Those on the first divide ground their stance on physical and mental degradation that comes with age. To those on the second divide however, wine gets better with years and so, in a like manner, maturity, experience and "rich" values come with age.[44] They forget, unlike new wines, old wines always leave everyone intoxicated.

In a poll conducted by YouGov America, (an International research data and analytics group headquartered in London), on whether or not there should be a maximum age limit beyond which a person cannot contest for the United States' presidency or any other elected office, 58% of the 27,797 Americans who took part in the poll said there should be a maximum age limit and only 21% said there should not be.[45] This highlights the urgency of the issue and the need for lawmakers to pay attention to these. This is not a novel issue but one that has begged for a solution for so many centuries. It can be traced to the days of Plutarch of Chaeronea, a Greek philosopher and biographer who lived about 2,000 years ago.[46]

Plutarch was a seasoned politician who was often criticised for his old age whenever he sought to continue with his political ambitions. He was consistently questioned as to why an old man should engage in politics amidst the physical derailment that comes with age. In a letter to his friend, Euphanes, Plutarch responded to the popular question he was bedevilled with in the affirmative. Therein, he highlighted the need for the aged to be allowed to partake in politics. By way of justification, he argued that notwithstanding the physical and psychological decline that come with age, every politician possesses different abilities and

[41] Constitution Review Commission (n 16) para. 38(e).
[42] Paul R Baier (n 10).
[43] Jeffery Beneker, 'Should an Old Man Engage in Politics?' (*Princeton University Press*, 7 April 2020) <https://press.princeton.edu/ideas/should-an-old-man-engage-in-politics> accessed 14 June 2022.
[44] Ibid.
[45] YouGov, 'Should There be a Maximum Age Limit for Elected Officials to Hold Office?: Poll Conducted on 18 January 2022. <https://today.yougov.com/topics/politics/survey-results/daily/2022/01/18/ffd58/1> accessed 12 June 2022.
[46] Plutarch, *How to be a Leader: An Ancient Guide to Wise Leadership* (Jeffery Beneker (ed/tr) 5th edn, Princeton University Press 2019).

competencies at different stages of their lives, and as such, societies should without discrimination, continually engage all politicians to draw on their varied competencies.

According to him, the greatest contribution of old politicians in the political arena is not the wisdom that may have developed over years but rather, the composure experience has to taught them to have. To Plutarch's mind, the steadiness of older politicians especially in times of crisis makes them very valuable to societies as compared to less experienced and younger politicians who, according to Plutarch, are likely to lose their heads in sudden misfortunes.

While the author of the present article finds these arguments by Plutarch appreciably convincing, he believes there are more compelling reasons why there should be a maximum limit beyond which a person should not be allowed to contest for elected offices including a presidential office. These compelling reasons will constitute the crux of the discussions later in the present article.

3.2 Review of the Age Limits for Presidency in Ghana from 1960 to 2022

After Ghana attained a fully responsible status among the Commonwealth, it repealed its first constitution, the Ghana Independence Act, 1957 and adopted the first republican constitution, 1960.[47] Under that constitution, the President was the Head of State, Head of Government and a member of the National Assembly.[48] The minimum age at which a person could become a president under that constitution was 35years.[49] This first constitution was suspended after a coup d'état by the National Liberation Council on 24th February 1966. The suspension of the constitution was effected by section 2 of the Proclamation for the Constitution of a National Liberation Council for the Administration of Ghana and for Other Matters.[50] After the suspension of the 1960 Constitution, it was not until the year 1969 that Ghana got another Republican Constitution.[51] Under article 37 of the 1969 Constitution, the executive authority of Ghana was vested in the office of Ghana's presidency and by virtue of article 40(b) of the 1969 Constitution, only persons who were 40 years and above could assume this office. After just two and half years, this 1969 Constitution was again toppled in a coup d'état by the General I K Acheampong-led National Redemption Council (NRC).[52] Section 2 of the "National Redemption Council (Establishment) Proclamation", 1972 was the relevant provision that effectively suspended the second Republican Constitution.[53] After the suspension of the 1969 Constitution, it took Ghana a decade to get another Republican Constitution and for that matter, a constitutional government.[54] Thus, it was in 1979 that Ghana had another Republican Constitution. Under this third Republican Constitution, the

[47] L Rubin and P Murray, *Constitution & Government of Ghana* (2nd edn, Sweet & Maxwell 1964).
[48] Constitution of Ghana, 1960 art 8.
[49] Ibid, art 11(2)(a).
[50] SY Bimpong Buta, *The role of the Supreme Court in the development of Constitutional Law in Ghana,* (Advanced Legal Publications 2007).
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Maxwell Opoku-Agyemang, *Constitutional Law and History of Ghana* (Maxwell Opoku-Agyemang 2009).

executive authority of Ghana was vested in the office of Ghana's presidency under article 45(1) and just like the preceding Republican Constitution,[55] a person could not occupy that office unless he or she was 40 years.[56]

The 1979 Constitution was also abrogated after a coup d'état by the People's National Defence Council (PNDC). From there, Ghana lived without a de jure government until 1992 when the present constitution was promulgated. Under the 1992 Constitution, the executive authority of Ghana has been vested in the office of the presidency[57]. Article 62 of the 1992 Constitution spells out the requirements for eligibility to run for the office of Ghana's presidency, which minimum age requirement is 40 years.[58] Although the age requirement for the present constitutional regime was recommended by the Drafters of the 1992 Constitution at paragraph 29 of the Drafters' report[59], that particular paragraph does not justify the rationale for the minimum age requirement of 40 years and the absence of a maximum age requirement. The only research document that speaks extensively on the age limits for presidency in Ghana and the rationale behind it, is the Report of the Constitution Review Commission (2011).

3.3 The Fiadzoe Constitutional Review Commission's Report on Article 62 of the 1992 Constitution

The Fiadzoe Constitutional Review Commission ("the Commission") was a ten-member Commission of Inquiry set up by the Late Prof. Evans Atta Mills in July 2010.[60] It was composed of:

a) Professor Albert Kodzo Fiadjoe - Chairman;
b) Dr. Nicholas Yaw Amponsah;
c) Mr. Gabriel Scott Pwamang;
d) Mrs. Jean Adukwei Mensa;
e) Dr. Raymond Akongburo Atuguba - Secretary;
f) Kumbun-Naa Yiri II (Paramount Chief of Kumbungu);
g) Mr. Akenten Appiah-Menka;
h) Mrs. Sabina Ofori-Boateng;
i) Osabarimba Kwesi Atta II (Omanhene of Oguaa Traditional Area); and
j) The Very Rev. Prof. Samuel Kwasi Adjepong

They were tasked to:

[55] Constitution of Ghana, 1969.
[56] Constitution of Ghana 1979, art 49(b).
[57] Constitution of Ghana 1992, art 57.
[58] Constitution of Ghana 1992, art 62(b).
[59] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (July 31, 1991), Paragraph 29.
[60] Constitution Review Commission of Inquiry Instrument, 2010, C.I. 64.

i. Solicit the opinions of Ghanaians on the operation of the 1992 Fourth Republican Constitution and, in particular, its strengths and weaknesses;[61]
ii. Record and present the concerns of Ghanaians on amendments that may be required for a holistic review of the 1992 Constitution; and
iii. Make recommendations to the Government for consideration and provide a draft Bill for all possible amendments to the 1992 Constitution.

As such, in discharge of this mandate, the Commission reviewed each and every provision of the 1992 Constitution including article 62 where the qualification for presidential candidacy has been spelt out. On reviewing that provision, two principal issues were considered:

a. Whether the eligibility age for the President should be further reduced; and

b. Whether there should be a particular age above which a person should be ineligible for the Presidency.

On the first question, the Commission recommended the maintenance of the present minimum age of 40 but did not provide any particular reason for recommending that.[62] However, it appears they sided with the section who were okay with the present 40 year-minimum age requirement merely because it has worked well for just 18 years into Ghana's democracy.[63]

On the second question, the Commission found that there should not be a maximum age limit beyond which a person should not be allowed to contest for the presidential office because the absence of such a maximum age limit is consistent with state practice.

Based on these findings, the Commission recommended the maintenance of the eligibility requirements set under article 62 of the 1992 Constitution.

The author of the present article finds those conclusions very incredible especially when one considers Ghana's present demography. Being a very youthful population, with persons below 35 years constituting 55.1% of the registered voters in Ghana, the Commission ought to have seen the need to call for a reduction in the requisite age for presidential candidacy. Members of the Commission cannot, however, be faulted much. Perhaps, it did not cross their minds because there was no one below 40 years on the ten-member committee to remind them of the rights of persons below 40 years to contest for Ghana's presidency.

[61] Ibid.
[62] Ibid. para. 40.
[63] Ibid. para 29.

4.0 THE ELIGIBILITY REQUIREMENTS FOR PRESIDENCY IN AN IDEAL DEMOCRACY

Democracy as a concept does not lend itself to any universally accepted definition, however, it has some key attributes and prerequisites that are universally recognised and accepted.[64] These include free and fair electoral processes; promotion, protection and enforcement of fundamental human rights and the control of abuse of power.[65] To that end, the electoral system in any democratic state is required to afford every eligible voter (persons who have attained the age of majority) an opportunity to participate in national governance either directly or through elected representatives.[66] Therefore, aside from grounds ensuring citizenship and allegiance, residency, mental capacity, good criminal records and appreciable financial standing, a person who qualifies as a voter should not be denied an opportunity to contest for any political office in any democratic state on any other ground except where such ground is reasonable and objective.[67]

This assertion is supported by the views of the International Institute for Democracy and Electoral Assistance.[68] According to them, although every citizen who has attained the age of majority is entitled to vote and to be voted for in all democratic states,[69] states are allowed to put certain qualifications on the enjoyment of these rights so long as the grounds for such qualifications are reasonable and objective.[70] Further, article 25 of the International Convention on Civil and Political Rights (ICCPR) obliges all its state parties to guarantee the rights of all its adult citizens to, among other things, vote and to be voted for.[71] Aside the guarantee of this two-fold right, the convention again requires all its state parties to ensure that their adult citizens are afforded the opportunity to enjoy these rights periodically without any distinctions whatsoever.[72] This means all persons who have attained the age of majority in the various party states should be allowed to vote and stand for elections into elected offices periodically without any discrimination. However, where states find it necessary to vary the age at which a person can vote and the ages at which he or she may contest for an elected office including the office of the presidency, they are to make such variations on only objective and reasonable grounds.[73] The office of the United Nations High

[64] SY Bimpong Buta (n 51).
[65] Ibid.
[66] International Convention on Civil and Political Rights 1966, art 25; African Charter on Democracy, Elections and Governance 2007, art 31(2).
[67] International institute for democracy and electoral assistance, International Electoral Standards Guidelines for reviewing the legal framework of elections (Bulls Tryckeri 2002); International Convention on Civil and Political Rights 1966, art 25.
[68] Ibid.
[69] Ibid.
[70] General Comment No. 25 (n 42).
[71] International Convention on Civil and Political Rights 1966, art 25; United Nations Human Rights Office of the High Commissioner, *Human Rights and Elections: A Handbook on International Human Rights Standards on Elections* Professional Training Series No. 2/Rev.1
[72] Ibid.
[73] General Comment No. 25 (n 39).

Commissioner for Human Rights put this more clearly in paragraph 15 of its General Comment No. 25 when it stated that:

> The effective implementation of the right and the opportunity to stand for an elected office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria.[74]

This therefore presupposes that in an ideal democracy, there can be age requirements for qualification into the office of the presidency in addition to the various grounds for eligibility suggested hereinabove. Except that, states are only allowed to do so on *objective* and *reasonable* grounds.[75]

4.1 Impact of the Minimum Age Requirement on Ghana's Democracy

On the coming into force of the 1992 Constitution, the people of Ghana hoped to become a part of a state dedicated to the realisation of *inter alia,* freedom, justice, and equality of opportunities as well as all other ideals characteristic of any democratic state.[76] Bamford Addo JSC (as she then was) in recognition of this fact, lent credence to it when she, in the case of *Apaloo v Electoral Commission,*[77] stated thus:

> The people of this country in 1992 promulgated for themselves a Constitution, …and provided a democratic system of government based on certain fundamental principles, namely, political pluralism, a majority parliamentary representative rule, under which form of government, all citizens of full age and of sound mind had the right to vote during an election to choose their representatives.[78]

Ghana has within this period attempted to religiously abide by all these prerequisites of democracy. Its commitment to democracy can be gleaned from the various provisions of the 1992 Constitution especially article 35 which states that 'Ghana shall be a democratic state dedicated to the realisation of freedom and justice'.[79] Again, in the preamble of the 1992 Constitution, Ghanaians affirmed their commitment to freedom, Justice, universal adult suffrage, and the protection and preservation of fundamental human rights, inter alia,[80] all of which are key tenets of democracy.[81] Those aside, Ghana has also signed and ratified a host of International Instruments that promote democracy including the African Charter on

[74] Ibid.
[75] Ibid.
[76] Constitution of Ghana, 1992, Preamble.
[77] [2001-2002] SCGLR 1.
[78] Ibid.
[79] Constitution of Ghana 1992, art 35.
[80] Constitution of Ghana 1992, Preamble.
[81] L Rubin and P Murray (n 48).

Democracy, Elections and Governance ("the Charter") . In article 4 of the Charter, Ghana is committed to the promotion of democracy, the principles of rule of law and human rights.[82]

These indicate how resolute Ghana is in observing democracy. However, in spite of this resolve, there still exist some conditions under the present constitutional regime that detract from Ghana's gains in democratic practice and this includes among others, the existence of a minimum age limit for presidential candidacy. The effect of this minimum age requirement has been the exclusion of persons who are otherwise capable of becoming presidential candidates from joining the presidential race for the past three decades and secondly, the presentation of only a few old options for Ghanaians to choose from. This has in turn reduced Ghana's democracy into a gerontocracy where in every fourth year, only persons from the minority 4.78% (percentage of Ghanaians that are 60 years and above) of Ghana's population are presented to Ghanaians to elect their president from.[83] The effect of which is Ghana getting an old (60+ years) president every four years except in extreme circumstances where we have had exceptions to this trend under the fourth republic. These exceptional situations are in relation to John Dramani Mahama who, at age 54, took over from the Late Professor John Evans Atta Mills who died in office; and secondly, Flt Lt. Jerry John Rawlings who promulgated this fourth republican constitution and continued in office at age 45. Apart from these two individuals, the remaining past presidents Ghana has had have been persons above 60 years. John Agyekum Kuffuor who was Ghana's president between 2000 and 2008 assumed office at age 62 years; John Evans Atta Mills who was Ghana's president between 2008 and 2011 assumed office at age 64 and the present president of Ghana, Nana Addo Dankwa Akuffo-Addo began his tenure at age 72 years. Meanwhile, the median age of Ghana's youthful population is 21.5 years. Therefore, in the author's opinion, the present trend of having presidents much older than the majority of Ghana's population is only suggestive of an entrenched gerontocracy rather than democracy in Ghana's constitutional order.

5.0 CASE FOR THE AMENDMENT OF THE MINIMUM AGE REQUIREMENT FOR ELIGIBILITY INTO THE OFFICE OF GHANA'S PRESIDENCY

Apart from the fact that the present minimum age requirement for presidency is reducing Ghana's democracy into a gerontocracy, it is also discriminatory. It breaches the rights of majority of Ghanaians to stand for elections and again creates inherent contradictions in the Constitution, 1992.

[82] African Charter on Democracy, Elections and Governance [Adopted 30 January 2007].
[83] World Population Prospects (2019 Revision) <https://worldpopulationreview.com/ghana-population> accessed 29 July August 2022.

5.1 Discriminatory Nature of the Minimum Age Requirement under the 1992 Constitution

The 1992 Constitution of Ghana proscribes discrimination of all forms.[84] Specifically, article 17(2) of the Constitution provides that, 'A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed, or social or economic status.'[85]

According to article 17(3) of the 1992 Constitution, to discriminate means:

> to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion, or creed, whereby persons of one description are subject to the restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.[86]

This notwithstanding, Date-Bah JSC (as he then was) in the case of *T. T Nartey v Godwin Gati*[87] noted that the express mention of those grounds on which discrimination is prohibited implied the fact that lawful discrimination may be done on the other grounds not mentioned. However, he further noted that for such discrimination based on the other grounds not mentioned to be lawful, it had to be justifiable by reference to an object that is sought to be served by the particular statute, constitutional provision or rule of law occasioning the discrimination.[88]

Therefore, for a person or a group of persons to be said to have suffered discrimination, the person or that group of persons must show that a selection or a differentiation against them was unreasonable or arbitrary, and that it does not rest on any rational basis having regard to the object which the legislature has in view.[89]

In this regard, the author argues that in so far as article 62(b) of the 1992 Constitution distinguishes between registered voters above 40 years and those below 40 years when it comes to the opportunity to contest for Ghana's presidency without any rational basis,[90] that provision is discriminatory.

Maturity and experience have always been the grounds upon which states including Ghana have often attempted to rationalise that discriminatory provision. However, no empirical datum was yielded to by the framers of the 1992 Constitution to ascertain the specific age at which young Ghanaians can be considered "mature" and "experienced". The framers, perhaps, just threw a dice and when it landed on the number "40", they decided to consider that the

[84] Constitution of Ghana 1992, art 17.
[85] Constitution of Ghana 1992, art 17(2).
[86] Constitution of Ghana 1992, art 17(3).
[87] [2010] SCGLR 745.
[88] *TT Nartey* v *Godwin Gati* [2010] SCGLR 745.
[89] *Tyrone Marghuy* v *Achimota School and Another* [2021] GHAHCHRD 1.
[90] Constitution of Ghana 1992, art 62(b).

age at which any young competent Ghanaian will have sufficient maturity and experience to contest for Ghana's presidency. Although this decision may have been taken in good faith by the framers, its results have been the exclusion of principal voters from having an opportunity to get voted for. At the moment, 55.1% of registered voters in Ghana representing a total of 9,375,520 persons out of the 17,027,650 registered voters have been barred from contesting for the presidency.[91]

In the author's opinion therefore, the restriction of the rights of all these individuals without any rational basis is not only discriminatory but also arbitrary and suggestive of an ageist culture that discourages youth inclusion and participation in governance.

5.2 Violation of the Rights of many Ghanaians to Stand for Election

The 1992 Constitution clearly stipulates that 'the rights, duties, declarations and guarantees relating to fundamental human rights and freedoms'[92] mentioned under Chapter five (5) are not exhaustive and that all others not mentioned thereunder should be deemed to be part of Ghana's human rights framework so long as they are inherent in a democracy and are intended to secure the freedom and dignity of man.[93]

The right to stand for elections is a primary right that is crucial for achieving an effective democracy.[94] It is a right and not a privilege.[95] In a Russian case titled *Russian Conservative Party of Entrepreneurs and others v Russian Federation,*[96] where the applicants were disallowed from participating in the elections to the Russian legislature, because a candidate from the party had been withdrawn for submitting an untrue financial declaration, the European Court of Human Rights held that there had been a violation of the rights of the first and second applicants to stand for elections because it was not their own conduct which had led to their disqualification. This lends credence to the fact that the right to stand for elections is a valid right that is inherent in any well-meaning democracy.

Therefore, the right to stand for elections properly comes within the framework of rights envisaged by article 33(5) of the 1992 Constitution. However, notwithstanding the fact that this is a right, the 1992 Constitution has by its provisions contravened it to a large extent. Specifically, section 62(b) of the 1992 Constitution has by its dictates denied a majority Ghanaian adults the right to stand for elections arbitrarily. Thus, without any just and reasonable cause. Although the author of the present article does not in any way disagree with the need to set qualifications on the right to stand for elections based on the political

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[91] Doris D Sasu (n 11).
Statista <https://www.statista.com/statistics/1193170/registered-voters-in-ghana-by-age/ > accessed 20 May 2022.
[92] Constitution of Ghana 1992, art 33(5).
[93] Doris D Sasu (n 11).
[93] Constitution of Ghana 1992, art 33(5).
[94] Achilles C Emilianides, 'Right to Participate in Elections' in *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2022).
[95] Ibid.
[96] (2007) (ECtHR).

context of any given country, the author posits that, according to best practices, such qualifications must be reasonable and devoid of any form of arbitrariness.

In the author's view, the present minimum age for presidency contravenes the right to stand for elections because it is unreasonable, given the demographic dynamics of Ghana's political context, and arbitrary because it unjustly sidelines many young potentials to the advantage of some elderly group.

5.3 Inconsistency of Article 62(b) with Articles 55(8), 57(2), 60(11) and 95(1) of the 1992 Constitution of Ghana

To start with, article 55(1) and (8) of the 1992 Constitution guarantees to all persons eligible to be elected members of parliament, the right to form and lead political parties into presidential elections. Falling within this category are citizens below 40 years. Therefore, unjustifiably fixing the minimum age for eligibility to contest for presidential races at forty (40) under article 62(b) of the Constitution only creates inherent contradictions in the Constitution of Ghana.

Again, article 60(11) of the 1992 Constitution makes it possible for speakers of parliament to assume the office of Ghana's presidency when both the president and vice president are unable to perform their functions. However, it is interesting to note that a person who is as young as 21 years of age can become a speaker of parliament in Ghana[97] and invariably the president of Ghana when both the elected President and his or her vice are unable to perform the functions as presidents.[98] Therefore, if a 21-year-old can become a president through that means, why should he or she not be eligible to stand for elections to be elected into the office of Ghana's presidency in the first place?

This inconsistency between the effects of article 62(b) and the combined effect of articles 60(11) and 95(1) of the 1992 Constitution highlights the fact that the framers did not doubt the competence of the young Ghanaian to assume the office of the speaker of parliament and by implication, the presidency. It therefore looks as though the 40-year minimum limit was put there to preserve Ghana's presidency for only a section of Ghanaians without just cause.

According to International Electoral Standards, the presence of a hidden intent behind a qualification for the right to vote or stand for election is suggestive of arbitrariness on the part of lawmakers which is inconsistent with good democratic practice.[99] Therefore, it is imperative for Ghana to stay true to her commitment[100] to democracy and international obligations,[101] by amending article 62 of the 1992 Constitution to afford at least, persons with the upper age

[97] Constitution of Ghana 1992, art 95(1) and 94(1).
[98] Constitution of Ghana 1992, art 60(11).
[99] International Institute for Democracy and Electoral Assistance, *Guidelines for Reviewing the Legal Framework of Elections* (2002).
[100] Constitution of Ghana 1992, art 35.
[101] International Convention on Civil and Political Rights 1966, African Charter on Democracy, Elections and Governance 2007, art 25; art 4, 8, 10(3), art 11 and 31.

limit within the age bracket 18- 35years, an opportunity to stand for elections into the office of Ghana's presidency. An amendment in this regard is not something that is unheard of.

In fact, Nigeria in 2016, passed the "Not too young to run bill" to amend section 131 of the Nigerian constitution to reduce the minimum age requirement for the presidency from 40 years to 35 years. It is apt for Ghana to take a cue from her neighbour. This would not only give electorates more options to elect the president from, but also remedy the discrimination that has for years been occasioned against the largest section of Ghanaians.

Secondly, the legislators should find some practical justifications rather than maturity and experience to justify the variation made to the age for eligibility to vote and that to stand for elections since those reasons are extremely prejudicial and not reflective of the actual reality. In the absence of any such justification, it is the author's opinion that the age eligibility to stand for elections should be aligned with the voting age as the case is in South Africa.[102] Alternatively, the criterion used by Congo Brazzaville, 15 years professional work experience[103], could be used in place of the age requirement since that is a more objective way of measuring a person's experience.

6.0 CASE FOR THE ESTABLISHMENT OF A MAXIMUM AGE LIMIT FOR ELIGIBILITY INTO GHANA'S PRESIDENTIAL OFFICE.

In this section, the author of the present article makes a case for the establishment of a maximum age cap beyond which a person should not be allowed to contest for any public office including that of Ghana's presidency. The author proffers three main justifications. First, the decline in physical abilities that come with age makes people less efficient to run for Ghana's presidency. Further, the author suggests that the unavailability of a maximum age cap is gradually turning Ghana's young democracy into a gerontocracy. Lastly, the policy rationale behind the retirement age set for all public officers is used as justification for a maximum age beyond which a person should not be allowed to contest for the presidency.

6.1 Decline in Physical Abilities due to Age

Age catches up with every human being and its toll on mankind makes even the brightest of men less meticulous and efficient than they were in their younger years.[104] According to the World Health Organisation, ageing results in a variety of molecular and cellular damage over time which consequently leads to a gradual decrease in physical and mental capacity.[105] In a further report by the organisation on ageing and the health situation in Ghana, it was noted

[102] Constitution of South Africa 1996, s 47(1).
[103] Constitution of the Republic of Congo (Brazzaville) 1992, art 68(2).
[104] *Senti Michael v Rev. Father Mon Kwame and Another* [2020] GHASC 61.
[105] World Health Organisation, 'Ageing and Health' (*World Health Organisation*, 1 October 2022) <https://www.who.int/news-room/fact-sheets/detail/ageing-and-health#:~:text=The%20UN%20Decade%20of%20Healthy%20Ageing%20(2021%E2%80%932030)%20seeks,foster%20the%20abilities%20of%20older>assessed on 26 June 2023.

that the elderly group in Ghana are very prone to suffering various defects due to ageing.[106] One of such defects is the decline in cognitive abilities. "Cognitive abilities" as used, comprises several specific domains including attention, memory, language, visuospatial abilities, and the executive function.[107] All these domains suffer substantial decline with age.[108] Usually, each one of these domains perceives a stimulus, processes that stimulus before responding to it.[109] As people age, the speed at which they perceive stimuli and process them decline immensely.[110] This decline in cognitive functions consequently makes older persons much slower in executing timed activities compared to younger persons.[111] Specifically, the abilities of individuals to make decisions, solve problems, multitask and to plan and sequence responses get impaired after 70 years because of the decline in executive cognitive function.[112]

Therefore, in view of these scientifically proven decline in cognitive function, it is imperative that there be a maximum age limit lest we are faced with an instance where we would have to put up with a relatively inefficient President for a term of four years. We ought not to assume such an instance is far from us. The possibility of this happening is evidenced by the norm in Ghanaian politics. When one looks into the Ghanaian political arena, one is sure to find a number of politicians waiting for their respective turn to lead one of the major political parties someday. By dint of hard work and massive campaigns in times past, such persons may have gained goodwill that is likely to put them into the office of the presidency when they finally get the chance to contest for same. Once such a person gets into the presidential office, the only means by which he or she could be removed is through the ballot box or the procedure for removal of presidents under article 69 of the 1992 Constitution on grounds of "infirmities of mind and body". What then becomes the fate of Ghanaians while we wait for the ballot box or a conclusion to the procedure under article 69?

Although it may appear that such a situation has been adequately catered for by provisions allowing for presidential succession under article 60(6) of the 1992 Constitution, such succession could only be possible when the president suffering from an infirmity of mind has been successfully removed from office on grounds of, among others, infirmity of body and mind.[113] The procedure for removing a president as spelt out under article 69 of the 1992 Constitution looks good on paper but may not be feasible when Ghana is faced with a president who is labouring under an infirmity of mind and body. The said provision can only be triggered when a notice in writing signed by a third of all members of parliament is presented to the speaker of parliament requesting the mental and physical capacity of the

[106] Dr. Kpessa - Whyte, 'Ageing and Demographic Transition in Ghana: State of the Elderly and Emerging Issues' [2018] 58(3) Gerontologist.
[107] CN Harada, MC Natelson Love, and KL Triebel, 'Normal Cognitive Aging' (2013) 29 Clin Geriatr Med 737
[108] Daniel L Murman, *The Impact of Age on Cognition* (Thieme Medical Publishers 2015).
[109] E Pannese, *Morphological Changes in Nerve Cells During Normal Aging*. (Brain Struct Funct 2011).
[110] Daniel L Murman, *The Impact of Age on Cognition* (Thieme Medical Publishers, 2015).
[111] JH Morrison and MG Baxter, 'The Ageing Cortical Synapse: Hallmarks and Implications for Cognitive Decline' (2012) 13 Nat Rev Neurosci, 240.
[112] Daniel L Murman, 'The Impact of Age on Cognition' (2015) 36 Semin Hear 111.
[113] Constitution of Ghana 1992, art 60(6).

president to be investigated. While getting a third of all members of parliament to sign the notice may not be a difficulty, having a reasonable ground to initiate the process might be. Ghanaians, including their elected representatives, only see the President occasionally and the brevity of the encounters they have with the president will not afford them the opportunity to detect a serious derail in his cognitive abilities. Again, given the special dynamics of Ghanaian politics, persons sufficiently close to the President are also more likely to get blinded by their sentiments and political affiliations to blow the whistle early enough for the president's removal. Therefore, it appears the procedure under article 69[114] may only avail Ghana in extreme situations of hopelessness and not when the deterioration in a president's cognitive abilities can go unnoticed. In the end, Ghana will have "faceless beings" at the helm of affairs and not the ailing president, which persons, Ghanaians will neither know nor can they hold them accountable in their personal capacities for the country's socio-economic woes stemming out of bad governance.

It is on account of these obvious difficulties that the author of this article posits that there should be a maximum age beyond which a person should not be allowed to contest for the presidency in order to forestall all complications. The ascertainment of such an age must however be based on empirical data akin to the justification for the eighty-five (85) years mentioned in the present article.

6.2 The Metamorphosis of Ghana's Democracy into a Gerontocracy

A gerontocracy is a form of oligarchical rule where a body polity is ruled by only persons who are much older than majority of their adult population. From 1971 to 2021, persons above 60 years have consistently been less than 5% of Ghana's population.[115] Their population was at its peak in 2020 and even with that, they constituted just 4.78% of Ghana's population.[116] However, notwithstanding their small percentage in Ghana's population, they have always been in the presidential office, save for John Dramani Mahama who assumed the office at 54 years after the demise of John Evans Atta Mills. While the author of the present article does not in any way downplay the willingness of people above 60 years to serve Ghana, the author argues that if this custom of getting presidents above 60 years continues, Ghana's democracy will succumb to the ills of gerontocracy. These ills include intergenerational challenges, and the spurning of ample opportunity to prosecute or otherwise hold past presidents accountable for violation of human rights, economic mismanagements and other atrocities they commit while in office.

As regards the intergenerational challenge, it is characteristic of any gerontocratic system to have a government that is unable to fully understand and relate to the needs of a majority of their people. This is caused by wide age gaps between the leaders and the body polity. For the purpose of having policies and programmes that better serve the interest of all Ghanaians,

[114] Constitution of Ghana, 1992.
[115] World Population Prospects (2019 Revision) <https://worldpopulationreview.com/ghana-population> accessed 29 July August 2022.
[116] Ibid.

it is imperative that we adopt deliberate schemes to ensure the age gap is not too wide. One of such schemes Ghana can adopt is adding a provision under Chapter 8 of the 1992 Constitution to the effect that there should be a fifteen-year gap between the President and the Vice President. That way, one of them will always be closer to the majority of Ghana's population.

6.3 All Public Officers Retire; the Presidency should not be the Resting Place for Retirees

'…And on the seventh day, God ended His work which He had done, and He rested from all His work which He had done'- Genesis 2:2.

Assuming however that the above quoted Bible verse has no relevance to the present article, some constitutional provisions might be.

Under article 295 of the 1992 Constitution[117], a public office has been defined to be any office, the emolument of which are paid directly from the consolidated fund or directly out of moneys provided by parliament and an office in a public corporation established entirely out of public funds or moneys provided by Parliament. By the combined reading of articles 68(7) and 71(2) of the 1992 Constitution, the President's emolument is known to be paid directly from the consolidated fund, and therefore the absence of the presidential office under article 71(1) of the 1992 Constitution does not negate the fact that it is a public office and that the president is a public officer.

Article 199 stipulates that all public officers should retire at 60 years unless the Constitution provides otherwise. Some public officers whose age for retirement differ from the usual sixty (60) are the Special Prosecutor, the Justices of the Supreme Court and the Electoral Commissioner.

The Justices of the Supreme Court have their retirement age pegged at seventy (70) years. The 70-year age of retirement for the Justices of the Supreme Court also applies to Justices of the Court of Appeal and the Electoral Commissioner by virtue of articles 145(2) (a) and 44(3) of the 1992 Constitution, respectively.

The policy rationale for fixing such ages for retirement is to ensure very old and less active public officers are given some time off to rest and enjoy the fruits they produced by their labour while they were young.[118] It seems however that, the essence of retirement has been downplayed by Politics. As it stands, a retired Justice of the Supreme Court or Electoral Commissioner could pick up nomination forms to contest for the presidency. In the author's opinion, the office of Ghana's presidency should not be an avenue for circumventing the retirement policy. Given the intensity of responsibilities associated with the office of the presidency, fitness should be a prime consideration. It serves Ghana very little or no purpose to burden a retired public officer, who has long passed the life expectancy of the average

[117] Constitution of Ghana, 1992.
[118] Constitution Review Commission (n 16).

Ghanaian (65.17),[119] with the stress associated with the office of Ghana's presidency. If we should insist on allowing such persons into the office of Ghana's presidency, we are sure to always get either of these two possible outcomes:

a) A president who prioritises his health and ends up not living up to the demands of his office; or
b) A president who strives to meet the demands of his office and ends up succumbing to the stress associated with the office because of old age and ill health.

The author finds none of these outcomes pleasant. The presidency is neither a resting place for retired public officers nor a death sentence for great but old patriots. It requires a hundred percent commitment with very minimal health complications. Therefore, in the interest of all Ghanaians, and in the interest of the greater good, there should be a maximum age beyond which a person should not be able to contest for Ghana's presidency.

7.0 CONCLUSION

In this article, the author made a case for an amendment of article 62 of the 1992 Constitution in relation to the age qualifications thereunder. Specifically, he argued that the minimum age for eligibility to contest for presidency should be reconsidered and also, that there should be a maximum age limit beyond which a person should not be allowed to contest for presidency. As regards the minimum age limit, the author argued that the present forty (40) years minimum age should be amended because:

i. It is discriminatory against a large section of Ghanaians;
ii. It violates the rights of majority of Ghanaians to stand for elections; and
iii. It creates substantial internal contradictions within Ghana's constitutional framework.

As regards the maximum age limit, the author argued that it is imperative to institute a maximum age limit beyond which a person cannot contest for presidency because:

i. Human abilities and brain function diminishes with age;
ii. The absence of a maximum age limit is degenerating Ghana's democracy into a gerontocracy; and
iii. The absence of a maximum age limit defeats the policy rationale for retirement of public officers.

In light of the discussion that has ensued in the present article, it is the author's firm conviction that the age qualification under article 62 poses a lot of challenges to Ghana's democracy and must for that reason, be amended to reduce the minimum age requirement from 40 years to 35 years. Further, there should be a maximum age limit beyond which a person should not be allowed to contest for the presidency.

[119] Ghana Life Expectancy 1950-2024 | MacroTrends (Accessed 30 December 2023).

WHERE HEARTSTRINGS TUG AT LEGALITIES: GHANA'S CONSTITUTIONAL STANCE ON LGBTQ+

David-Kratos Ampofo*

ABSTRACT

In 2021, the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill was proposed in Ghana to criminalise LGBTQ+ activities, prohibit advocacy, and mandate 'rehabilitation' of children in the community. This paper critically examines how the Bill infringes upon certain fundamental human rights guaranteed under the 1992 Constitution of Ghana and International Human Rights law. The paper makes an imperative call for the Bill's withdrawal or rejection due to its unconstitutional nature and the potential for state-sponsored discrimination.

* I hold an LL.B from GIMPA and I am currently pursuing my BL at the Ghana School of Law. This article is an abridged form of my dissertation, titled "THE "PROMOTION OF PROPER HUMAN SEXUAL RIGHTS AND GHANAIAN FAMILY VALUES" BILL: A RETROGRESSIVE STEP AWAY FROM THE FULL RECOGNITION OF HUMAN RIGHTS." Special thanks to Dr. Isidore Tufuor for his invaluable guidance and thorough review of the paper.

1.0 INTRODUCTION

In recent times, Ghana has witnessed the introduction of the controversial Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill. It is presented as a private member's Bill, sponsored principally by Hon. Samuel Nartey George, the Member of Parliament for Ningo-Prampram. Per its memorandum, the object of the Bill is:

> to provide for proper human sexual rights and Ghanaian family values; proscribe LGBTQ+ and related activities; proscribe propaganda of, advocacy for or promotion of LGBTTQQIAAP+ and related activities; provide for the protection of and support for children, persons who are victims or accused of LGBTTQQIAAP+ and related activities and other persons; and related matters.

Quite clearly, the primary object of the Bill is the criminalisation and restriction of LGBTQ+ community activities and advocacy. Historically, LGBTQ+ behaviours have often been seen as abnormal across diverse cultures, with some even categorising them as mental disorders. Despite this, perceptions have shifted considerably in many parts of the world. However, in Ghana, where the 1992 Constitution enshrines fundamental human rights that are subject to limitations based on public interests, morals, and safety, the Bill poses a potential conflict with constitutionally guaranteed rights.

The catalyst for the Bill's inception was the publicised opening of an LGBTQ+ advocacy centre, attended by international figures from nations that recognise LGBTQ+ rights. Set against the backdrop of Ghana's significant religious landscape, this event drew considerable backlash. Consequently, the Bill emerged to stifle the progression of LGBTQ+ rights, effectively targeting not only the community but also its supporters. This proposed legislation has raised concerns both locally and globally, with many viewing it as a state-sanctioned discrimination against a marginalised group.[1]

The problem this article seeks to address is the potential curtailment of minority rights. It is noteworthy that the Bill could blur the distinctions of inalienable rights.

This article aims to interrogate the Bill's constitutionality and its consistency with globally recognised Human Rights standards. Key objectives include: understanding the affected demographics, analysing the Bill's alignment with human rights, and providing actionable recommendations that prioritise the rights of sexual minorities. Critical questions this paper endeavours to answer encompass the current legal stance on the LGBTQ+ community in

[1] Attorney General's Memorandum to the Chairman of the Committee on Constitutional, Legal and Parliamentary Affairs' (19 October 2022) cited in GhanaWeb 'Gay Bill Not Unconstitutional but Faces Fundamental Problems – Attorney General' (*GhanaWeb*, 17 November 2022) <ttps://www.ghanaweb.com/GhanaHomePage/NewsArchive/Gay-bill-not-unconstitutional-but-faces-fundamental-problems-Attorney-General-1664261> accessed 5 September 2023. The Bill in its present form violate some fundamental human rights and freedoms enshrined in the Constitution, including the right to freedom of expression, thoughts and conscience and freedom from discrimination.

Ghana, the scope of the Bill, the constitutional rights under threat, potential justifications for these infringements, and the stance stakeholders should consider.

Emphasising the Bill's possible misalignment with the 1992 Constitution, this study delves into the paramountcy of constitutionally assured rights and potential jeopardies. The research methodology predominantly adopted by this article is a doctrinal approach, examining relevant legislation, international treaties, and articles. A comparative perspective juxtaposes the Bill's tenets with progressive LGBTQ+ protective measures in the United States of America, while field work provides depth to the understanding of the Bill's implications.

2.0 HISTORICAL ANTECEDENTS FOR THE CRIMINALISATION OF HOMOSEXUALITY

Like other former British Colonies,[2] Ghana has, to some extent, criminalised homosexual acts. However, it has not criminalised all activities of the LGBTQ+ community, due largely to their recent exposure. [3]

Religious laws frown on the activities of the LGBTQ+ community, thus, this formed the initial basis for the criminalisation of such activities. Christians believe strongly that it is against the Bible to partake in LGBTQ+ activities[4] whilst Muslims believe it is also against their religion and is a crime against Allah.[5] Various European countries proceeded to provide for its criminalisation in their legal codes in the pre-colonial era and further transmitted them to their colonies.[6] In England, the first law to criminalise LGBTQ+ activities was the Buggery Act 1533.[7] It was an anti-sodomy law but most convictions under the law were of same-sex unions. The position of the law developed a narrower focus by targeting especially male sex unions 300 years after the passing of the Buggery Act in the Offences Against the Person Act 1828. The Wolfenden report eventually recommended that the actions of homosexuals were acts of private persons and that the law should not interfere with such activities. The Sexual Offences Act 1967 decriminalised private, consensual "homosexual acts" between persons aged twenty-one and over in England and Wales. At the time of this decriminalisation, Ghana was an independent Republic and had enacted its own Criminal Code that criminalised unnatural carnal knowledge. This provision, it is urged, is not unique to homosexuals but also

[2] E Han and J O'Mahonney, 'British Colonialism and the Criminalization of Homosexuality' [2014] CRIA 266, 270.
[3] US Department of Justice, 'Homosexuals - Legal Provisions' <https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/25/homosexuals-legal%20provisions.pdf> accessed 23 March 2022.
[4] Christian Educator, 'What Does the Bible Say About Homosexuality?' (*Human Rights Campaign*) <https://www.hrc.org/resources/what-does-the-bible-say-about-homosexuality> accessed 23 March 2022.
[5] Human Rights Campaign, 'Stances of Faiths on LGBT Issues: Islam - Sunni and Shi'a' <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-islam> accessed 23 March 2022; The Quran. Surah 7:80-81.
[6] Human Dignity Trust, 'A History of Criminalisation' <https://www.humandignitytrust.org/lgbt-the-law/a-history-of-criminalisation/> accessed 23 March 2022.
[7] Ibid.

affects heterosexuals who engage in other penetrative sexual activities other than vaginal sex, as they constitute practices that are considered unnatural carnal knowledge.[8]

2.1 The Criminalisation of Unnatural Carnal Knowledge in Ghana

Some Ghanaian scholars have argued that Ghana's criminal statute does not outlaw homosexuality and the LGBTQ+ community or the expression thereof in Ghana.[9] It is submitted that what is outlawed by Ghana's primary criminal legislation—section 104 of the Criminal Offences Act, 1960 Act 29—is unnatural carnal knowledge. The provision is reproduced below.

> Section 104—Unnatural Carnal Knowledge.
>
> (1) A person who has unnatural carnal knowledge
>
> (a) of another person of not less than sixteen years of age without the consent of that other person commits a first-degree felony and is liable on conviction to a term of imprisonment of not less than five years and not more than twenty-five years: or of another person of not less than sixteen years of age with the consent of that other person commits a misdemeanour; or of an animal commits a misdemeanour.
>
> (2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or with an animal.

This provision remains one of the many colonial relics that exist in Ghanaian Law, although it has been done away with by our former colonial masters.[10]

The Bill references the case of *Richard Banousin v The Republic* [11] as an interpretation of the term unnatural carnal knowledge. This position should however be taken with a pinch of salt because the appeal before the court was about the offence of rape contrary to section 97 of the Criminal Offences Act, 1960 (Act 29). The case defined carnal knowledge as 'the female sex organs called the vulva and vagina that are normally penetrated into during any sexual act which can qualify to be carnal knowledge'.

The law therefore targets unnatural carnal knowledge and not merely identifying as an LGBTQ+ person. Therefore, to punish a person for homosexuality, it must be proved that an individual is guilty of the offence of unnatural carnal knowledge. Section 99 of Act 29 helps shed more light on what amounts to unnatural carnal knowledge. The provision is reproduced below.

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[8] Raymond Atuguba, 'Homosexuality in Ghana Morality Law Human Rights' [2019] JPL 113, 116.
[9] Ibid. The author argues: "It may, therefore, be reasonably proposed that, a person belonging to the LGBT community is permitted by the confines of Ghanaian law, to live openly as a homosexual––with the opportunity at will to publicly show affection to another person of the same-sex, and engage in all acts attendant to such affection, and which fall short of the requisite degree of penetration."
[10] Ibid.
[11] [2015] DLSC 3046.

> Section 99—Evidence of Carnal Knowledge.
>
> Where, on the trial of a person for a criminal offence punishable under this Act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge is complete on proof of the least degree of penetration.

The law therefore provides that unless there is the least form of penetration unnaturally, the LGBTQ+ community and their expressions and activities are not necessarily criminal. The situation under our current legal dispensation becomes tricky when a biological male undergoes gender reassignment surgery[12] and then engages in sexual relations with a biological male. The confusion arises as to what is considered natural: the gender at birth or the reassigned gender? The reassigned gender cannot be said to be automatically unnatural because the purpose of the reassignment is to make a biologically determined man a woman and *vice versa*.[13]

2.2 The Implications of the Criminalisation of Unnatural Carnal Knowledge on the LGBTQ+ Community and the Social Posture towards the LGBTQ+ Community

This paper refers to a 72-paged Human Rights Watch study that interviewed 114 Ghanaians who self-identify as LGBT between December 2016 and February 2017 in four regional capitals in Ghana which are Accra, Tamale, Kumasi and Cape Coast to show the societal effect of the existing legal framework on the LGBTQ+ community.[14] The results of the report showed the harsh realities members of the LGBTQ+ community had to go through to avoid prosecution under section 104 of Act 29. Instances of abuse were documented, where members of the LGBTQ+ community had to endure sexual abuse by people who threatened to reveal that they were members of the LGBTQ+ community. There is disdain from a large section of the Ghanaian public for the activities of the community.

A Gallup International Association survey showed that ninety-six (96) percent of Ghana's population subscribed to a religious belief system. The members interviewed stated that despite the various religious and cultural beliefs of Ghanaians that caused them to abhor the community, they were empowered by the provision of section 104 of Act 29. To avoid discrimination, these individuals have to self-censor or not exercise their constitutionally guaranteed freedom of expression to avoid the harsh societal consequences as well as possible criminal consequences. They often suffer domestic violence in silence for fear of being subjected to more violence should they try and seek help for their abuse. In another

[12] Cleveland Clinic, 'Gender Affirmation/Confirmation or Sex Reassignment Surgery' <https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery> accessed 14 January 2022.
[13] Ibid.
[14] Isaack (n 2).

report adopted by Human Rights Watch,[15] it was noted that Ghana had several hundred prayer camps which were privately owned by faith-based organisations where members of the community could seek refuge in times of turmoil. However, these camps are places of abuse for members of the LGBTQ+ community, where they are attempted to be "cured" or have their "demons expelled". It should however be noted that despite the provisions of section 104 of Act 29, Ghanaian law does not allow for the persecution and discrimination of individuals that are members of the LGBTQ+ community. The Constitution in article 17 guarantees equality and freedom from discrimination for all Ghanaians.

2.3 Can the Activities of the LGBTQ+ Community Constitute a Threat to Public Interest?

Homosexuality was once seen as a mental anomaly necessitating the need for the law to interfere with their activities.[16] Research has now shown that the prevailing scientific evidence does not support the claim that homosexuality and the members belonging to the LGBTQ+ community are affected by a mental disorder or are classified as having a mental disorder.[17] Gays are also perceived to spread HIV rapidly. However, research shows that this is due to 'social and structural issues—such as HIV stigma, homophobia, discrimination, poverty, and limited access to high-quality health care'.[18]

The justification of laws that violate the rights of members of the LGBTQ+ community has been that the activities of the LGBTQ+ community constitute a threat to national security, public safety and public morals. Indeed, the rights guaranteed under the 1992 Constitution are not absolute. Article 12 of the Constitution provides for the enjoyment of rights by all subject to the preservation of public safety, public health and morals and national security. It is argued that the practices of the LGBTQ+ community do not pose a justifiable threat to public interest such that they should be curtailed. The proportionality test has been put forward by the Supreme Court as a standard test that can be used to determine whether there has been a just imposition of restrictions on the rights of an individual bearing in mind the preponderant general interest of rights and freedoms of others and the public interest.

In *Republic v Tommy Thompson Books Ltd. (No2)*[19] the proportionality test was explained as follows:

> … the law in question must be 'reasonably necessary or required' in the public interest, national security etc… for any law to qualify as being reasonably necessary or required the objective of that law must be of such

[15] S R Barriga, 'The (In)human Dimension of Ghana's Prayer Camps' (*Human Rights Watch*, 10 October 2014) <https://www.hrw.org/news/2014/10/10/inhuman-dimension-ghanas-prayer-camps> accessed 14 January 2022.
[16] American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders* (1st ed, 1952).
[17] Sheila Mysorekar, 'Homosexuality is not a disease' <https://www.dandc.eu/en/article/world-health-organization-considers-homosexuality-normal-behaviour accessed> 1 March 2022.
[18] Centers for Disease Control and Prevention, 'HIV and Gay and Bisexual Men' <https://www.cdc.gov/hiv/group/msm/index.html> accessed 1 March 2022.
[19] [1996-97] SCGLR 484, 500-501.

> sufficient importance as to override a constitutionally protected right or freedom… the objective of that law must not be trivial or frivolous, otherwise that law will not be reasonably necessary or required. The objective must be sufficiently important …it must relate to concerns which are pressing and substantial.

The test was applied more recently in *Civil and Local Government Staff Association of Ghana [CLOSAG] v The Attorney-General and 2 Ors*[20] and quoted with approval in *The Republic v Eugene Baffoe Bonnie & Ors*[21]. It was also applied in *Center for Juvenile Delinquency v Ghana Revenue Authority.*[22] In the *CLOSAG* case, Akuffo JSC stated that 'prima facie, constitutional rights and freedoms are to be enjoyed fully subject to the limits which the Constitution itself places thereon in terms of Article12(2) ...'

In the *Center for Juvenile Delinquency* case, relying on the proportionality test, Adinyira JSC. stated that:

> access to justice enables people who are more vulnerable to socio-economic hardships, discrimination and general human rights abuses to access and enforce their inalienable human rights. Generally, the majority of persons face obstacles when trying to bring cases to court due to lack of access to legal aid. So that any additional impediment introduced by any arm of government that prevents a person from invoking the jurisdiction of the court and thereby results in a denial of justice is unacceptable.[23]

For a limitation to be valid, it must be necessary for the enhancement of democracy and freedoms of all and must at the same time not be overbroad such as to effectively nullify a particular right or freedom guaranteed by the Constitution. In *Ahumah Ocansey v The Electoral Commission*[24], in applying the proportionality test Wood CJ held:

> I have considered the 1st defendant's counter arguments that the impugned legislation is reasonably required in the public interest, in that access to prisons must be restricted, and further that violators of the law must be punished, kept away from the public, under lock and key, disenfranchised and not allowed to have any say in who governs them. These, counsel contend, do serve as their just deserts for causing pain and suffering to others. In short, Counsel contends that the legislation meets the proportionality test. These arguments, examined in the best of lights, I am afraid, would have no place in participatory democracy, with the guaranteed rights that are enshrined in the Constitution.

[20] Suit No. J1/1/2016 (Unreported judgment of the Supreme Court dated 14 June 2017).
[21] [2018] DLSC 73.
[22] Writ No. J1/61/2018 SC, (Unreported judgment of the Supreme Court dated 30 July 2019).
[23] Suit No. J1/1/2016 (Unreported judgment of the Supreme Court dated 14 June 2017).
[24] [2010] DLSC 6138.

A questionnaire survey and further interviews conducted as part of the research for this paper on Snapchat; a popular social media platform famed for protecting the privacy of its members found that the attempts to restrict the rights of LGBTQ+ members were largely seen as an attempt to further infringe the rights of the members of the community. The study had five respondents who were unanimous on the issues the survey sought responses for. The study sought to find out how the current state of the law affected LGBTQ+ persons especially their enjoyment of their constitutionally guaranteed rights, how they expected the law to relate with them and their views on the proposed Bill and how it would affect them.

The study found that these individuals had been targeted and had many of their rights infringed upon usually on the threat of reports to the relevant authorities that they were LGBTQ+ persons. Although they stated that they identify as LGBTQ+ persons, they were too afraid to make this publicly known because of fear of persecution. They were all unaware that the current law only expressly criminalised partaking in sexual acts which were considered as unnatural carnal knowledge. Consequently, they were tagged as culpable due to their "queer" tendencies. One respondent recounted an incident from Secondary School where he had been beaten by students and teachers after a friend, he had confided in about his sexuality reported. He stated that he had been told by the headmaster after the ordeal that he should be grateful to them for not reporting the incident to the police as he would have been prosecuted. He was also threatened not to disclose the "discipline" he had received, as doing so would cause his arrest and prosecution for being "gay". They had all been discriminated against and were unable to express themselves and had instances where their human dignity had simply been thrown out the window. All the respondents citing the socio-cultural attitude of Ghanaians were not optimistic about ever realising their full constitutional rights in Ghana. They however believed that should laws that recognise and protect them be put in place, the situation would be much more bearable. They believed that the passage of the Bill would be the final nail in the coffin of their efforts to be able to live in Ghana as members of the LGBTQ+ community.

It is submitted that, by applying the proportionality test, the Bill does not contain necessary limitations for the enhancement of democracy. The limitations attempted to be imposed by the Bill are indeed too broad and effectively nullify the rights and freedoms guaranteed by the Constitution.

3.0 CONSTITUTIONAL RIGHTS UNDERMINED BY THE BILL

The Constitution provides that the fundamental human rights and freedoms enshrined in Chapter 5 shall be respected by all the organs of government as well as its agencies and all other legal and natural persons in Ghana.[25] The Constitution further entitles everyone no matter his race, place of origin, political opinion, colour, religion, creed or gender to their fundamental human rights and freedoms of the individual as contained in the chapter.[26] The

[25] Constitution of the Republic of Ghana (1992), art 12(1).
[26] Ibid, art 12(2).

Bill contradicts many constitutionally guaranteed rights, and no strong case can be made to the effect that the activities of members of the LGBTQ+ community constitute a threat to the public interest. The paragraphs that follow discuss the constitutional rights that are violated by various portions of the Bill.

3.1 The Right to Personal Liberty.

The Office of the High Commissioner of Human Rights has defined the right to personal liberty as one that requires that a person is not subject to arrest or detention except by law. The right to personal liberty is one every individual is entitled to and is provided for by article 14 of the Constitution. The right to personal liberty is one of the rights that the bill contradicts. The infringement on the right to personal liberty is unique in this situation. Whilst the Constitution allows for the personal liberty of individuals to be curtailed by the law, including an Act of Parliament, such law, should not be contrary to the Constitution. If the law that subjects a person to arrest or detention is unconstitutional, then any arrest or detention made by the law is against the right to personal liberty of the person.[27]

The proposed Bill seeks to infringe on the personal liberty of individuals by imposing prison sentences on individuals unlawfully. Clause 6 of the Bill defines and criminalises the activities of LGBTQ+ persons. The Bill, being contrary to the Constitution, cannot be a validly recognised law and as such cannot amount to a lawful restriction on the personal liberty of individuals.[28]

To the best of my knowledge, there is no domestic case law to support the assertion that a proposed Bill contrary to the Constitution, that seeks to arrest and detain individuals is against the personal liberty of a person. It is however useful to look to foreign jurisdictions for guidance on the topic.

In the Supreme Court of the United States case of *Lawrence v Texas*[29], the questions before the court were on the validity of the Texas law that criminalised same-sex sexual intercourse and whether their criminal convictions for adult consensual sexual intimacy in the home violated their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment. Upon establishing that the claimants had an inherent right to privacy as consenting adults engaging in consensual sexual intercourse, it found that the liberty of the appellants had been curtailed contrary to the Fourteenth Amendment.[30] In this

[27] Constitution of the Republic of Ghana (1992), art 1(2). *Mensima and Others v Attorney-General and Others* [1997-98] 1 GLR 159. The court stated that article 1(2) contains "an in-built repealing mechanism which automatically comes into play whenever it is found that a law is inconsistent with the Constitution, 1992."
[28] The various parts of the Bill that seek to contravene the personal liberty of persons are found in: Clauses 4(2), 6(2), 7(b), 8, 9, 10(1), 11(b), 12, 13(1)(d), 14(1), and 16(2)
[29] [2003] 539 U.S. 558.
[30] U.S. Constitution, Amend. XIV. This amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

case even though the Texas law had been validly passed and the appellants subjected to the criminal justice system, the Supreme Court found that the liberty of the citizen as ensured by the Fourteenth Amendment had been contravened as a result of the contravention of other constitutional rights.

The Bill, by creating offences punishable by terms of imprisonment in many of its provisions that are contrary to the Constitution, amounts to an unjust interference with the personal liberty of affected individuals.

3.2 The Right to Dignity

The right to dignity is a prerequisite to having rights.[31] It is the capacity for and the right to respect as a human being.[32] Ackerman posits that the right to dignity allows human beings to have self-awareness, a sense of self-worth, self-determination, develop individual personalities and strive for self-fulfilment. To her dignity 'arises from the capacity of human beings to enter meaningful relationships with others'.[33] Human dignity is a fundamental right generally recognised[34] and guaranteed by the Constitution and described as inviolable.[35] The right to dignity is to a large extent the basis of the right to equality or freedom from discrimination[36] and the right to privacy.[37] A person should be able to determine certain personal matters of which sexual orientation is one.

Intentionally defining "Ghanaian Family Values" in Clause 2 of the Bill such that members of the Ghanaian society who identify as members of the LGBTQ+ community are cut out infringes upon the dignity of these individuals as it unconstitutionally defines their lifestyles as outside Ghanaian family values. Clause 6[38] of the Bill further derogates from the dignity of a person by attempting to describe which sexual activities are permissible and allowed. The Bill further violates the personal dignity of LGBTQ+ individuals in Clause 11.[39] Clause 11 of the Bill is to the effect that marriages celebrated amongst members of the LGBTQ+ community are void.

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[31] A Rudman, 'The Protection Against Discrimination Based on Sexual Orientation Under the African Human Rights System' [2015] AHLJ 1.
[32] L Ackerman, 'Human Dignity: Lodestar for Equality in South Africa' [2014] OJLS 609,610.
[33] Ibid.
[34] *Martin Kpebu v The Attorney-General* [2016] DLSC 11086. Benin JSC states, "Since the period of Roman civilization, this right to personal dignity has been emphasized. Religious thinkers insisted on it, citing the biblical statement that 'God made man in his own image'.
[35] Constitution of the Republic of Ghana (1992), art 15.
[36] Rudman (n 31)
[37] *Raphael Cubagee v Michael Yeboah Asare, K. Gyasi Company Limited and Assembly of God Church* [2018] DLSC 10909.
[38] Promotion Of Proper Human Sexual Rights and Ghanaian Family Values Bill [2021], clause 6(1). This clause stipulates: "A person commits an offence if the person (a) engages in a sexual intercourse between or among persons of the same sex."
[39] Ibid, s 11(1). This section provides, "A marriage entered into by the following persons is void: (a) persons of the same sex, or (b) a person who has undergone gender or sex reassignment."

In the context of sexual rights, the Ghanaian courts have not made any pronouncements, however, the courts have been called upon to give meaning and effect to Article 15 and have refused to give an exact meaning to what amounts to human dignity. In *Ahumah Ocansey and Centre for Human Rights & Civil Liberties v The Attorney-General & The Electoral Commission,* [40] Atuguba JSC stated that 'giving justifiable meaning to article 15(1) is a complex task because the legal meaning of "dignity" is not easy to pin down'.

The Supreme Court of the United States offers some guidance on how the courts should treat the right to personal dignity of LGBTQ+ individuals in the case of *United States v Windsor.*[41] The court found that the aim of the "Defense of Marriage Act" to exclude same-sex marriages was unconstitutional as such exclusion amounted to a violation of the dignity of individuals in same-sex unions.[42] The court thought that by giving a class of persons the right to marry and denying another class that right, they had put the other class at a disability whereby they could not even aspire for the same status to which those of the class allowed to marry aspired to.

3.3 The Right to Equality and Freedom from Discrimination

The Ghanaian Constitution abhors discrimination and requires all laws to conform to the Constitution and not to discriminate.[43] People have suffered discrimination in all spheres of life based on their sexual orientation.[44] It was, however, not the intention of the framers of the Constitution that there would be any form of discrimination.[45] Discrimination is generally abhorred but when viewed through the clouded lenses of cultural attitudes, the rights of sexual minorities are disregarded and these minorities are discriminated against.

Positive discrimination, such as affirmative action, is however permissible.[46] The Ghanaian position is that different treatment can be given to different classes but within the same class, it will be unconstitutional to treat people differently.[47] Article 17 provides that all persons shall be equal before the law. It further prohibits discrimination on the grounds of "gender, race, colour, ethnic origin, religion, creed or social or economic status."

[40] [2010] DLSC 6138.
[41] [2013] 570 U.S. 744.
[42] M Finck, 'The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective' [2016] IJCL 26, 29.
[43] *Nii Kpobi Tettey Tsuru iii v The Attorney-General* [2010] DLSC 4144.
[44] United Nations High Commissioner for Human Rights, 'Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity' (Report) A/HRC/19/41.
[45] *Christiana Quartson v Pious Pope Quartson* [2012] DLSC 6687.
[46] Stanford Encyclopedia of Philosophy, 'Affirmative Action' <https://plato.stanford.edu/entries/affirmative-action/> accessed 3 March 2022.
[47] *T. T. Nartey v Godwin Gati* [2010] DLSC 4143

The Constitution, aside from making freedom from discrimination a fundamental human right, also provides a directive principle of state policy[48] that the state cultivates among all Ghanaians, an attitude that rejects discrimination.[49]

Given the constitutional stipulation, it is submitted that the Bill by seeking to outlaw the LGBTQ+ community, unfairly targets them and seeks to give them a different treatment relative to others as the LGBTQ+ community is subjected to disabilities or restrictions in the enjoyment of their rights as guaranteed by the Constitution. The Bill in clause 1 singles out a portion of the population that holds out any type of relationship other than a heterosexual relationship and applies the law to them. The Bill, by uniquely applying to people of one class of sexual orientation and not all sexual orientations, unfairly targets and discriminates against those of the identified group.

Ghana suffers a dearth of case law on the promotion of sexual rights. However, the courts have been called upon to interpret the anti-discriminatory clause of the 1992 Constitution in *Nartey v Gati*.[50] Dr. Date-Bah JSC in giving the unanimous ruling of the court stated that the freedom from discrimination and the right to equality does not mean that everyone had the same set of rights. Whilst discrimination is allowed, the proposed Bill does not fall within the limits of positive discrimination allowed by the Constitution. The Bill operates to unfairly target and discriminate against people who identify as homosexuals. This grants heterosexuals special treatment unavailable to homosexuals.

The history of discrimination against homosexuals should make them entitled to receive special rights intended to ensure they have an equal footing in society. As noted in the Supreme Court of the United States case of *Romer v Evans*[51], 'there is nothing "special" about laws which prevent people from losing jobs and homes because of who they are'.

3.4 The Right to Privacy of Home and other Property

The right to privacy is the right to personal autonomy[52] which is now seen as an essential right to enable a person to enjoy their right to life.[53] Article 18 of the 1992 Constitution provides, that 'No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law'

The memorandum of the Bill states in clause 6 that the purpose of the provision is to make an offence of sexual intercourse between persons of the same sex.[54] The Bill seeks to infringe on the right to privacy of individuals by prescribing which sexual conduct the individual may

[48] R Atuguba (n 8).
[49] Constitution of the Republic of Ghana (1992), art 37(2)(b).

[50] T. T. Nartey (n 47).
[51] [1996] 517. U.S. Reports 620.
[52] BA Garner and HC Black, Black's Law Dictionary (9th edn, 2009).
[53] W Samuel, 'The Right to Privacy' [1890] HLR 193.
[54] Memorandum of the Bill at 11, 'Under clause 6, a person commits an offence if the person engages in sexual intercourse between or among persons of the same sex or between a man and an animal or a woman and an animal.'

partake in. This has the effect of criminalising behaviour incompatible with the Bill and at the same time limiting the right of a person to have sexual relations in line with what the Bill prescribes. The right to privacy of an individual must necessarily be breached to prosecute a person for the crime of engaging in an LGBTQ+ activity involving sexual relations.

Although the courts have not made any pronouncements on the right to privacy in the context of sexual rights, the courts have on more than one occasion been called upon to interpret and enforce Article 18.[55] In *Cubagee v. Asare*[56], Justice Pwamang stated:

> in our understanding, the framework of our Constitution does not admit of an inflexible exclusionary rule in respect of evidence obtained in violation of human rights'. He, however, went on to state that there must be a prevailing public interest that calls for the non-recognition of the right to privacy before it will be curtailed.

In the USA, privacy is deemed a fundamental human right and requires that it can only be breached when there is a prevailing legitimate and compelling state interest that requires the breach.[57] In *Smith and Grady v United Kingdom*[58], the right to privacy was invoked as a justification for LGBTQ+ rights. It was found that the investigation and subsequent discharge of personnel from the Royal Navy based on sexual orientation was a breach of their right to a private life.

Also, in *Lawrence v Texas*[59] a case involving two homosexuals who had engaged in homosexual relations with full mutual consent, Justice Kennedy stated that 'The State cannot demean their existence or control their destiny by making their private sexual conduct a crime'.

The Bill, by attempting to regulate the sexual conduct of Ghanaians, infringes on their constitutionally guaranteed right to privacy without just cause and is an attempt by the legislature to demean the existence and control the destiny of LGBTQ+ Ghanaians.

3.5 The Fundamental Freedom of Assembly

Freedom of assembly is a fundamental right, guaranteed to every person under article 21 (1) (d) of the Constitution, 1992, which provides: 'All persons shall have the right to - (d) freedom of assembly including freedom to take part in processions and demonstrations.' In many countries around the world, the push for the recognition of LGBTQ+ rights was preceded by lawful marches and demonstrations intended to galvanise support for the LGBTQ+

[55] *Edmund Addo v Attorney-General and The Inspector General of Police* (Suit No. HR/0080/2017. Unreported judgment of the High Court dated 30 March 2017); *Mrs. Abena Pokuaa Ackah v Agricultural Development Bank Civil Appeal* (No. J4/31/2015. Unreported judgment of the Supreme Court dated 28 July 2016).
[56] *Raphael Cubagee* (n 37).
[57] [1999] 29 EHRR 493.
[58] Roe v. Wade, 410 U.S. 113 (1973)
[59] *Lawrence v Texas* 539 U.S. 558.

community.[60] The legal effect of the freedom of assembly was considered *in New Patriotic Party v Inspector-General of Police*.[61] In his judgment, Charles Hayfron-Benjamin JSC said 'the right to assemble, process or demonstrate cannot be denied…This positive attitude towards the enjoyment of the freedoms cannot be abridged by a law which prevents the citizen from delivering his protest even to the seat of government'.

The Bill seeks to violate this fundamental right by prohibiting the promotion of LGBTQ+ activities in Clauses 12 to 16. A way by which the LGBTQ+ community can seek better protection of their rights is through assembling and embarking on walks and rallies as well as conventions to promote their interests. They may also decide to demonstrate for better treatment. The Bill in contemplation of this seeks to outlaw all such expressions which are constitutionally guaranteed rights.

3.6 The Fundamental Freedom of Speech and Expression

Freedom of speech and expression are fundamental freedoms that the Ghanaian courts have had to make pronouncements on, most notably in *New Patriotic Party v Ghana Broadcasting Corporation*[62] and *Republic v Independent Media Corporation of Ghana (Radio Eye Case)*.[63] In the former case, Francois JSC feared that to hold otherwise than that, the denial of the plaintiff's right to present or express divergent and dissenting opinions constituted an interference with the freedom of speech and expression, 'would mean a right given to persons, bodies or institutions to exercise censorship which could block avenues of thought and foreclose the citizen's right of choice contrary to the prohibition of censorship'. The 1992 Constitution frowns on censorship. Article 162 of the 1992 Constitution provides that 'Subject to this Constitution and any other law not inconsistent with this Constitution, there shall be no censorship in Ghana'.

The American Civil Liberties Union defines censorship as the unconstitutional act of government suppressing words, images, or ideas that are deemed offensive.[64] The Bill seeks to use censorship as a tool to curtail the rights of freedom of speech and expression of the LGBTQ+ community.

Clause 12 of the Bill makes it an offence for a person to promote or sympathise with the LGBTQ+ community. The provision further makes it an offence to engage in an activity that is aimed at changing public opinion towards the LGBTQ+ community. Clause 13 of the Bill also makes it an offence to make children aware of the activities of the LGBTQ+ community. Clause 14 of the Bill makes it an offence to fund and sponsor activities related to the LGBTQ+

[60] S Hall, 'The American Gay Rights Movement and Patriotic Protest' [2010] JHS 536, 538.
[61] [1993-94] 2 GLR 459.
[62] [1993-94] 2 GLR. 354.
[63] [1996-97] SCGLR 258.
[64] American Civil Liberties Union, 'What is Censorship?' (*ACLU*, 30 August 2006). <https://www.aclu.org/other/what-censorship> accessed 31 March 2022.

community which may include the funding of speeches and conferences to discuss LGBTQ+ rights.

In *New Patriotic Party v Ghana Broadcasting Corporation,* the plaintiff alleged that the refusal of the defendant statutory corporation to give it time to air its views on the budget was a denial of their fundamental human rights and amounted to censorship. The court agreed with the plaintiff that the refusal of an opportunity to air their views was a violation of their rights. The court in giving its decision expressed the importance of having diverging views in the Ghanaian Society. It stated that the intention of the framers of the Constitution in formulating the freedom of speech and prohibiting censorship was to make available information and to allow for valued judgments from all citizens. 'That objective was only possible if there was a free ventilation of views.'

It is submitted that the Bill by attempting to restrict and prevent activism in the form of free speech and expression is an affront to the constitutionally guaranteed freedom of speech and expression as provided for by the 1992 Constitution.

4.0 CONCLUSION

Questions on the morality of the activities carried out by sexual minorities are of concern to many in society especially in modern times where the moral fabric of society is being constantly eroded. However, the people of Ghana from whom sovereignty emanates[65] chose and promulgated a constitution that ensures and guarantees the fundamental human rights of all individuals. The institutions tasked with governance must act in a manner that ensures that the rights of all are zealously protected. The legislature should not prioritise passing populist laws over protecting the rights of all in society including sexual minorities. Ghana would be taking a step backwards from the full realisation of individual rights should it pass the Bill into law and would greatly hinder the desire of the Ghanaian people to be free and to protect and preserve the Fundamental Human Rights and freedoms of all. [66] It is for these reasons this paper calls on Parliament to withdraw or reject the Bill, failing which, the president should refuse an assent to the Bill. In the event that the Bill becomes Law, the Supreme Court should declare the Law as null and void.

[65] 1992 Constitution of Ghana, art 1(1).
[66] The Preamble, 1992 Constitution of Ghana.

UNRAVELLING THE SNARE: DISSECTING THE INTERPLAY OF ENTRAPMENT IN INVESTIGATIVE JOURNALISM AND ITS REPERCUSSIONS IN GHANA'S CRIMINAL JUSTICE SYSTEM

Joel Telfer*

ABSTRACT

In democratic societies, the media, often dubbed the 'Fourth Estate,' serves as a critical watchdog, safeguarding transparency and accountability. Yet, an unsettling trend is emerging in Ghana's investigative journalism, namely, the use of entrapment to unveil corruption and other illicit activities. While effective in unmasking wrongdoers, entrapment raises serious ethical and legal quandaries that can jeopardise the integrity of criminal investigations and judicial proceedings. This paper offers an in-depth analysis of the legal and ethical ramifications of entrapment within Ghana's legal landscape. It posits that entrapment not only risks impairing the fairness of trials but also erodes public confidence in the judicial system and potentially violates the rights of the accused. A focal point of this inquiry is whether entrapment could negate mens rea, a cornerstone in establishing criminal liability. Drawing on an array of decided cases, statutes, and legal and ethical theories, this paper aims to contribute to the body of knowledge dissecting the complex interplay between investigative journalism and criminal prosecution in Ghana. The paper culminates in a clarion call for a comprehensive reevaluation of entrapment practices, advocating for the formulation of stringent legal frameworks to uphold individual rights and fortify the integrity of Ghana's judicial system.

* B.Sc., LL.B (Ghana), BL Candidate at the Ghana School of Law. The writer is grateful to Ibrahim Abdul Karim and Diane E. Kaye who reviewed and edited the initial manuscript of the paper. Nana Tawiah Okyir Esq. and Prince Ganaku Esq. are also credited for their fierce debates with the writer on the subject that helped shape the final text of this paper.

1.0 INTRODUCTION

"Human nature is frail enough at best, and requires no encouragement in wrongdoing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation."[1]

The Republic of Ghana boasts of a dynamic and flourishing media landscape, a direct result of the 1992 constitution that guarantees media freedom.[2] Consequently, the nation has witnessed a steady proliferation of media pluralism, with numerous TV and radio stations supplementing the traditional state broadcaster and state newspapers. Additionally, the advent of social media has fostered citizen journalism, providing individuals with internet access, and the ability to report on local events for global consumption.

Journalism encompasses a diverse array of forms and practices, each serving a specific purpose in informing, educating, and engaging the public. The various types of journalism contribute to a comprehensive understanding of events, issues, and phenomena that shape society.

Among the various forms, investigative journalism occupies a unique position.[3] Distinguished by its meticulous and thorough approach, investigative journalism plays a critical role in holding power accountable, fostering transparency, and strengthening democratic institutions.

In Ghana, this type of journalism plays a vital role in shedding light on the myriad of challenges that occur behind closed doors, especially in public life. Several state institutions have been fraught with varying degrees of corruption that have significantly impaired the country's revenue generation efforts, efficiency of public service and general trust and confidence in state institutions.[4] Investigative journalism has been a crucial tool in revealing some of the rot that exists and, in some cases, served as a basis for important reforms.

In the realm of investigative journalism, the methods used to uncover truths can sometimes pose significant ethical and legal challenges. One such challenge, particularly relevant to Ghana's legal landscape, is the concept of entrapment. While journalists aim to expose wrongdoing and bring hidden realities to light, there's a fine line between exposing criminal activities and inadvertently encouraging them. Entrapment, defined as the act of inducing or encouraging an individual to commit a crime they otherwise would not have committed,[5] has emerged as a growing trend in investigative journalism in Ghana.

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[1] People v. Saunders, 38 Mich. 218, 222 (1878).
[2] Article 162(1) of the 1992 Constitution provides; Freedom and Independence of the media are hereby guaranteed.
[3] Hugo de Burgh, *Investigative Journalism: Context and Practice* (Routledge, 2008) 24-25.
[4] Afrobarometer, 'Trust, Corruption, and Political Efficacy' (Afrobarometer Round 6) <https://www.afrobarometer.org/wp-content/uploads/migrated/files/media-briefing/ghana/gha_r6_presentation3_trust_corruption.pdf > accessed 26 July 2023.
[5] Jonathan C. Carlson, '*The Act Requirement and the Foundations of the Entrapment Defense*' (1987), 73 VA. L REv. 1011.

Three instances that struck a nerve in the national discourse form the basis for the paper's analysis. The first, the 2015 premiere of Anas Aremeyaw Anas' film "Ghana in the Eyes of God," revealed a disconcerting underbelly of corruption within the judiciary. The second instance pertains to Anas Aremeyaw Anas' investigation into corruption within the Ghana Football Association (GFA) and the final one relates to an investigation that led to the resignation of a Minister in Ghana's government.

The frailty of human nature, as poignantly highlighted in the opening quote, underscores the inherent responsibility and caution that must be exercised when delving into sensitive investigative practices. In Ghana's vibrant media landscape, investigative journalism stands as a beacon of truth and accountability. However, when journalistic endeavours toe the line between unveiling and unintentionally promoting wrongdoing, ethical and legal conundrums arise. The central focus of this paper is to critically examine the role of entrapment within investigative journalism in Ghana and to assess its wider implications on criminal prosecution.

The paper analyses the background of entrapment in Ghanaian law. Here, an exegesis is made of the state of the law on entrapment. Due to the dearth of case law and legislation on the subject in Ghana, reference is made to the practice as it pertains in two jurisdictions, the United Kingdom and the United States. These references offer insights into how Ghanaian Courts might approach the matter of entrapment. Further, a venture into the abstract realm is made, dissecting the theoretical and philosophical fabric that shapes the concept of entrapment. Profound notions such as individual autonomy, free will, the attributability of guilt and the likelihood of abuse by entrappers are analysed. Here, a critical eye is cast on the potential pitfalls of utilising entrapment to root out societal ills. Additionally, entrapment and the establishment of intent in criminal prosecutions are discussed. Here, the paper argues that entrapment can negate the establishment of *mens rea.* The paper then dovetails into a discussion of entrapment as it pertains to Ghana. Notable instances of entrapment, their outcomes and the likely consequences for the Ghana Legal System are discussed extensively. Finally, the paper offers compelling alternatives to the use of entrapment in investigative journalism.

2.0 BACKGROUND OF ENTRAPMENT IN GHANAIAN LAW

Entrapment is a legal concept that has seen limited development within Ghanaian law, necessitating a reliance on the rich jurisprudence of English common law and other common law jurisdictions. This section explores the concept, the attitude of courts, and specific decisions related to entrapment.

2.1 Entrapment under the Common Law

Under the Common law, entrapment is viewed as being fundamentally concerned with the conduct of state and private individuals in inducing persons to commit criminal acts and the

subsequent prosecution thereof. The definition can be discerned from the articulation of Lord Nicholls in *Regina v Loosely*:[6]

> It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen.

What then has been the attitude of the English Courts towards acts of entrapment? In the case of *R v Sang,*[7] Lord Salmon noted that a Judge had no discretion to exclude evidence that proved an individual had committed an offence after he had been induced to do so by an *agent provocateur.* Following this decision, the Common Law has generally held that evidence is generally not rendered inadmissible by how it is obtained. If it is relevant and has a probative value which substantially outweighs any prejudicial value, it is admissible; irrespective of how it was obtained.[8] This position is consistent with the Ghanaian position on the admissibility of evidence; it matters not how the evidence was obtained. Once the evidence is relevant and has probative value, it shall be admitted to establish a fact before the court.[9]

The English courts' attitude towards entrapment is multifaceted and indicates an approach that looks at balancing the state's duty to detect and prosecute crime and the need to safeguard individual rights and the integrity of the judicial process. Several key cases illustrate the tension in this issue.

2.1.1 *R v Governor of Pentonville Prison, Ex-Parte Chinoy*[10]

This case concerned the establishment of a bank account for money laundering linked to drug trafficking. The Court emphasised that if true entrapment were present, the proceedings would have been stayed. Still, the circumstances did not warrant the exclusion of evidence. The Court expressed that the detection and proof of specific criminal activities might require underhanded or even unlawful means.

2.1.2 *R v Latif*[11]

Here, the accused was lured into England by deceit and convicted of being involved in drug importation facilitated by an undercover customs officer. The House of Lords upheld the conviction, refusing to stay the proceedings or exclude the evidence, despite the questionable means employed.

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[6] *Regina v Loosely; and Attorney – General Reference (No3) of 2000* (2001) 4 ALL ER 897 HL.
[7] [1980] AC 402.
[8] *R v. Leatham* (1861) 8 Cox CC 498.
[9] Evidence Decree, 1975 (NRCD 323), 51(2).
[10] (1973) 2 All ER 741.
[11] (1996) 1 WLR 106.

2.1.3 *DPP v Marshall*[12]

Charged with selling alcohol without a licence, the evidence was provided by plain-clothed officers posing as customers. The Court held that when a police officer merely provides an opportunity to break the law, and the accused freely takes advantage of it, an application to stay proceedings for entrapment will not succeed.

2.1.4 *Williams v DPP*[13]

This case involved a sting operation involving a van packed with valuables left unsecured. The Court ruled that the accused had a choice whether to succumb to temptation or not, and entrapment was not applicable.

2.1.5 *Ealing London Borough v Woolworths PLC*[14]

In this case, trading standards officers used a minor to purchase an age-restricted video. The appellate court held that the trial court had wrongly excluded the evidence.

2.1.6 *R v Christou*[15]

Police officers set up a jewellery shop to purchase stolen goods. The Court held that the accused were not forced or persuaded into their actions. The Court emphasised that not every trick producing evidence against an accused results in unfairness.

As the cases have established, entrapment, is no defence under Common Law. Despite these authoritative rulings on the effect of entrapment, the Court has also acknowledged that the detection and validation of certain criminal acts might necessitate unconventional or even illicit methods. A notable expression of this dilemma can be found in the case of *R. v. Mack,*[16] where the Canadian Supreme Court outlined the possible difficulty with the *Sang* reasoning as follows:

> The state does not wield an unchecked power to invade our personal lives or to capriciously test the virtue of individuals. There exists a genuine apprehension that techniques of entrapment may induce the commission of crimes by those who might otherwise have remained law-abiding... ultimately, we may recognize that there are intrinsic limits on the power of the state to manipulate people and events solely for the purpose of achieving convictions.[17]

These reservations and concerns found a definitive expression in the comprehensive judgments in *Loosely,* which crystallised the law into five main principles:

[12] (1988) 3 ALL ER 683.
[13] (1993) 3 ALL ER 365.
[14] (1995) Crim LR 58.
[15] (1992) 4 ALL ER 599.
[16] [1988] 2 SCR 903.
[17] Ibid.

i. Entrapment is not a substantive defence, but where an accused can show entrapment, the Court may stay the proceedings as an abuse of the Court's process or it may exclude evidence;
ii. As a matter of principle, a stay of the proceedings rather than exclusion of evidence should normally be regarded as the appropriate response;
iii. A prosecution founded on entrapment would be an abuse of the Court's process. Police conduct which brings about state-created crime is unacceptable and improper and to prosecute in such circumstances would be an affront to the public conscience;
iv. In deciding whether conduct amounts to state-created crime, the existence or absence of a predisposition on the part of the accused to commit the crime is not the criterion by which the acceptability of police conduct is to be decided, because it does not make acceptable what would otherwise be unacceptable conduct on the part of the police or negative misuse of state power; and
v. A useful guide is to consider whether the police did no more than present the accused with an unexceptional opportunity to commit a crime. The yardstick for these purposes is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances.

Loosely marks a notable shift in the English courts' stance on entrapment, reflecting a growing concern for the protection of individual rights and the integrity of the legal process. The ruling in this case crystallises a perspective that increasingly rejects entrapment as a legitimate method of law enforcement. By establishing that entrapment is not a substantive defence but can lead to either a stay of proceedings or the exclusion of evidence, the ruling emphasises the court's role in safeguarding the integrity of the judicial process. It sets clear guidelines for what constitutes unacceptable state-created crime, shifting the focus from the accused's predisposition to commit a crime to the nature of police conduct.

2.2 Entrapment under American Law

Entrapment, under American law, operates as a robust defence against criminal charges, founded on the principle that state agents must not engineer a criminal scheme and implant it within an innocent individual's consciousness for subsequent prosecution. As articulated in *Jacobson v. United States,*[18] the defence rests on two interrelated components:

(1) governmental initiation of the crime or inducement; and

(2) the defendant's absence of predisposition to commit the criminal act. Among these, predisposition is the paramount factor.[19]

Inducement is the first essential element of the entrapment defence. It goes beyond mere encouragement or the use of deceptive tactics by government agents.[20] Instead, it focuses on some form of persuasion or coercion that could lead an ordinary person to commit a crime.

[18] 503 U.S. 540, 548 (1992).
[19] *Mathews v. United States*, 485 U.S. 58, 63 (1988).
[20] *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

The state may use trickery or deceit to catch criminals, but that alone doesn't constitute inducement. The line is crossed when the tactics employed are so compelling that they might persuade an average law-abiding citizen to commit a crime.[21]

The second element, predisposition, is the cornerstone of the entrapment defence. It explores the defendant's readiness to commit the crime, regardless of the state's influence. Predisposition is not the same as intent. While intent refers to the mental state required to commit a crime, predisposition examines if the individual is already inclined to commit the crime without the government's influence. Even if the defendant has no previous criminal record, they can be predisposed to commit a crime. If they quickly accept an illegal offer, this might be enough to demonstrate a predisposition. Conversely, if the state's actions create a substantial risk that a non-ready person would commit the crime, the entrapment defence can succeed. If the person was not naturally inclined to commit the crime but was pushed into it, they might not be considered predisposed.[22]

In both the English and American legal frameworks, the legality of entrapment is primarily associated with actions carried out by law enforcement officers, not private citizens. This is a crucial distinction, especially in the context of this paper, which focuses on entrapment activities in Ghana often initiated by investigative journalists. In the United States, the legal system adopts a dual focus, it scrutinises both the state's role in inducing the crime and the defendant's predisposition to commit it. A successful defence on these grounds can result in full acquittal. Conversely, English law prioritises the nature of police conduct and the ethical integrity of the judicial process. In cases of proven entrapment, the court may either stay the proceedings or exclude evidence.

Both legal systems strive to strike a balance between effective criminal prosecution and the safeguarding of individual rights and the rule of law. However, they diverge in their underlying philosophies in the sense that, the American system values personal autonomy, while the English approach focuses on the ethical conduct of the state and the integrity of the judicial process. Despite these philosophical differences, it is evident that neither system condones entrapment, viewing it as detrimental to both individual liberties and the credibility of the legal process.

3.0 THE ENTRAPMENT CONUNDRUM: THEORETICAL AND PHILOSOPHICAL UNDERPINNINGS

The philosophical quandary presented by entrapment lies at the intersection of legal responsibility, individual autonomy, and moral agency. This complex issue raises critical questions about the nature of free will, the fairness of assigning guilt under inducement, and

[21] *United States v. Nations*, 764 F.2d 1073, 1080 (5th Cir. 1985).
[22] *Mathews*, 485 U.S. at 6.

the ethical consequences of leaving the inducer unpunished, especially when not acting on behalf of the state.

3.1 Individual Autonomy and Legal Responsibility

In legal and moral philosophy, the notion of individual autonomy is foundational to attributing responsibility for actions.[23] It is the idea that people should be able to make choices based on their reasoning and values. However, entrapment disrupts this autonomy by manipulating situations and influencing choices, often using coercion or exploiting weaknesses. This raises a critical question; can someone be held fully accountable when their ability to make free choices is compromised? The answer, as is a settled matter of legal philosophy, is no. Entrapment is problematic precisely because it undermines individual autonomy, making it difficult to fairly attribute responsibility.

3.2 Free Will and Moral Agency

The concept of free will is also central to the discussion of autonomy and responsibility. Philosophers have long debated the conditions under which an action can be considered a product of free will.[24] Classical liberal theories of free will stipulate that an individual must act voluntarily, without coercion, and in line with reason to be considered autonomous.[25] This principle is foundational in liberal democracies, emphasising the inherent value and dignity of each individual. In entrapment scenarios, the inducement, whether through deceit, threats, or manipulation, compromises the voluntariness of the individual's actions. Scholars argue that such inducement alters the nature of the choice, thereby undermining the moral culpability of the entrapped.[26]

3.3 Ethical Implications and Legal Paradoxes

The dilemma deepens when considering that the one who has orchestrated the entrapment often walks free. This creates a paradox where the induced individual faces punishment for committing the crime, while the inducer, who has arguably engaged in an equally or more morally questionable act, faces no legal consequences. This dissonance between legal response and moral intuition raises issues of fairness and justice. From a Kantian perspective,[27] for instance, individuals should be treated as ends in themselves and not as mere means to an end. Entrapment arguably violates this principle, as individuals are used as instruments to achieve a broader goal, such as exposing corruption or reducing crime.

3.4 Balancing Social Goals and Ethical Principles

The justification for entrapment often rests on consequentialist grounds, where the ends, for example, uncovering corruption or protecting society are seen as justifying the means.

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[23] John Christman, "Autonomy in Moral and Political Philosophy", *The Stanford Encyclopedia of Philosophy* (Fall 2020 Edition), Edward N. Zalta (ed.), available at https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral accessed on 26 July 2023.

[24] H. Baumann, "Reconsidering Relational Autonomy. Personal Autonomy for Socially Embedded and Temporally Extended Selves," 2008 *Analyse and Kritik*, 30: 445–468.

[25] Ibid.

[26] Isiah Berlin, "Two Concepts of Liberty," *Four Essays on Liberty (London*: Oxford University Press, 1969) 118–72.

[27] Ibid.

However, this approach conflicts with deontological or rights-based ethics, which emphasise the intrinsic moral value of actions and the importance of respecting individual rights and dignity.[28] The challenge, therefore, lies in reconciling societal benefits with the preservation of individual autonomy and fair attribution of responsibility. If an action is not a product of free will, attributing criminal liability becomes not just unfair but also inconsistent with legal principles. In a legal system that aims for justice, the fair attribution of responsibility is paramount. Criminal sanctions should only be applied to actions that an individual freely and knowingly commits.[29] Entrapment, in overriding individual autonomy, renders this attribution of responsibility problematic.

3.5 Societal Impact and Legal Credibility

While the pursuit of societal benefits like crime prevention and corruption exposure is undoubtedly essential, it must not be pursued at the cost of eroding individual rights. The erosion of individual rights may create a slippery slope where the means justify the ends, leading to further infringements on civil liberties. This erosion can diminish public trust in the legal system and undermine the very social fabric that the law is meant to protect. Public fears of entrapment also create suspicion and insecurity. Public confidence in the legal system is paramount for its effectiveness and credibility. Entrapment, by its nature, can erode this confidence. When investigative journalists are seen as instigators rather than investigators, it leads to a perception that the system that leads to their prosecution is unjust and biased. As has been observed,[30] such erosion of trust has lasting implications for the democratic fabric, leading to cynicism and disengagement from the legal process.

The risk of selective enforcement, where certain groups or persons are disproportionately targeted based on biases, prejudices, or political considerations, can lead to unequal application of the law. Investigative journalists can be influenced by a plethora of motives which will enhance their eagerness to create a state of affairs that leads to the commission of a crime. The journalist transcends into the boundary of an agent provocateur who instigates the crime he reports and then into a fabricator who invents them.[31]

In sum, while the pursuit of societal benefits like crime prevention and corruption exposure is undeniably important, it should not come at the expense of individual rights and autonomy. Entrapment disrupts this delicate balance, calling into question the fairness of attributing responsibility and eroding public trust in the legal system. This erosion can have far-reaching consequences, including the potential for selective enforcement and the undermining of democratic principles. Given these complexities, it's imperative to critically examine and address the ethical and legal dimensions of entrapment. Only by doing so can

[28] J. Christman, J. Anderson (eds.), *Autonomy and the Challenges to Liberalism: New Essays*, (New York: Cambridge University Press, 2005).
[29] Ibid.
[30] Ibid.
[31] Chafee, *Free Speech in the United States* (Cambridge, Mass., 1942) 215.

we hope to maintain a legal system that is both just and effective, one that respects individual autonomy, upholds moral agency, and enjoys the confidence of the public it serves.

4.0 ENTRAPMENT AND THE ESTABLISHMENT OF INTENT IN CRIMINAL PROSECUTION

Article 19 of the 1992 Constitution guarantees an individual's right to a fair trial. Except in the case of strict liability offences, which are offences that do not require proof of intent, the establishment of criminal liability hinges on the establishment of two elements; *actus reus* and *mens rea* and the lack of a valid defence. The *actus reus* is the wrongful deed that comprises the physical components of a crime. The term *actus* connotes a 'deed,' a physical result of human conduct. When criminal policy regards such a deed as sufficiently harmful it prohibits it and seeks to prevent its occurrence by imposing a penalty for its commission. The *mens rea* on the other hand refers to the mental state or intention behind the act. In simple terms, *mens rea* evaluates whether the act was committed with purpose, knowledge, recklessness, or negligence. In essence, while *actus reus* examines 'what' was done, *mens rea* delves into 'why' it was done and whether it was done with guilty intent. For a crime to be established, these two elements typically need to converge: the guilty act must be accompanied by a guilty mind. Moreover, even if both elements are present, the presence of a valid defence can negate criminal liability, ensuring the principles of justice and fairness enshrined in article 19 of the 1992 Constitution.

The question of whether entrapment can negate the establishment of *mens rea* is a subject of considerable legal import, warranting an exploration. This paper posits that entrapment does undermine the concept of *mens rea*. *Mens rea* functions as an indicator that an act was committed not fortuitously but with a discernible level of conscious intent. However, the practice of entrapment introduces a significant perturbation into this foundational legal principle. Specifically, when investigative journalists employ persuasive tactics to induce individuals into committing crimes they would not have otherwise engaged in, a problem arises. This dilemma raises the question, can an individual be accurately ascribed a 'guilty mind' if their actions are substantially the product of external inducements rather than their volitional inclinations? If an act is precipitated by coercion, undue influence, or deceptive manoeuvres, it calls into question the very authenticity of the criminal intent behind the act. This is particularly significant given that the relationship between *mens rea* and free will is inextricably linked. Philosophically and legally, for one to possess a guilty mind, one's actions must stem from a place of autonomy and agency. Entrapment, by its very nature, compromises this autonomy, thereby raising a significant challenge in establishing the moral culpability of the act.

Moreover, the essence of criminal prosecution is rooted in the principles of justice and fairness. Entrapment challenges the moral integrity of a system that punishes individuals for acts they might not have conceived or executed without external inducement. This point is

vividly illustrated in the case of *Butts v. United States*,[32] where the court noted that it was unconscionable, contrary to public policy, and the law of the land to punish a man for the commission of an offence of the like of which he never would have been guilty of if the officers of the law or private persons had not inspired, incited, persuaded and lured him to attempt to commit it.[33] This statement underscores the fact that the justice system should not only adjudicate based on the actions of an individual but must also scrutinise the environment and conditions under which such actions were undertaken.

Furthermore, a just legal framework extends beyond the letter of the law to its spirit. As suggested in *Woo Wai v. United States*,[34] it is crucial to distinguish between genuine criminal intent and acts committed under undue influence. Focusing solely on the act without considering the surrounding circumstances risks undermining broader public policy goals. This is particularly relevant when we consider that convicting an individual who has been deceived or manipulated into committing a crime runs counter to our innate sense of morality. Such a conviction not only raises questions about the role and ethics of law enforcement but also challenges our very definitions of guilt, intention, and responsibility.

In reflecting on the holding of the Court in *Ex-Parte Moore*,[35] where the court opined that upholding the conviction of someone lured into criminality by law enforcement would be both against sound public policy and morally objectionable, an ethical dimension that is central to the debate on entrapment is brought in view. Such a stance by the court not only challenges our fundamental moral intuitions about what constitutes guilt, intentionality, and responsibility, but it also raises serious ethical questions regarding the role of law enforcement in the justice system.

In essence, using entrapment as a basis for conviction has profound legal implications. For a legal system to maintain its credibility, trust, and respect in the eyes of the public, it must be focused on ensuring that justice, in its truest form, is served. Convicting someone on the grounds of entrapment is not only contrary to public policy but also at odds with the very ideals of justice, fairness, and morality.

5.0 ENTRAPMENT AND INVESTIGATIVE JOURNALISM IN GHANA

In the Ghanaian context, entrapment has predominantly been the domain of investigative journalism. Entrapment in this realm involves a journalist orchestrating a scenario where a target is induced to commit an act that is criminal, immoral, or socially frowned upon. The

[32] 273 Fed. 35, 38 (8th Cir. 1921).
[33] Ibid.
[34] 223 Fed. 412, 415 (9th Cir. 1915).
[35] 70 Cal.App. 483, 487; 233 Pac. 805, 806 (1924).

journalist not only procures the act but also ensures that it is traceable to the target, thereby enabling law enforcement agencies to prosecute or expose the individual.[36]

Why might investigative journalists resort to entrapment as a method for exposing corruption and other illicit activities, as opposed to employing more conventional investigative techniques? One plausible explanation lies in the clandestine nature of these offences, which often involve consensual exchanges that leave no victims to sound the alarm or provide evidence. For instance, when a citizen bribes an official at the Ministry of Foreign Affairs to expedite passport processing, the citizen may not perceive themselves as a victim, given that the bribe ostensibly serves to simplify their life. Even if they did recognise their victimhood, the lackadaisical approach of law enforcement agencies and the fear of self-incrimination could deter them from reporting the incident. Furthermore, these offences often occur in secrecy, leaving scant evidence in their wake. Witnesses, typically close associates who benefit from the illicit activity, are generally unwilling to betray their principals or alert law enforcement agencies. This perhaps speaks to the motivations to expose crime through entrapment.

Prominent Ghanaian investigative journalist Anas Aremeyaw Anas has garnered national attention through his controversial employment of entrapment techniques. Anas has exposed corruption across various sectors, including the judiciary and executive branches, as well as the football industry, by strategically presenting individuals with opportunities to engage in illicit activities.

Anas Aremeyaw Anas's investigative approach often commences with allegations of corruption within a targeted organisation. In this process, a Tiger Eye representative becomes embedded within the target organisation, undertaking a preliminary examination to either corroborate or dismiss initial suspicions. At this stage, Tiger Eye's operatives might seek employment within the organisation in various roles like cleaners, labourers, or administrative staff. These individuals are tasked with strategically placing cameras at key locations to enable further surveillance.[37] They may then assist other team members in penetrating the organisation to conduct their investigation. The methodology frequently culminates in a form of entrapment, often involving the offer of a bribe or other inducements to the individual under investigation. This tactic is designed to serve as an integrity test, gauging the subject's propensity to engage in corrupt activities. The ultimate objective is to ascertain whether the individual will succumb to the temptation presented.[38]

[36] Daniel J. Hill, Stephen K. McLeod and Attila Tanyi, 'The Concept of Entrapment' (2017) https://doi.org/10.1007/s11572-017-9436-7 accessed 2 August 2023.

[37] Isaac Boaheng, *Assessing Anas' Methodology of Undercover Investigative Journalism in the Light of the Doctrine of Free Will*, E-Journal of Humanities, Arts and Social Sciences (EHASS) Volume 1 Issue 6 – October 2020, 228-233 Available online at: https://noyam.org/journals/ehass/ https://doi.org/10.38159/ehass.2020104

[38] Ibid.

Anas' undercover film "Ghana in the Eyes of God," which premiered on 23 September 2015, used hidden cameras to capture judges and magistrates accepting bribes in a method akin to entrapment.[39] The hidden camera operation was not a passive observation of naturally occurring corruption but an active orchestration of scenarios where judges were offered enticements like money and consumables to influence their decisions in various court cases. This deliberate construction of scenarios may have exposed widespread corruption within the judiciary but it also provoked serious questions about whether the targets would have committed the acts without the enticement. The consequences of the film were profound, leading to a judicial crisis with 34 judges and magistrates caught in the act and 20 of them removed from office.[40] The public reaction to Anas' entrapment-like method was mixed. While it was not universally accepted, with some arguing that it unfairly lured individuals into committing crimes, the film also received considerable public support, as evidenced by songs, cartoons, and public shows that celebrated the exposure of corruption.

In another illustrative case led by Anas Aremeyaw Anas and his Tiger P.I. team, an elaborate entrapment strategy was devised to probe potential corruption within Ghana's Akufo-Addo administration. The undercover investigators masqueraded as representatives of a well-known Islamic bank based in Bahrain, expressing an intent to establish a bank in Ghana with a stated capital of US$500 million. [41] To lend credibility to their operation, they enlisted the services of a prominent Ghanaian law firm and leveraged contacts within the Ministry of Finance to arrange high-level meetings. Their initial target was Charles Adu-Boahen, then the Deputy Minister for Finance. Through meticulous planning, a meeting was orchestrated in Dubai in February 2018, which became a pivotal moment in the investigation. This encounter was rigorously documented and later featured as a central element in the ensuing investigative report. Unsatisfied with merely engaging the Deputy Minister, the Tiger P.I. team aimed higher, securing a meeting with Finance Minister Ken Ofori-Atta in Dubai in April 2018. During this meeting, Ofori-Atta was offered a "gift" by the purported investors, which he declined, exiting the meeting visibly irritated. This operation employed a multifaceted approach, including impersonation of legitimate business entities, strategic coordination with insiders, utilisation of legal services, and targeted engagement with key political figures. The objective was ostensibly to entice these high-profile individuals into committing a crime.

It is noteworthy that Anas Aremeyaw Anas has neither been prosecuted nor accused of criminal conduct, suggesting that his investigative methods, while ethically and legally contentious, have not been formally recognised as criminal. This lack of legal scrutiny could be attributed to the reluctance of law enforcement agencies to critically assess the legality of

[39] M Mark and M Monica, 'Ghana's top undercover journalist masters disguise to expose corruption' (The Guardian, 24 September 2015) <https://www.theguardian.com/world/2015/sep/24/anas-aremeya-anas-ghana-corruption> accessed 21 July 2023.
[40] Ibid.
[41] W.Asare, "Tiger Eye Entrapment": Adu Boahen claims Anas targeted him and others" (Citinews, 14 November 2022) <https://citinewsroom.com/2022/11/2018-tiger-eye-entrapment-adu-boahen-claims-anas-targeted-him-and-others> accessed 21 January 2024.

his actions for fear of public backlash as Anas' methods enjoy considerable support among the citizenry who have a huge mistrust for the state and its institutions. The general position of the law, is that a private individual who participates in a crime without communicating same with law enforcement, even if it is to uncover evidence or expose another crime is guilty.[42] For instance, in the English case of *Smith*,[43] the defendant was convicted for offering a bribe, despite his claim that the action was intended to expose corruption within local government. [44] Even when it comes to law enforcement officers, entrapment activities are generally proscribed. In *Ahenkora v the Republic*, [45] Justice Crabbe cited Lord Goddard C.J.'s dictum in *Brannan v. Peek*,[46] emphasising that it is "wholly wrong" for police officers to commit an offence to detect another person's offence. In Brannan, Lord Goddard C.J noted that:

> The court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasized that, unless an Act of Parliament provides for such a course of conduct—and I do not think any Act of Parliament does so provide—it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow, or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person has committed an offence. It would have been just as much an offence for the police constable in the present case to make the bet in the public house as it would have been for the bookmaker to take the bet if in doing so, he had committed an offence.

Anas' entrapment methodology brings to light the very dilemma that underpins the discussion around entrapment in the legal sphere. His methods challenge the traditional notions of legality and fair play. While the intention is to expose corruption, the tactics employed can be seen as coercive and criminal conduct long repudiated by our Courts. The orchestration of scenarios where individuals are offered bribes poses the question of whether those targeted would have engaged in such behaviour without the inducements. The Ghanaian legal system, which is undergirded by principles of justice, fairness, respect for individual autonomy, and the rule of law, must not be seen to encourage unsound and ethically questionable practices in an attempt to combat corruption or illicit activities in society.

[42] Ahenkora v the Republic [1968] GLR 625.
[43] [1960] 2 Q.B. 423.
[44] Ibid.
[45] [1968] GLR 625.
[46] (1947] 2 All E.R. 572, D.C.

5.1 Alternative Strategies to Entrapment in Uncovering Corruption

Entrapment undeniably has its appeal in the field of investigative journalism, particularly when it comes to exposing corruption and other hidden malfeasances. It must be noted, however, that as has been explored in previous sections of this paper, the demerits of entrapment are significant and deeply concerning. Entrapment is bad for journalists in several ways. Journalists have to go to dizzying heights to engage in trapping. In the course of acting as criminals, they would often be asked to commit crimes other than what they are seeking to gain evidence of with risks to their integrity. The secrecy with which many of these offences are committed means an increase in journalistic corruption. A journalist can appear to be helping expose the rot when in fact he is using the material obtained in such ventures to induce payments from criminals in exchange for the journalist's silence.

This tension between the potential benefits and the profound drawbacks of entrapment forms the basis for the exploration of alternatives. In recognising the necessity to continue the fight against corruption and uphold confidence in the governance system, there is an urgent need to identify methods that retain the effectiveness of entrapment without succumbing to its pitfalls.

Whistleblower protection under Ghana's Whistleblower Act, 2006[47] presents a good alternative to the controversial method of entrapment. Unlike the direct and sometimes deceptive inducements associated with entrapment, whistleblower protection relies on the voluntary disclosure of information relating to unlawful or illegal conduct or corrupt practices. The effectiveness of whistleblower protection hinges on public awareness, trust, and a rigorous adherence to the procedures set out in the Act. It offers a legal channel for individuals to come forward with critical information without fear of reprisal. In a society where corruption can be deeply rooted, the Whistleblower Act has the potential to encourage more individuals to expose wrongdoing, leading to a higher likelihood of uncovering corruption. However, the lack of success of this approach is intricately tied to its implementation and the government's lack of capacity to investigate claims diligently. To this extent, several steps must be taken to enhance the Whistleblower Act's relevance in Ghana. These include raising public awareness through educational campaigns and ensuring that citizens understand the protections offered by the Act. Strengthening enforcement through clear procedures and dedicated resources is essential. Finally, the government must consider enhancing the reward system within the Act to provide fair incentives for disclosure without encouraging false claims.

Again, the inherent strength of collaborative investigations, data-driven reporting, and community engagement lies in their collective synergy and legal propriety, placing them as a powerful alternative to entrapment in investigative journalism. First, collaborative investigations offer a breadth and depth that solitary efforts cannot match. Alliances between

[47] (Act 720).

different media houses, investigative bodies, and international organizations, can ensure journalists can overcome financial and geographical constraints, accessing expertise and resources that would otherwise be unavailable. This approach also minimises the risk of subjective bias and promotes a culture of openness and accountability. Unlike entrapment, which often involves deceptive practices and can lead to legal challenges, collaborative investigations operate within a transparent and ethical framework, enhancing their credibility and societal acceptance.

Second, data-driven reporting introduces a layer of empirical rigour to investigative journalism. The use of statistical analysis, data visualisation, and advanced computational tools, would allow journalists to unearth hidden connections, trace financial irregularities, and expose systemic malpractices. Unlike entrapment, which may lead to entangling innocent individuals or inducing criminal behaviour, data-driven reporting relies on existing evidence and logical inference. It provides a more objective and legally sound method for uncovering wrongdoing, strengthening the public's trust in the media's integrity.

In comparison to entrapment, these alternatives offer a more legally sound, ethical, transparent, and effective approach to investigative journalism. While entrapment may yield quick results, the accompanying risks of legal complications and potential harm to innocent individuals make it a perilous tool. The alternatives are proposed to align investigative journalism with democratic values and legal norms, reinforcing its vital role as a guardian of public interest in Ghana and beyond. This makes them not only more compelling but also more sustainable alternatives, capable of enduring scrutiny and contributing positively to the media landscape.

6.0 CONCLUSION

The importance of investigative journalism in Ghana cannot be overemphasised. Yet, the very tool that has been used to expose the hidden shadows of malfeasance, and entrapment, has become a subject of intense scrutiny and debate. Entrapment is a snare. It's a problematic concept, especially in the realm of investigative journalism, and even more so when we look at its application in Ghana. From the days of Eve and the Serpent[48] and also the Lord's prayer, our traditions have historically abhorred the principle of deliberate tempting. This paper delved into the process of exploring the fine line between capturing the wrongdoers and crossing legal boundaries. While entrapment has uncovered some uncomfortable truths, especially in high-profile cases, it's not without its pitfalls. It may trap those who are guilty, but what if it also ensnares principles of fair play, autonomy, and ethics? This paper by dissecting the legal landscape, analysing philosophical underpinnings, and reflecting on some instances as have occurred in Ghana, grapples with these tough questions.

[48] *"Then the Lord God said to the woman, 'What is this that you have done?' The woman said, 'The serpent beguiled me, and I ate."* Genesis 3:13, HOLY BIBLE (Rev. Stan. ed. 1952).

The law is not and should not be exclusively concerned about right and wrong or black-and-white answers. The law must also make a journey into the gray areas, where the law meets real life, where good intentions might lead to unintended consequences. In the end, this paper turns on one thing, entrapment might seem like a handy tool, but it's a snare that might just trap us all. Innocent bystanders may be entrapped rather than the intended victim and even if the entrapper tells the truth as to what occurred, he has the power to make any man a criminal which he may abuse.

The concluding reflections of this paper will be to provide a new rendition of the stern warning issued by Lord Nicholls in the *Loseley* case.

The practice of private individuals enticing citizens to break the law under the guise of investigative journalism, only to then call for state prosecution, is entirely unacceptable. This is entrapment, a blatant abuse of power and a flagrant disregard for individual self-determination. The potential consequences of such journalistic conduct, which can be frightening and sinister in extreme cases, are clear. The courts and society must serve as a buffer between the state, investigative journalists, and citizens to prevent this from occurring.

COMMON SENSE, BOLAM OR MONTGOMERY? IN SEARCH OF AN "APPROPRIATE" STANDARD FOR ASSESSING CONSENT-RELATED MEDICAL NEGLIGENCE IN GHANA.

Samuel Kwame Kumi* and Joel Tetteh Zutah**

ABSTRACT

Disclosure of material risks associated with medical treatment to obtain patient consent is vital to the doctor-patient relationship. It could be the determining factor between life and death, or between permanent disability and full recovery from medical treatment. On the part of the caregiver, properly obtained consent for medical treatment may offer significant protection against patient lawsuits. In this paper, we explore the legal duty placed on medical professionals regarding disclosure of medical information and obtaining consent for treatment. Particularly, we examine three contrasting tests or standards available to the Ghanaian courts for the assessment of medical negligence claims that turn on patient consent: common sense, Bolam and Montgomery. We observe that the Ghanaian courts have favoured the Bolam test over the common-sense approach adopted in the case of Asantekramo. We further observe that the United Kingdom ("UK") decision in Montgomery's case is yet to receive judicial blessing in Ghana. We recommend that in developing jurisprudence in this area of the law, the Ghanaian courts should lean favourably toward the sound principles animated in Montgomery's case.

*LL. B, LLM; Corresponding Author.
** LL. B, BSc., MA. Clinician (Ghana Health Service); Lecturer, Legal Systems Applied to Nursing & Midwifery (Family Health University College, Ghana).

1.0 INTRODUCTION

Information and risk disclosure in medical treatment are important aspects of the doctor-patient relationship. They could be the determining factor between life and death, or between permanent disability and full recovery from medical treatment. Medical professionals are obligated by law and the ethics of their profession to obtain the informed consent of the patients they treat. Informed consent is based on the duty of medical professionals to disclose the necessary information to enable a competent patient to make an informed choice about a medical procedure of their own volition.[1]

Under section 97 of the Mental Health Act, 2012 (Act 846), informed consent has been defined as 'an agreement or consent for a procedure given freely without coercion by a person with capacity when the person has been made fully aware of the nature of the procedure, its implications and available alternative.' The Common Law courts over the years have had to address the issue of informed consent in varying circumstances. However, no uniform rule of law appears to have been applied besides the fundamental principle that a competent person must decide what should be done to his own body. The recent UK Supreme Court decision in the case of *Montgomery v Lanakshire Health Board*[2] is however instructive on the issue as it attempts to lay down a general rule as to the scope and extent to which a medical professional is obligated to disclose medical information to his patient to obtain his or her consent for treatment.

In this paper, we explore the legal duty placed on medical professionals in terms of disclosure of medical information and obtaining consent for treatment. We further explore the law on how and what information should be given, and the implications of failing to provide such information. Particularly, we examine three contrasting tests or standards available to the Ghanaian courts for the assessment of medical negligence claims that turn on patient consent. Thus, the common-sense test applied in the Ghanaian case of *Asantekramo Alias Kumah v Attorney-General*[3] is discussed in light of the *Bolam* and *Montgomery* tests applied in the English cases of *Bolam v Friern Hospital Management Committee*[4] and the recent UK Supreme Court decision in *Montgomery v Lanakshire Health Board*,[5] respectively.

2.0 *BOLAM V FRIERN HOSPITAL MANAGEMENT COMMITTEE* (BOLAM'S CASE)

2.1 Brief Facts

John Bolam, the plaintiff, was a salesman who was suffering from depression. He was advised to undergo electroconvulsive therapy (ECT), a form of therapy used to manage some

[1] Paul Appelbaum, 'Assessment of Patients' Competence to Consent to Treatment' (2007) 357 New England Journal of Medicine 1834.
[2] [2015] UKSC 11.
[3] [1975] 1 GLR 319.
[4] [1957] 1 WLR 582.
[5] *Montgomery* (n 2).

psychiatric conditions. By the procedure, electrodes were to be placed on his head by which he was to have electric current administered to his brain. He signed a consent form agreeing to the procedure. At the time, there were differing views among medical professionals over whether relaxant drugs should be provided before the procedure was carried out. A relaxant drug could be administered to put the patient to sleep and to paralyse the muscles to limit movement in the course of the procedure to reduce the risk of fractures. The hospital did not believe that a relaxant drug was necessary, therefore Mr. Bolam was not provided with them. He suffered a bone dislocation and some fractures as a result of the procedure. Mr. Bolam sued claiming negligence on account that the doctor failed to warn him of the risks he was taking when he was consenting to the procedure and that he was not to have anaesthesia. He claimed further that the doctor was negligent in not administering a relaxant drug.

2.2 Holding

The Jury decided in favour of the hospital to the effect that they were not liable for negligence. McNair J in directing the jury to come to a decision stated the following test to apply as follows:

> The real question on which you have to make up your mind on each of the three major points to be considered is whether the defendants, in acting in the way in which they did, were acting in accordance with a practice of competent respected professional opinion ... I myself would prefer to put it this way: *A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art* (Emphasis added).

The court proceeded to rule that, on the evidence provided by medical experts who were called as witnesses in the matter, it was common practice not to provide information or warn the patient of the risks of treatment, especially in cases where the risk of the injury was small, and where the patient does not ask of the medical procedure to be used, as it was in the case of *Bolam*. The test in the *Bolam* case has come to be known as the *Bolam Principle*. The *Bolam principle,* therefore, applies a standard for assessing consent-related medical negligence that is set by and dependent on the opinion of medical professionals. This standard implies that, if in the opinion of a reasonable body of medical professionals, there is no need to disclose a particular medical information or risk to a patient, then a professional should not be held liable for not disclosing same. This standard therefore appears to be more caregiver-centred, rather than patient-centred.

One inherent weakness of the *Bolam* principle is underscored in Justice Date-Bah's observation that 'in Ghana, it is said that health professionals never testify against themselves and therefore there is a real hurdle to litigation of medical malpractice cases.'[6]

The test in the *Bolam* case was later qualified in *Bolitho v City and Hackney Health Authority*[7] in which the UK House of Lords held that a judge is not entitled to uphold a professional medical opinion if it can be demonstrated that that opinion is not capable of withstanding logical analysis. The House of Lords, however, did not extend this modification to questions of disclosure of risks. Rather, it confined itself to the question of clinical judgment that had been brought before it. In that case, a doctor was summoned to attend to a child suffering from breathing difficulties but failed to do so as her bleep had failed due to low battery. When the child died, his mother argued that if the doctor had attended and intubated the child, he would have lived. The doctor contended that even if she had seen the child, she would not have been intubated. Other doctors gave concurring opinions. The trial judge applied the *Bolam* test and held that there was no breach of duty. This was affirmed by the Court of Appeal and the House of Lords.

3.0 *MONTGOMERY V LANARKSHIRE HEALTH BOARD*

The *Bolam* principle was re-examined and departed from in 2015 by the UK Supreme Court when confronted with another issue that turned on informed consent, in the case of *Montgomery v Lanarkshire Health Board*.[8] The court, in this case, adopted a more patient-centred approach to the disclosure of medical information and risk and placed a greater duty of care on doctors about such disclosures to obtain consent for treatment.

3.1 Brief Facts

The appellant, Nadine Montgomery, was a short and diabetic woman who gave birth to her baby boy at the Bellshill Maternity Hospital, Lanarkshire. At the time, scientific data showed that pregnant women with diabetes were more likely to have large babies with a 9-10% risk that the shoulders of the baby would be too wide to be delivered through the vaginal canal without medical intervention. This delivery risk is called shoulder dystocia. It was the policy of the hospital not to advise routinely diabetic women about shoulder dystocia. The doctor who managed her through delivery, therefore, did not disclose this information to her. It happened that her baby was large and therefore suffered serious disabilities as a result of the vaginal delivery. Mrs. Montgomery argued that she ought to have been advised about the risk of shoulder dystocia and the alternative option of delivery by caesarean section. The overarching question before the court was whether or not the attending doctor breached her duty of care when she failed to disclose the risks of shoulder dystocia.

[6] University of KwaZulu-Natal, 'UKZN Academic Conducts Medical Law and Ethics Workshop in Ghana' (University of KwaZulu-Natal) <https://ukzn.ac.za/news/ukzn-academic-conducts-medical-law-and-ethics-workshop-in-ghana/> accessed 25 July 2023.
[7] [1997] 3 WLR 1151 [HL].
[8] Ibid.

3.2 Holding

The UK Supreme Court held that the doctor breached her duty by failing to provide the necessary advice upon which Mrs. Montgomery could have made an informed choice as to the method of delivery of her baby. The court ruled that failure to warn a patient of a risk associated with a medical procedure should be considered negligent if the risk was such that it was '*material*' in nature. In paragraph 87 of its judgment, the court stated that the test for materiality is 'whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.' The basis of the court's decision is captured in the following paragraphs of the judgment:

> An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment and of any reasonable alternative or variant treatments…[9]

> The doctor is however entitled to withhold from the patient information as to a risk if he reasonably considers that its disclosure would be seriously detrimental to the patient's health. The doctor is also excused from conferring with the patient in circumstances of necessity, as for example where the patient requires treatment urgently but is unconscious or otherwise unable to make a decision. It is unnecessary for the purposes of this case to consider in detail the scope of those exceptions.[10]

4.0 CONTRASTING *BOLAM* AND *MONTGOMERY*

The court in the *Montgomery* case believed that the question of whether or not a treatment-related risk is material cannot merely be reduced to percentages and that such risks ought to be weighed on various contextual factors, including the importance of the benefits of the procedure to the patient herself. Indeed, the court held that the significance of a given risk is likely to reflect a composite of factors such as the magnitude, nature, and effect of the risk on the patient as well as the expected benefit of the treatment, available alternatives and the risks associated with those alternatives.[11] In effect, the court adopted the opinion that what goes into materiality is issue-specific, fact-sensitive and is dependent on the peculiar circumstances of the patient. By this decision, the court departed from the *Bolam Test*, which had placed more emphasis on what a competent medical professional would do as an accepted practice. It appeared that the court was now carving a rule around what a reasonable, competent professional would do having regard to the peculiar circumstances of

[9] *Montgomery* (n 2), para 87.
[10] Ibid, para 88.
[11] Ibid, para 89.

the patient. Of course, the court recognised the '*therapeutic exception*' that a doctor could withhold some medical information from the patient if disclosing same would be detrimental to the health of the patient. However, according to the court, this was merely an exception and could not be the norm or the general rule. In paragraph 75 of the judgment in *Montgomery's* case, the court stated as follows:

> It has become increasingly clear that the paradigm of the doctor-patient relationship …has ceased to reflect the reality and complexity of the way in which healthcare services are provided, or the way in which the providers and recipients of such services view their relationship. One development which is particularly significant in the present context is that patients are now widely regarded as persons holding rights, rather than as passive recipients of the care of the medical profession.

The court further emphasised in paragraph 78 that 'In relation to risks, in particular, the document advises that the doctor must tell patients if treatment might result in a serious adverse outcome, even if the risk is very small, and should also tell patients about less serious complications if they occur frequently'.

This meant that the patient was to be left to decide what weight or value to place on a medical risk. It is safe to conclude, therefore, that under the Common Law, there is a paradigm shift from the *Bolam Test* regarding cases coming under informed consent. In particular, the UK Supreme Court had redefined the duty of a doctor to his patient regarding the need for informed consent for medical procedures. This duty was to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.[12] Clearly, there is a shift from the traditional paternalistic approach to a more patient-centred approach to caregiving. Instructively, the court provided a three-step approach to this duty by stating that:

I. The assessment of whether a risk is material cannot be reduced to percentages. No matter the smallest possibility of an event occurring, it should be disclosed to the patient;
II. The doctor's advisory role involves dialogue by avoiding technical terms and rather aiming to ensure that the patient understands the seriousness of the condition, the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, to make an informed decision; and
III. The therapeutic exception should not be abused considering that it is a limited exception and may only be activated in limited cases.

In outlining the therapeutic exception, the UK Supreme Court was still minded to make the wellbeing of the patient paramount. The therapeutic exception, also known as therapeutic privilege or therapeutic non-disclosure, is defined as the 'withholding of relevant health

[12] Ibid, para 87.

information from the patient if non-disclosure is believed to be in the best interest of the patient.'[13] It is mostly deployed when the information that should be disclosed to the patient would psychologically harm the patient which may in turn harm the physical health of the patient. In the case of *Canterbury v Spence,*[14] a US court held that in cases where disclosing medical information would make the patient so ill or emotionally distraught as to hinder or complicate his or her treatment or disable that patient from making a rational decision, such information could be withheld. The court was, however, mindful to hold further that in such situations, it would be prudent to disclose to a close relative with the view to securing consent to the proposed treatment. In the case of *Sidaway v Board of Governors of the Bethlem Royal Hospital*[15], Lord Scarman stated that the burden of proof is on the doctor to prove that he or she reasonably believed that disclosure of risk would be contrary to the best interest of his client.

As stated in the *Montgomery* case, the therapeutic exception should rarely be used as it is a digression from the fundamental ethical principle of patient autonomy, which promotes respect for the right of a patient to decide on matters that affect their health.[16] The position in *Montgomery* appears to have been necessitated by the emergence of cases in which caregivers have placed little or no premium on patient autonomy.

5.0 *ASANTEKRAMO* (THE *COMMON-SENSE* TEST)

The Ghanaian courts have not had many occasions to address negligence claims bordering on informed consent. We argue, however, that a search of the test applicable to Ghana must begin from the seminal case of *Asantekramo Alias Kumah v Attorney-General.*[17]

5.1 Brief Facts

In *Asantekramo*, the plaintiff was a young married woman of 19 years who was diagnosed with a ruptured ectopic pregnancy at the Komfo Anokye Teaching Hospital. She consented to a surgical procedure to treat her condition. The surgery was successful. However, her right arm became swollen and gangrenous due to an infection she suffered after being transfused an amount of blood through a vein in that arm by the nursing staff. The infection was so serious that the doctors proposed to have the affected arm amputated. The plaintiff claimed that she objected to the amputation on the basis that she saw no reason why her arm should end up being amputated when she reported to the hospital with complaints of stomach ache. According to her, the doctors then obtained the consent of her relatives and amputated her arm a few inches above the elbow. She sued the hospital for negligence.

[13] EB Rubin, 'Professional Conduct and Misconduct' (2013) 118 Handb Clin Neurol 91.
[14] 464 F 2d 772 (1972).
[15] [1985] 1 AC 871, HL.
[16] RW Scott, *Promoting Legal and Ethical Awareness: A Primer for Health Professionals and Patients* (Elsevier Health Sciences 2008).
[17] [1975] 1 GLR 319.

5.2 Holding

The court, in part, subjected the defendant's medical evidence to common sense and found that the opinion lacked sufficient logical basis to persuade the court. The opinion of the court is captured in the following dictum:

> In the case before me, I think I can as a matter of *common sense* take judicial notice of the fact that persons who go to hospitals with stomach ailment do not end up with their arms amputated. It is not part of the treatment. Indeed, even a very cursory examination of the evidence of the plaintiff shows clearly that at least something must have gone wrong in the hospital and that that something must be in the peculiar knowledge of the defendant's servants. The circumstance further shows prima facie that that something which went wrong ought not to have gone wrong if those in charge of the plaintiff had not been at some fault of a sort, for prima facie there ought not to be any reason why stomach pains should end up in amputation.[18]

6.0 *ASANTEKRAMO, BOLAM* OR *MONTGOMERY*? EXPLORING A CURRENT GHANAIAN STANDARD

It would appear that at the time *Asantekramo* was decided, the law on the doctor's duty as it relates to patient consent was one that was still being developed in the UK. It can be inferred from the reasoning of the court that emphasis was placed on the scope of consent initially provided by the patient and the apparent departure from such consent by the surgical team through the subsequent amputation. The court's emphasis on common sense shows that there are certain instances where the medical procedure digresses from the ailment complained of, so much that medical expertise is not necessary to prove that the treatment was wrong or unconsented to. Effectively, the court adopted the view that the eventual amputation could not be included in the treatment that the plaintiff consented to and was therefore expected to receive. By this decision, the court was setting a precedent that where a treatment or procedure fell so wide outside the scope of treatment or procedure consented to, it could not be justified within the initial consent given, more so, if the subsequent procedure or treatment arose from negligence. Zutah and others have argued that negligence could not properly be counted as a risk associated with a particular medical procedure, therefore, it does not come within the scope of procedure consented to.[19] According to the authors, it would be wrong and unjust for the courts to adopt the view that a person should not sue a caregiver for negligent treatment only because that person consented to the risks associated with that treatment. The authors' position appears to find expression in section 42 (c) of the Criminal and Other Offences Act, 1960 (Act 29) which provides that 'consent to the use of force for the purpose of medical or surgical treatment does not extend to an

[18] Ibid 334.
[19] JT Zutah and others, 'Licensed to kill? Contextualising Medical Misconduct, Malpractice and the Law in Ghana' (2021) 1(2) UCC Law Journal 49.

improper or a negligent treatment.' This position is further accentuated by the holding of the Supreme Court of Ghana in *Amakom Sawmill & Co. v Mansah*[20] that even where a person has consented to the risk of some harm, he could not be said, either by implication or otherwise, to have consented to harm by negligence.

In the case of *Frank Darko v Korle-Bu Teaching Hospital,*[21] a young boy reported at the defendant hospital with a complaint of pain in his right knee. He was diagnosed with a torn patella ligament and consented to a surgical procedure to repair the affected ligament. During the surgery, the boy's left knee was rather operated on. When his father sued the hospital for negligence, the High Court applied the *Bolam* principle and found that the hospital could not be held liable. The court believed that the patient had signed a broad consent form which allowed the doctors to apply any necessary measures toward his treatment, so that, if there was any medical indication for the operation of the left knee instead, the hospital could not be held liable for treating it. Indeed, a portion of the signed consent reads as follows: 'I also consent to such further or alternative operative measures as may be found to be necessary during the course of such operation and to the administration of a local or other anaesthetic for the purpose of the same.'

In principle, this case turned on the scope of consent and the question as to whether or not such broad consent to a medical procedure should absolve a doctor from any liability in negligence arising from that procedure. The High Court in its ruling noted that the plaintiff failed to make a case on the scope and effect of the consent signed. We are of the view that it was crucial for the court to ascertain whether the decision to operate on the other leg arose out of necessity and in accordance with the terms of the consent form or out of negligence. It is our opinion that if the latter was the case and the court had adverted its mind to the principle in *Amakom Sawmill* supra, it may have arrived at a different conclusion. It could also have been argued that since the conditions under which he was operated upon were not one of emergency, the team could not have justified their new decision to operate on the other leg out of necessity. Consequently, operating on the other leg was not properly within the scope of the consent given and the surgical team should have discussed the new plan with the patient.

In the case of *Mohr v Williams,*[22] a patient consented to an operation on her right ear. When she was anaesthetised and unconscious, the doctor discovered that the left ear was more seriously diseased. He therefore decided to operate on the left ear instead. Despite the procedure being successful, the patient sued for damages, claiming she had suffered hearing impairment in that same left ear. The court had to address the question as to whether the patient impliedly consented to an operation on her left ear when she consented to an operation on her right ear. It was decided that since there was no evidence of a serious or life-

[20] [1963] 1 GLR 368.
[21] Suit No. AHR 44/06, 9. Unreported judgment of the Fast Track High Court, Accra dated 24/06/2008; Zutah (n 19).
[22] 104 N.W. 12 (1905).

threatening situation with the left ear, the circumstances were such that further consent should have been obtained. Two principles of law are animated in this case. The first is that a procedure that is performed without the consent of the patient is wrongful unless the circumstances necessitate its performance without consent. The second is that the absence of evil intent or negligence on the part of a caregiver is not a defence in cases where further consent should have been obtained, where the patient is alleging assault or battery for exceeding the consent given. We adopt the view that even if in the case of *Frank Darko,* it was later discovered although before the procedure that the left knee was rather diseased and not the right, or more diseased than the right, the surgical team should have sought further consent if in the circumstances of his case, there was no imminent risk to life.

A different set of events was observed in the case of *Agyire-Tettey and Sodokeh v The University of Ghana.*[23] In this case, the plaintiff's late wife was scheduled for a caesarean section during which procedure her uterine fibroids were also to be removed. According to the plaintiff, his wife had asked the doctors if there were any risks associated with the removal of fibroid during delivery by caesarean section and was told it was a normal and regular practice without any risks. The woman later died of complications relating to the surgery. The plaintiff argued that his wife had consented to the surgery only because they were told that the procedure was something they did regularly and that there would not be any issues with it. The court, however, found on the medical evidence that the doctors had explained the risks associated with the surgery to them. In finding so, and in finding further on the evidence given by the defendants that the doctors had not been negligent in going about her treatment, the court dismissed the allegation against the defendants. This case did not directly refer to the test in *Bolam's* case but it affirmed the case of *Gyan v Ashanti Goldfields Corporation*[24] which had earlier affirmed the *Bolam* principle. Again, the case demonstrates that, where a doctor fulfils his duty to inform, the doctor would be exonerated from liability. Under the Public Health Act, 2012 (Act 851), which is discussed later in this work, patients also have a duty to ask for further clarification and additional information when they do not understand the information provided to them by the doctor regarding their treatment. The case of *Agyire-Tettey and Sodokeh* presented an early opportunity for the Ghanaian court to examine the applicability of the rule in *Montgomery's* case in its jurisdiction. We, however, observe that no such reference was made to it.

In the recent case of *Chinbuah v Attorney-General,*[25] the Accra High Court also found that a medical team at the 37 Military Hospital ignored the wishes of a pregnant woman to be delivered of her baby by caesarean section. According to the hospital, the medical team considered the option of vaginal delivery to be best for the patient. However, the hospital failed to satisfy the court why a caesarean section could not be performed per the wishes of the woman or why vaginal delivery was the best option under the circumstances. The team,

[23] Suit No. GJ150/2016. Unreported judgment of the High Court, Accra dated 19th December 2018.
[24] [1991] 1 GLR 466.
[25] Suit No. GJ/378/2021. Unreported judgment of the Accra High Court dated 21 July 2021.

having observed that her labour had delayed, gave medication to induce labour. Consequently, she had a traumatic delivery, causing her to have a deformed baby. She also sustained a vaginal injury from which she bled to death. The conduct of the medical team in this case mirrors certain observations in the *Montgomery* case. In *Montgomery*, the doctors attempted to rationalise their conduct in their evidence that 'if you were to mention to any mother who faces labour that there is a very small risk of the baby dying in labour, then everyone would ask for a caesarean section, and it's not in the maternal interests for women to have caesarean sections.' Similar to the situation in *Chinbuah*, the doctors adopted a paternalistic approach to care without regard to individual preference and peculiarities, and without satisfying the court as to why caesarean section could not be done for the patient. Effectively, the patient was denied the opportunity to make an informed choice as to the mode of delivery. In *Chinbuah*, the court held that the medical team had no justification to refuse to grant the patient's request for a caesarean section. Here again, the court relied on *Gyan v Ashanti Goldfields Corporation* supra which had affirmed the principle in *Bolam's* case.

7.0 STATUTORY INTERVENTIONS IN MATTERS OF INFORMED PATIENT CONSENT

Under the Fourth Republican Constitution, the Parliament of Ghana has made notable interventions in matters hinging on informed patient consent. These interventions are provided for in the Public Health Act, 2012 (Act 851) and the Mental Health Act, 2012 (Act 846).

7.1 The Public Health Act, 2012 (Act 851).

The Public Health Act, 2012 (Act 851) prescribes a Patient's Charter.[26] This Charter defines the rights of patients and the patient's responsibilities. The section on the Patient's Rights provides that:

- The patient is entitled to full information on his/her 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 alternative treatment(s) and other health care providers within the Service if these may contribute to improved outcomes.

Considering the above provisions, the holding in *Montgomery's* case could be conceived as one that significantly mirrors the Patient's Charter. The Charter focuses on the rights of a patient to full disclosure of information related to the person's medical condition and the possible risks associated with it. The therapeutic exception outlined in Montgomery's case further mirrors the Charter. According to the Charter, the patient is entitled to full information on his/her condition and management and the possible risks involved *except in emergency*

[26] Public Health Act, 2012 (Act 851), s 167 (Sixth Schedule).

situations when the patient is unable to make a decision and the need for treatment is urgent. By recognising this, it is noticed that the nature of protection afforded doctors under the therapeutic exception is also enjoyed by medical professionals in Ghana. As it protects medical professionals, it also allows the patient to receive medical attention in an emergency where an informed decision cannot be made at that particular time. The Public Health Act, 2012 also provides that there should be a supply of information in clinical trials.[27] It places a duty on the medical practitioner to give full disclosure of the aims, objectives, risks and effects of the clinical trial to enable the patient make an informed decision as to whether or not to participate.[28]

Between *Montgomery's* case and the Patient's Charter, an important distinction can be seen. In *Montgomery's* case, one of the 3 approaches to ensuring compliance with the requirement of patient consent, as stated by the court, was that a doctor must ensure that the information disclosed to a patient is devoid of technical terms to further ensure a well informed and well understood disclosure. In the Patient's Charter, however, this duty is extended and appears to be shared between the patient and the doctor. The Charter provides that the patient's responsibility includes, 'Requesting additional information and or clarification regarding his/her health or treatment, which may not have been well understood.'[29] The Charter provides that where a patient does not understand any information that was provided to him or her, it is up to that patient to take the further step of requesting further information to understand the issue at hand.

7.2 The Mental Health Act 2012 (Act 846)

Section 62 of Act 846 provides for access to information. It provides that, the patient shall have access to information about the mental disorder and treatment plan of that patient. This provision reflects the court's holding in *Montgomery's* case. The section further provides that access to information may be granted or denied by the clinical representative if the information is harmful to the wellbeing of the patient.[30] In paragraph 88 of the judgment in *Montgomery's* case[31], the court stated that 'the doctor is however entitled to withhold from the patient information as to a risk if he reasonably considers that its disclosure would be seriously detrimental to the patient's health.' There is a direct relationship between the principle laid down in *Montgomery's* case and Act 846. Again, section 45 (4) of Act 846 provides for patient inclusion in care planning and decision making relating to that patient. Additionally, under section 71 of the Act, a caregiver cannot proceed to conduct a major medical or surgical procedure on a mentally challenged patient without informed consent or the informed consent of a personal representative if that patient is incompetent to give consent.

[27] Act 851, s 159.
[28] Ibid,158.
[29] Ibid.
[30] Act 846, s 62(3).
[31] *Montgomery* (n 2), para 88.

The observations from these two statutes underscore the fact that the lawmaker considers informed consent as a crucial aspect of medical treatment in Ghana.

8.0 CONCLUSION

The Ghanaian courts have had the opportunity to put *Montgomery* to test in at least two cases that turned on informed patient consent– *Agyire-Tettey* and *Chinbuah.* But in either case, the *Bolam* test was favourable to the court in the peculiar circumstances. Again, we observe that the *common-sense* approach adopted in *Asantekramo,* which resonates with the objective or reasonable man's test, has not been affirmed or expressly departed from in subsequent decisions. It is further observed that *Montgomery,* despite its significant positive implications for patients' rights advocacy, is yet to receive judicial blessing in the Ghanaian courts. We note, however, that some of the essential principles espoused in *Montgomery* had earlier been codified in Ghanaian statutes that govern patient information disclosure and consent.

We propose that having regard to the inherent weaknesses of the *Bolam* test, the Ghanaian courts, in developing their own jurisprudence on malpractice matters involving informed consent, must lean favourably toward the instructive decision in *Montgomery.* We recommend that the courts be guided by the existing statutes which animate the sound principles outlined in *Montgomery.*

PLEA BARGAINING, PLEA OF GUILTY AND CONFESSIONS – INVESTIGATING THE TRIANGULAR RELATIONSHIP

Daniel Arthur Ohene-Bekoe* and Emmanuella Okantey**

ABSTRACT

The minimal concern is whether plea bargain is a type of confession or plea of guilty. Traditionally, the courts presented the guilty plea as a "confession" and as a gesture of remorse, in that, it was commonly relied upon as a mitigating factor in sentencing. Technically, an unambiguous plea of guilty to a criminal charge amounts to a judicial confession to have committed the offence. For the plea to amount to a confession and a demonstration of remorse or contrition, it must logically amount to an acceptance by the defendant of the truth of the allegations in the prosecution's case. With this understanding of the guilty plea, the need for trial is obviated, relieving the prosecution of their statutory burden of proving the charge. Thus, it is ideal to analyse plea bargaining with confessions and plea of guilty as they all facilitate convictions without trial.

* LL.B, BL, MA, LLM, LLM Candidate, CITG & ICAG Candidate, (Ghana); Attorney, Office of the Attorney-General and Ministry of Justice, Ghana.
** LL.B (Ghana); BL Candidate, Ghana School of Law.
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1.0 INTRODUCTION

Plea bargaining is gaining global traction. Attention has been focused primarily on the advantages and disadvantages of plea bargaining.[1] The minimal concern is whether plea bargain is a type of confession or plea of guilty. Traditionally, the courts presented the guilty plea as a "confession" and as a gesture of remorse, in that, it was commonly relied upon as a mitigating factor in sentencing.[2] Technically, an unambiguous plea of guilty to a criminal charge amounts to a judicial confession to have committed the offence.[3] For the plea to amount to a confession and a demonstration of remorse or contrition, it must logically amount to an acceptance by the defendant of the truth of the allegations in the prosecution's case. With this understanding of the guilty plea, the need for trial is obviated, relieving the prosecution of their statutory burden of proving the charge.[4] Thus, it is ideal to analyse plea bargaining with confessions and plea of guilty as they all facilitate convictions without trial.

This article, thus, analyses the various concepts that are often catalogued under the plea-bargaining concept by exploring their key features, implications, inter alia. The article begins with an introduction after which there is an overview of plea bargaining. Additionally, the article provides a general overview of the law on confessions. It discusses confessions obtained during custodial interrogations and assesses the Supreme Court's treatment of confessions in police custody. The article further articulates important elements of plea of guilty. The remarkable parallels in the factors taken into consideration by the Courts in accepting a plea or confession and the waiver of constitutional rights pertaining to the law on plea bargaining, confessions and plea of guilty are examined. Furthermore, plea bargaining, plea of guilty and confessions are contrasted. Lastly, the article ends with a conclusion.

2.0 THE LAW ON PLEA BARGAINING

As noted by Justice Anthony Kennedy, 'the reality is that criminal justice today is, for the most part, a system of pleas, not a system of trials.'[5] The vast majority of criminal litigation today is resolved by plea bargain rather than by trial.[6] Plea bargaining is not merely an addendum to contemporary criminal prosecution; it is contemporary criminal prosecution.[7] Today, 'plea bargaining is a defining, if not the defining, feature of the present federal criminal justice system.'[8] Plea bargaining is the process by which defendants give up their right to trial

[1] Frank H. Easterbrook, 'Plea Bargaining as Compromise' (1992) 101 Yale Law Journal 1969.
[2] Juliet Horne, 'Plea Bargains, Guilty Pleas and the Consequences for Appeal in England and Wales' (2013) Legal Studies Research Paper No. 2013-10.
[3] Solomon Nana Acheampong v The Republic (HC, 29 July 2019).
[4] Ibid.
[5] Aditi Juneja, 'A Holistic Framework to Aid Responsible Plea-Bargaining by Prosecutors' (2017) 11 New York University Journal of Law and Liberty 600.
[6] Derek Teeter, 'A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains' (2005) 53 University of Kansas Law Review 727, 729 (discussing plea bargains in federal criminal cases).
[7] Robert E. Scott and William J. Stuntz, 'Plea Bargaining as Contract' (1992) 101 Yale Law Journal 1909, 1912.
[8] Mary Patrice Brown and Stevan E. Bunnell, 'Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia' (2006) 43 American Criminal Law Review, 1063, 1064.

and instead plead guilty in exchange for concessions from the prosecution, generally in the form of withdrawal of charges or lighter sentences.[9] The plea bargaining process is 'merely an extension of the screening process in an effort to find the correct result for a matter before the court.'[10]

The introduction of plea bargaining marked a significant milestone in Ghana's criminal justice system. Plea bargaining was introduced in Ghana by an amendment to the Criminal and Other Offences (Procedure) Act, 1960 (Act 30).

Discussions in the bargaining process can focus on any aspect of the case, including what charges the Republic will elect to bring, what facts will be included in the agreement, and what proposed sentence will be submitted to the judge.[11] In plea bargaining, the prosecutor may elect to use charge bargaining. Charge bargaining refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the defendant in exchange for a guilty plea.[12] Alternatively, the prosecutor may also opt for sentence bargaining. Sentence bargaining refers to a promise by the prosecutor to recommend a specific or lenient sentence or refrain from making any sentence recommendation following the accused person's guilty plea.[13] Additionally, the prosecutor may deploy fact bargaining. Under fact bargaining, a prosecutor agrees not to contest an accused person's version of the facts or agrees not to reveal aggravating factual circumstances to the court. There is an agreement for a selective presentation of facts in return for a plea of guilty. This form of bargaining is likely to occur when proof of an aggravating circumstance would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines.[14]

The benefits of plea bargaining are considerable as such it is deemed as an indispensable tool without which certain 'judicial systems would collapse'.[15] Scholars who support plea bargaining offer scores of reasons for its increased practice in the world, including crowded

[9] Daniel S. McConkie, 'Judges as Framers of Plea Bargaining' (2015) 26 Stanford Law & Policy Review, 61, 66.
[10] Mary Lou Dickie, 'Through the Looking Glass — Ethical Responsibilities of the Crown in Resolution Discussion in Ontario' (2005) 50 Criminal Law Quarterly 128, 147.
[11] Carol A. Brook et al., 'A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States' (2016) 57 William & Mary Law Review 1147, 1164-1167.
[12] Daniel A. Ohene-Bekoe and Emmanuella Okantey, 'Is the Victim Victimized? The Victim in the Plea Bargaining Process in Ghana' (2022) 7 Ghana School of Law Students Journal 149, 153 (This can be further classified into multiple charge and unique charge. In multiple charges, some charges are dropped in return for a plea of guilty to one of them. In a unique charge, a serious charge is dropped in exchange for a plea of guilty to a less serious charge. The multiple charge is also known as the horizontal charge bargaining and the unique charge as vertical charge bargaining).
[13] Ibid.
[14] Ibid.
[15] Hedieh Nasheri, *Betrayal of Due Process: A Comparative Assessment of Plea Bargaining in the United States and Canada* (University Press of America 1998) 25.

court dockets;[16] pretrial detention;[17] lawyer characteristics and incentives;[18] increasingly careful selection of cases by police and prosecutors;[19] greater access to defence counsel;[20] increasingly cumbersome and time consuming jury trial procedures;[21] and sentencing practices that made penalties at trial more certain.[22]

Despite its associated benefits, the obvious problems with plea bargaining are worrisome. Plea bargaining has not been spared by critics especially with regards to its nature and fundamental assumptions. The presumption that parties to plea bargain are rational has been criticised vehemently.[23] It has been argued that innocent people are likely to be coerced to accept plea bargain[24] in order to avoid harsher punishments.[25] Also, the critics posit that it allows criminals to escape the criminal justice system without the punishment that was prescribed by law[26].

2.1 Plea Bargaining under the Criminal and Other Offences (Procedure) (Amendment) Act, 2022 (Act 1079)

An accused or his counsel, if represented where the circumstances so permit, may at any time before judgment, enter a plea bargain with the prosecutor.[27] No plea agreement shall be entered into between a prosecutor and accused, without the prior written consent of the Attorney-General.[28] Where the accused agrees to plea bargaining, he forfeits numerous constitutional rights and procedural rights granted by statutes especially the right to a full trial. Other rights that are eviscerated are the presumption of innocence, examination of witnesses and right to remain silent.[29]

[16] Arnold Enker, 'Perspectives on Plea Bargaining' (1967) President's Commission on Law Enforcement and Administration of Justice, Task Force Report' The Courts 108, 112.
[17] Ronald F. Wright, 'Trial Distortion and the End of Innocence in Federal Criminal Justice' (2005) 154 University of Pennsylvania Law Review 79, 124.
[18] Malcolm M. Feeley, 'Perspectives on Plea Bargaining' (1979) 13 Law & Society Review 199, 200.
[19] Lynn M. Mather, Comments on the History of Plea Bargaining, (1979) 13 Law & Society Review 281, 284.
[20] Feeley, (n 19) 201.
[21] Albert W. Alschuler, 'Plea Bargaining and Its History' (1979) 79 Columbia Law Review, 1, 41.
[22] Wright (n 18), 129.
[23] Daniel D. Bonneau and Bryan C. McCannon, 'Bargaining in the Shadow of the Trial? Deaths of Law Enforcement Officials and the Plea Bargaining Process' (2019) Law & Society: Criminal Procedure eJournal 3 <https://www.semanticscholar.org/paper/Bargaining-in-the-Shadow-of-the-Trial-Deaths-of-Law-Bonneau-McCannon/826ae367a29ec69b318a69c4aa4605303f678657> accessed 21 January 2024.
[24] Oren Bar-Gill & Oren Gazal Ayal, 'Plea Bargains Only for the Guilty' (2006) 49 Journal of Law and Economics 353, 354.
[25] Lucian E. Dervan and Vanessa A. Edkins, 'The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem' (2013) 103 Journal of Criminal Law and Criminology 1, 2-5; F. Leverick, 'Sentence Discounting for Guilty Pleas: An Argument for Certainty Over Discretion' (2014) Criminal Law Review, Issue 5, 338, 340.
[26] Reginald Heber Smith and Herbert B. Ehrmann, 'The Criminal Courts' in Roscoe Pound & Felix Frankfurter (eds), *Criminal Justice in Cleveland* (The Cleveland Foundation, 1922) 229, 237-238.
[27] Criminal and Other Offences (Procedure) (Amendment) Act 2022 (Act 1079), s 162A.
[28] Ibid, s 162B.
[29] Ibid, s 162C (2).

Besides, the law also provides for the requirement of plea bargaining. The law requires a plea agreement to be in writing witnessed by the accused and his counsel if represented.[30] Where an accused person has negotiated with a prosecutor through an interpreter, the interpreter shall certify that he is proficient in that language and that he interpreted accurately during the negotiations and in respect of the contents of the plea agreement.[31]

The court shall not accept any plea agreement, unless it satisfies itself that the agreement was voluntarily obtained and the accused was competent to enter into such agreement.[32] The court may give a decision based on plea agreement or make any such orders as it seems necessary including an order to reject the plea agreement for sufficient reasons, except that, such rejection shall not operate as a bar to any subsequent negotiations preferred by the parties.[33] Where the court accepts a plea agreement, it shall proceed to convict the accused person.[34]

It is pertinent to note that, there are some limitations regarding the application of plea bargaining in Ghana. Plea bargaining is available to an accused who is charged with any offence except offences punishable by death.[35] Some offences are not applicable under the plea agreement such as, treason or high treason, high crime, rape, defilement, genocide, robbery, murder, kidnapping, piracy, hijacking, abduction and offences related to public elections.[36] A plea agreement may be set aside by the parties on grounds of fraud, misrepresentation, mistake, duress, illegality, incapacity, undue influence or in breach of the rules of natural justice.[37]

3.0 THE LAW ON CONFESSIONS

Confessions have always been the main simplifier and expediter of criminal proceedings. When a defendant confesses, the preliminary investigation may be curtailed or terminated[38]. Confessions may be very powerful before a jury; a confession may "trump" all other evidence in the case.[39] A confession has long been held as the key in any case, as 'the introduction of a confession makes the other aspects of a trial in court superfluous.'[40]

[30] Ibid, s 162F.
[31] Ibid.
[32] Ibid, s 162H.
[33] Ibid, s 162J.
[34] Ibid, s 162I.
[35] Ibid, s 162R.
[36] Ibid.
[37] Ibid s 162M.
[38] Stephen C. Thaman, 'Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases' (2007) General Reports of the XVIITH Congress of the International Academy of Comparative Law 951.
[39] Brandon L. Garrett, 'Contaminated Confessions Revisited' (2015) 101 Virginia Law Review 395, 407.
[40] Saul M. Kassin, 'The Psychology of Confession Evidence' (1997) 52 American Psychologist, Volume 52, 221 (quoting C.T. Mccormick, *Handbook of The Law of Evidence* 316 (2d edn, West Publishing Company 1972) 316).

Confessions act as catalysts in the determination of criminal trials. Under the Evidence Act,[41] confessions are categorised as hearsay and have no clear definition. In the absence of any statutory definition of confessions, resort is made to definitions suggested by jurists and the definitions expressed in judicial decisions. A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it.[42] In *Ekow Russell v The Republic*, the Supreme Court speaking through Akamba JSC, stated the law on confession as follows:

> A confession is an acknowledgment in express words, by the accused in a criminal charge, of the truth of the main fact charged or of some essential part of it. By its nature, such statement if voluntarily given by an accused person himself, offers the most reliable piece of evidence upon which to convict the accused. It is for this reason that safeguards have been put in place to ensure that what is given as a confession is voluntary and of the accused person's own free will without any fear, intimidation, coercion, promises or favours.[43]

Thus, a confession may be inadmissible if the statement was not voluntarily made due to police coercion.[44]

A confession amounts to sufficient evidence of the admission of an offence. A conviction could be based solely on the evidence of a confession. There is a plethora of decided cases to the effect that a court can rely solely on a confession statement made by an accused person to found a conviction. Van Lare JSC expressed in the case of *State v Aholo* that:

> A conviction can quite properly be based entirely on the evidence of a confession by a prisoner, and such evidence is sufficient as long as the trial judge, as in this case, enquired most carefully into the circumstances in which the alleged confession was made and was satisfied of its genuineness.[45]

The case of *Tiduri v The Republic* also supports the proposition that conviction can be obtained by relying on a confession statement only. In this case, one of the questions decided on appeal was whether the trial judge had erred in relying solely on the accused person's statement to convict him. In dismissing the appeal, the appellate court per Benin J (as he then was) held at holding 2 that:

[41] Evidence Act of Ghana 1975 (NRCD 323), s 120.
[42] William Richardson, *The Law of Evidence* (3rd edn, Brooklyn Law School 1928) 268.
[43] Ekow Russell v The Republic [2017-2020] SCGLR 469.
[44] Steven Penney, 'Theories of Confession Admissibility: A Historical View' (1998) 25 American Journal of Criminal Law 309.
[45] [1961] GLR 626.

> The Learned trial magistrate was right in placing reliance on the caution statement of the accused, and he could even have convicted him solely on his own statement because the statement was admissible (having been voluntarily made in conformity with the requirements of section 120 of the Evidence Decree 1975 (NRCD 323), was tendered in evidence as part of the prosecution's case without objection. Accordingly, by the provisions of section 6(1) of NRCD 323, the court could consider it.[46]

3.1 Classifications of Confessions

A confession may take various forms. A judicial confession is one made to the court. An extra-judicial confession, on the other hand, is one made to a person outside of the court. It may even consist of conversations with oneself, which may be adduced as evidence once overheard by another.[47]

Judicial confessions are also referred to as formal confessions. They are those which are made before a magistrate[48] or in court in the due course of legal proceedings. A judicial confession has been defined by Justice S. A. Brobbey[49] as one that is given during judicial proceedings by an accused who pleads guilty. It also includes confession given during committal proceedings which may form part of what are described as statutory statements.

Extra-judicial confessions also referred to as informal confessions, are those which are made by the accused elsewhere than before a magistrate or in court. It is not necessary that the statements should have been addressed to any definite individual. It may take the form of a prayer or a confession to a private person.[50]

3.2 Confessions in Police Custody

It seems confessions obtained during custodial interrogation are involuntary since pressure is mounted on the suspects to confess. The injustice and cruelty resulting from the early practice of extorting confessions from accused persons eventually led to the development of certain precautionary rules aimed at controlling the admissibility of confessions[51]. A cursory

[46] [1991] 1 GLR 209.
[47] See *Sahoo v State of U.P.* 1966 AIR 40 [where the appellant after murdering his daughter-in-law, was seen and heard by many people living there uttering words while stating that I finished her and now I am free from any daily quarrel. The Supreme Court held in this case that the accused's declaration or self-conversation should be considered a confession to prove his guilt, and that such confession should be recognised as important in proof of administering justice, and that the fact that the statements were not conveyed to anyone else does not negate the relevance of a confession. As a result, a confession made to oneself is good evidence that can be used in a court of law. The Court further clarified that confession need not be made by the accused to someone else mere muttering is sufficient.]
[48] See *Agyiri alias Otabil v The Republic* [1987-1988] 1 GLR 58.
[49] Stephen A. Brobbey, *Essentials of the Ghana Law of Evidence* (Datro Publication, 2014) 119.
[50] See *Dua v The Republic* [1987-1988] 1 GLR 343, where the accused confessed to his relative at Osu that he killed his wife. The Court of Appeal upheld his conviction on the basis that the confession was given voluntarily.
[51] M. C. Slough, 'Confessions and Admissions' (1959) 28 Fordham Law Review 96, 98.

look at NRCD 323 reveals safeguards in place to protect suspects from police custodial torment. Under the law, confessions made to a police officer is not admissible, unless made in the presence of an independent witness.[52] This is to deflect allegations levelled against police officers of tormenting or torturing suspects upon arrest.

In the case of *Kwaku Frimpong alias Iboman v The Republic*, Dotse JSC highlighted the significance of the presence of an independent witness as follows:

> The rationale for the above elaborate provisions is clear. They are to ensure that the rights of the declarant, i.e. accused who is under restriction are not trampled upon by the Police or the investigative agencies. These constitute the rights of all accused persons as has been protected in the Constitution 1992.[53]

4.0 THE LAW ON GUILTY PLEA

Under our criminal jurisprudence, in the event that an accused person pleads guilty, he automatically forfeits some constitutional rights. The prosecution need not prove the accused person's guilt beyond reasonable doubt.[54] A confession or an acceptance of the commission of a crime one is charged with amounts to a plea of guilty. The court ought to scrutinise the guilty plea before convicting the accused. That is, the court before accepting the plea, shall explain to the accused the nature of the charge and the procedure which follows the acceptance of a guilty plea.[55] Ordinarily, where the accused person pleads guilty and is recorded by the court, the court can proceed to convict the accused person in the event the facts of the case presented support the conviction. In the case of *Tetteh Asamadey alias Osagyefo v Commissioner of Police*, it was held that it is incumbent upon a trial judge to record the facts narrated by the prosecution after the accused has pleaded guilty because he takes into consideration those facts in convicting the accused and in imposing a sentence.[56]

The accused person may withdraw his guilty plea and plead not guilty[57]. Any statement made by the accused in answer to the court shall be recorded in writing and shall form part of the record of proceedings.[58] In circumstances where the accused pleads guilty but adds words illustrative of a defence, the court shall enter a plea of not guilty and record it as having been entered by order of the court.[59] In the case of *State v Poku & Anor*,[60] an accused person

Available at: https://ir.lawnet.fordham.edu/flr/vol28/iss1/2

[52] Evidence Act 1975 (n 41), s 120(2) [This provision acts as the safety valve that protects the suspect].
[53] Kwaku Frimpong alias Iboman v The Republic [2012] 1 SCGLR 297.
[54] Evidence Act, (n 41), s 13.
[55] Criminal and Other Offences (Procedure) Act (Act 30), s 199(2).
[56] Tetteh Asamadey alias Osagyefo v Commissioner of Police [1963] 2 GLR 400.
[57] Criminal and Other Offences (Procedure) Act (Act 30) s, 199(2).
[58] Ibid, s 199(3).
[59] Ibid, s 199(4).
[60] State v Poku & Anor 1967 C.C. 31.

pleaded guilty with explanation. The explanation was not recorded and he was convicted on the plea of guilty only. The Court held that, where an accused person pleads guilty to a charge the court must record:

a) the facts of the case to enable one know whether they support the charge; and

b) any explanation that the accused offers, to make sure that the accused really meant to plead guilty. If the explanation is inconsistent with the plea of guilty, the court must enter a plea of not guilty.

5.0 THE PARALLELS

A careful analyses of plea bargaining, plea of guilty and confessions would reveal a close and interconnected relationship. These are abbreviated trial mechanisms in the criminal justice system which mechanisms sometimes complement one another. The remarkable parallels in the factors taken into consideration by the courts in accepting a guilty plea, plea bargain or confession would be examined.

5.1 Court Considerations

Daily, hundreds of juvenile and adult defendants decide whether to plead guilty.[61] It is estimated that every two seconds a defendant pleads guilty.[62] Defendants in the criminal justice system are inherently vulnerable as a result of the imbalance of power between themselves and the state.[63]

Ghana's justice system, fortunately, is not based on the vulnerable accused, but on the idea of an accused who can freely make decisions based on the alternatives available. Nonetheless, in reality that is not the case for the accused since he must make a decision of going to trial to prove his innocence or plead guilty. That is why, some safety valves have been put in place to provide necessary protections to ensure that the presumption of innocence is sufficiently respected in practice. When accepting a plea or admitting confession statements, the court must consider certain factors. According to Wigmore[64], among the factors to be considered are: the character of the accused (health, age, education, intelligence, mental condition, physical condition); character of detention, if any (delay in arraignment, warning of rights, incommunicado conditions, access to lawyer, relatives and friends); manner of interrogation (length of session(s), relays, number of interrogators, conditions, manner of interrogators); and force, threats, promises or deceptions.

[61] George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (1st edn, Stanford University Press 2003) 223-227.
[62] Timothy Lynch, 'The Case Against Plea Bargaining' (Fall 2003) Regulation, 24. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=511222> accessed 17 September 2023.
[63] J Peay and E Player, 'Pleading guilty: Why Vulnerability Matters' (2018) Volume 81, Issue 6 Modern Law Review, 929.
[64] John Henry Wigmore, *Evidence in Trials at Common Law* (4th edn, Volume 3, Little Brown 1970), s 818, 352.

The following are some of the factors the court takes into consideration before accepting a plea bargain or plea of guilty or admitting confession:

5.1.1 Coercion

Under the doctrine of "unconstitutional conditions", which posits that 'even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly "coerce", "pressure", or "induce" the waiver of constitutional rights.'[65] This implies all pleas must be entered willingly without any threat from the prosecutor or the court. Coercion or duress[66] is sufficient enough to render a statement or plea involuntary. It is well recognised that coercion need not be physical to be effective.[67] Coercion could be psychological as well as physical. Indeed, most successful interrogation techniques are almost purely psychological.[68] Prosecutors' questioning rely on psychological coercion and social influence techniques in an attempt to obtain a guilty plea. For example, defendants who agree to a plea may be misled on the strength of the evidence against them giving them a false sense of what may occur at trial.[69]

With respect to confessions, it is a principle of law that a confession is not admissible unless the prosecution shows that the statement was made voluntarily 'in the sense that it has not been obtained by him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.'[70] A statement given by an accused under coercion is not voluntary, thus, is inadmissible.

Is the legal position in Ghana different? Ghana's law on confessions is captured in section 120 of NRCD 323. Prior to the enactment of NRCD 323, the Supreme Court in *State v Otchere*,[71] affirmed the aforementioned position when it stated that:

> A confession made by an accused person in respect of the crime for which he is tried is admissible against him provided it is affirmatively shown on the part of the prosecution that it was free and voluntary and that it was made

[65] Richard A. Epstein, 'Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent' (1988) 102 Harvard Law Review 4.

[66] The terms 'coercion' and 'duress' are used interchangeably throughout this article.

[67] American Law Institute, *Model Code of Pre-Arraignment Procedure - Complete Text and Reporters' Commentary* (1975) S 140.4.

[68] Kamisar, 'What Is an Involuntary Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions' (1963) 17 Rutgers Law Review 728.

[69] M. Joselow, 'Promise-Induced False Confessions: Lessons from Promises in Another Context (2019) Volume 60 Issue 6 Boston College Law Review, 1641-1688.

[70] Ronald Joseph Delisle and Don Stuart, *Learning Canadian Criminal Procedure* (6th edn, Carswell Publishing 2000) 356.

[71] State v Otchere [1963] 2 GLR 463.

without the accused person's being induced to make it by any promise or favour, or by menaces, or undue terror.[72]

With regards to plea bargaining, it is argued that it is coercive in itself due to prosecutors' charging decisions, judges' imposition of sentences, and legislators' enactment of criminal acts with harsh penalties.[73]

5.1.2 Misunderstanding of Charges

This stems from the fact that many accused persons do not know or understand the plea process and the legalese used.[74] In order to determine whether the accused person appreciates the charges, the court will inquire whether the accused understands the nature of the allegations. That is, the ability of the accused to know the similarity between his act and the crime for which he has pleaded or confessed to.

5.1.3 Misunderstanding of the Implications of the Plea

The accused must be informed of the direct consequences of entering into a plea. It is involuntary once the accused would not have entered the plea if he knew of the consequences. An accused's failure to understand the direct consequences of a plea of guilty is a defect that vitiates a conviction. It is however noteworthy that failure or refusal to communicate collateral or indirect consequences to defendants does not render the plea nugatory.[75]

5.1.4 Misrepresentation/Inaccuracy of Facts

The parties may themselves conceal certain relevant facts from the public as well as the court in order to have a win-win situation[76]. Nonetheless, where the accused enters a plea without being privy to the correct information or based on unknown facts of the case or the prosecutor's misrepresentation of facts or false information, that plea could be considered involuntary.

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[72] Ibid, 479; See also, *Anang v The Republic* [1984-1986] 1 GLR 458, where one of the issues raised on appeal was the admissibility of a statement made under "pressure" (duress) and therefore not voluntary. The Court of Appeal's decision was that the statement Anang, the appellant, made was not voluntary and was consequently not admissible in evidence (against him).

[73] Rachel E. Barkow, 'Separation of Powers and the Criminal Law' (2006) 58 Stanford Law Review 989, 1034.

[74] Hussemann, Jeanette and Siegel, Jonah, 'Pleading Guilty: Indigent Defendant Perceptions of the Plea Process' (2019) Volume 13 Issue 2 Article 3 Tennessee Journal of Law and Policy 29.

[75] Under the 1992 Constitution of Ghana, there are certain positions that one cannot occupy when convicted of an offence that borders on dishonesty, such as Member of Parliament (art 94(2)(c)(i)), Speaker of Parliament (art 95(1)), President or Vice President (art 60(3) and 62(c)), Ministers of State (Article 78(1)), and Deputy Ministers of State (art 79(2)). Also, under the Companies Act, 2019, (Act 992), s 172(2)(a), 177(1)(a)(i) and 177(2)(a) bar an individual from holding key positions such as director, receiver, auditor or liquidator in a company where that individual has been convicted of an offence relating to dishonesty. These are collateral consequences because it affects the individual in particular unlike direct consequence that has immediate effect on the individual's punishment such as imprisonment, payment of fines or signing a bond.

[76] Mari Byrne, 'Baseless Pleas: A Mockery of Justice' (2010) 78 Fordham Law Review 2961, 2964; Thea Johnson, 'Fictional Pleas' (2019) 94 Indiana Law Journal 855; Stephen J. Schulhofer & Ilene H. Nagel, 'Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period' (1997) 91 Northwestern University Law Review 1284, 1289–90 at 1293.

Prior to the commencement of a criminal trial, the prosecution must make all necessary disclosures.[77] It is for the judge to verify the fairness and transparency of the consensus reached by the accused and prosecution. Through necessary disclosures, the accused's bargaining power is enhanced. Uncertainties concerning the trial are reduced and the accused is able to properly, carefully, dispassionately and accurately assess the benefit and the adverse consequences of accepting a plea bargain.[78]

Furthermore, it ensures that a plea is not entered into by an accused based on false or misleading information rendering it involuntary.

5.1.5 Competency to enter Plea

The test of competence to enter a guilty plea applies mutatis mutandis to that of standing trial. The courts sometimes take the view that persons without capacity (the insane, mentally defective, or otherwise, gravely mentally disabled) act involuntarily. This is attributable to the absence of mens rea.[79]

All the above factors are taken into consideration by the courts in determining whether plea bargaining, plea of guilty or confessions are knowingly and voluntarily made. In determining what "voluntariness" is, Taylor J in *Republic v Konkomba* opined as follows:

> In my view, in ordinary parlance, 'voluntary statement' means a statement offered by a person on his own, freely, willingly, intentionally, knowingly and without any interference from any person or circumstance. If a person of unsound mind makes a statement, it is not voluntary, due to the interference induced by insanity; if short of insanity, a person makes a statement not because he wishes to make it but because of circumstances however induced, it will not be voluntary because of the interfering circumstances. If a statement is induced by threats and violence, it cannot be said to have been made without interference from any person and so it is not voluntary. If a statement is induced by promises, then it is not offered by the person on his own volition and it is accordingly involuntary.[80]

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[77] *The Republic v Baffoe-Bonnie and Others* [2017-2018] 2 SCLRG 808. Here, the Supreme Court held that in order to meet the requirement of a fair trial in criminal matters, it is the duty of the prosecution in both trials on indictment and summary trials, to disclose to the defence copies of witnesses' statements, copies of documents and exhibits in the possession of the prosecution, including materials which the prosecution intends to tender before a trial court … even where the prosecution has evidence in its possession which it may not tender at the trial, it must still disclose that evidence to the defence … the disclosure of any documents or other materials in the possession of the prosecution is to be made before the commencement of the trial or within a reasonable time in the course of the trial, before the documents are tendered as evidence in court by the prosecution.

[78] Sophia Waldstein, 'Open-File Discovery: A Plea for Transparent Plea—Bargaining' (2020) Temple Law Review Volume 92, 517.

[79] Francis Bowes Sayre, 'Mens Rea' (1932) 45 Harvard Law Review 974, 1004.

[80] Republic v Konkomba [1979] GLR 270, 278 (HC).

5.2 Waiver of Constitutional Rights

There are a few constitutional rights that an accused waives when he pleads guilty. These rights include: the right to a trial by jury[81], the right to testify or not to testify at trial[82], the privilege against self-incrimination,[83] the right to confront one's accusers, the right to plead 'not guilty'[84], the right to require the prosecution to prove your guilt beyond a reasonable doubt[85], the right to compel favourable witnesses and the right to present any available defences at trial.

5.2.1 Right to Appeal

Since time immemorial, a citizen's right to appeal has been accorded much respect. This justifies why Apostle Paul's right to appeal was upheld by Governor Porcius Festus as recorded in the book of Acts in the Bible, chapter 25: 8-12. The right to appeal, as fundamental as it is, was respected and enforced under the constitution of the ancient Roman Empire. The right accorded Apostle Paul is not different from what our 1992 Constitution guarantees. The right to appeal in criminal cases has been variously described as a fundamental component of procedural fairness and the 'final guarantor of the fairness of the criminal process.'[86]

It is trite that an appeal is a creature of Statute and or the Constitution and for that matter a party who intends to invoke the appellate jurisdiction of a court must strictly comply with and or satisfy the law that grants him or her the right to appeal. In the case of *Sandema-Nab v Asangalisa and Others*, the Supreme Court delivered at page 306 of the report as follows:

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[81] 1992 Constitution of Ghana, art 19 (2)(a); Criminal Procedure Act 1960 (Act 30), s 204; See also, *Addai v The Republic* [1973] 1 GLR 312.

[82] 1992 Constitution of Ghana, art 19(10). See also, *Okyere v The Republic* [1972] 1 GLR 99 [Hayfron-Benjamin J] (as he then was) stated that where an accused person in the exercise of his constitutional right refuses to give evidence at his trial, fails or refuses to give a statement to the police when he is charged with a crime, the trial judge ought not to infer guilt from the accused person's constitutional right to keep silent.

[83] Evidence Act (n 41), s 97(1).

[84] Accused is not under any obligation to prove his innocence as the burden of proof is on the prosecution throughout the trial. The Supreme Court aptly put it in the case of Mallam Ali Yusif vrs The Republic [2003-2004] SCGLR 174 that: the burden of producing evidence and the burden of persuasion are the components of 'the burden of proof'. Thus, although an accused person is not required to prove his innocence, during the course of his trial.

[85] See *Gligah and Another v The Republic* [2010] SCGLR 870, 4, where the Supreme Court speaking with unanimity stated the principle of law thus:- "under article 19 (2) (c) of the 1992 Constitution, everyone charged with a criminal offence was presumed innocent until the contrary was proved. In other words, whenever an accused person was arraigned before any court in any criminal trial, it was the duty of the prosecution to prove the essential ingredients of the offence charged against the accused person beyond any reasonable doubt. The burden of proof was therefore on the prosecution and it was only after a prima facie case had been established by the prosecution that the accused would be called upon to given his side of the story." See also, *Lutterodt v Commissioner of Police* [1963] 2 GLR 429; *Darko v Republic* [1968] 203.

[86] David Rossman, 'Were There No Appeal: The History of Review in American Criminal Courts' (1990) 81 Journal of Criminal Law and Criminology 518.

> Now it must be appreciated that an appeal is a creature of statute and therefore no one has an inherent right to it. Where a statute does not provide for right to appeal, no court has jurisdiction to confer that right in a dispute determined under that statute. Similarly, where a right to appeal is conferred as of right or with leave or with special leave, the right is to be exercised within the four corners of that statute and the relevant procedural regulations, as a court will not have jurisdiction to grant deviations outside the parameters of that statute.[87]

Thus, where a statute denies one a right to appeal, an appellate court's appellate jurisdiction is ousted.

5.2.1.1 Does an Accused Person, Convicted on a Plea of Guilty have a Right to Appeal?

On arraignment, a defendant is asked how he pleads in response to the charges read to him.[88] By pleading guilty[89], the accused person admits that he committed the act charged, that the act is prohibited by law, and that he has no defence for his actions. In the event that an accused person pleads guilty, he cannot challenge the conviction. This is clearly provided for in the Criminal and other Offences (Procedure) Act, 1960[90]. Subsection (3) of Section 324 provides that 'no appeal shall be entertained against conviction by an accused person who has pleaded guilty and has been convicted on his plea'.

This law enjoins the appellate court not to entertain an appeal from plea of guilty. Nevertheless, there are cases where the appellate court may entertain an appeal, in spite of the provisions of section 324 (3) of Act 30. That is, where there are defects, irregularities or errors in the legal proceedings. These defects can be grouped into jurisdictional defects and non-jurisdictional defects.

5.2.1.1.1 Jurisdictional Defects

Jurisdiction is the authority conferred by law upon a court to hear and determine issues between parties or render judgment or order. Jurisdiction is fundamental; it is not simply a question of form for it prescribes the boundaries of the authority of a court. If a court tries a case over which it has no jurisdiction, the sentence becomes a nullity and is unenforceable.

Jurisdictional defects are defects that affect the power vested in the court to try a defendant. Taylor J in the case of *Kpekoro v The Republic*,[91] *(Kpekoro's case)* in addressing a similar argument with respect to jurisdiction, was of the opinion that:

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[87] Sandema-Nab v Asangalisa and Others [1996-1997] SCGLR 302. See also, *Nye v Nye* (1967) GLR 76; *Bosompem and Others v Tetteh Kwame* [2011] 1 SCGLR 397.
[88] Thomas O'Malley, *The Criminal Process* (Round Hall 2009) 471.
[89] Criminal and Other Offences (Procedure) Act (n 55), s 239(1) states to the effect that a plea of guilty, when recorded, constitutes a conviction.
[90] Criminal and Other Offences (Procedure) Act, (n 55).
[91] Kpekoro v The Republic [1980] GLR 580 (HC).

> Now what is the proper forum for the trial of an offence under section 1 (h) of the Subversion Decree, 1972 (N.R.C.D. 90)? The Decree itself in its section 4 provides the answer … The offences under which the appellants were tried before the circuit court, are only justiciable by a military tribunal as section 4 of the Subversion Decree, 1972 (N.R.C.D. 90), too plainly shows. … I think therefore that the prosecution of this case before the circuit court is wrong. The circuit court has no jurisdiction and the conviction is therefore null and void.[92]

Prior to *Kpekoro's case*, *Watara v The Republic*[93] was cited as bestowing a blessing upon the principle of jurisdiction. Osei-Hwere J (as he then was) stated as follows:

> Indeed, in the instant case, as nothing emerged from the facts given at the trial throwing light on the gravity of the offence which did not appear in the charge itself the trial magistrate could not have had the power to commit for sentence under section 178 (1) of Act 30. It is clear from the foregoing that the purported committal of the appellant for sentence by the circuit court can in no way be justified.[94]

5.2.1.1.2 Non-Jurisdictional Defects

Non-jurisdictional defects directly affect the guilty plea. In the case of *Alpha Zabrama v The Republic*[95], Taylor J, as he then was, stated that an accused person can still challenge conviction after pleading guilty under the following circumstances:

i. if it could be shown that an appellant did not appreciate or understand the charge or procedure, thus, pleaded guilty by mistake; [96]
ii. if it could be shown that the appellant had pleaded guilty to a non-existent crime; [97]
iii. if the appellant pleaded guilty but gave an explanation which practically amounted to a defence or negatived the plea of guilty as in the instant case; [98]
iv. if the plea of guilty was such as, in fact, to be no plea at all; [99]

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[92] Ibid, 589 – 590.
[93] Watara v The Republic [1974] 2 GLR 24.
[94] Ibid, 36.
[95] Alpha Zabrama v The Republic [1976] 1 GLR 291.
[96] *Essien v R.* (1950) 13 W.A.C.A. 6, 7; *Kofi alias Fiozo v The State* [1965] G.L.R. 28, 30 and *Duah v Commissioner of Police* (1950) 13 W.A.C.A. 85 applied.

[97] *Glah and Another v The Republic* [1992] 2 GLR 15 and Amadu v The Republic, High Court, (HC, 17 March 1967).
[98] *Ofei v The State* [1965] G.L.R. 680 and *Kotokoli v The Republic*, (HC, 7 November 1969).
[99] *R. v Lloyd* (1923) 17 Cr.App.R. 184 185 [Lord Hewart CJ]; C.C.A.; R. v Baker (1912) 7 Cr.App.R. 217, C.C.A.; *R. v Hussey* (1924) 18 Cr.App.R. 121, C.C.A.; *R. v Nze* (1941) 7 W.A.C.A. 24 and *Yakubu v The State*, (HC, 17 November 1966).

v. if on the admitted facts upon which the prosecution was founded, no offence was disclosed upon which the appellant could legally be convicted on the charge preferred; [100];

vi. if there had been a miscarriage of justice by an apparent wrong acceptance of a plea of guilty; [101] and

vii. if the plea of guilty was so ambiguous that the appellant could not be said to have unequivocally pleaded guilty.[102]

The aforesaid could be raised by an accused person on appeal, after a guilty plea has been entered and conviction handed therein.[103]

5.2.1.2 Can an Appeal Lie against a Conviction Based on Plea Bargaining?

A comparison can be drawn between sections 324 (3) of Act 30 and 162L of Act 1079. Under both provisions, the appellate courts are obligated not to entertain any appeal whatsoever. Section 162L of Act 1079 provides that 'where a Court convicts and sentences an accused person in accordance with a plea agreement, the conviction and the sentence shall be final and an appeal shall not lie against the judgment of the Court.'

Although, the Courts uphold appeal waivers regarding the plea of guilty, there have been instances where appeal is allowed. We therefore admonish the courts to recognise the important role played by the appellate process in the criminal justice system, particularly, regarding plea bargaining. The purpose of appeals is to correct errors and judges may err when convicting and sentencing accused persons based on plea bargaining. Therefore, a proposal is made for accused persons to be allowed a right to appeal.

6.0 DIVERGENCE

Theoretically, plea bargain, plea of guilty and confessions are similar in nature, underpinning rationales and implications, yet each is unique. That is, the accused person under these mechanisms takes responsibility for the crime perpetuated. However, these terms are not the same either in terms of their procedures or substantively.

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[100] *Osei Tutu v The State* [1965] G.L.R. 593, 596 (HC) [Koranteng-Addow J]; *R. v Forde* [1923] 2 K.B. 400; *Essien v R.* (n 97); *Duah v. Commissioner of Police* (1950) 13 W.A.C.A. 85; *Dagomba v The State*, (CA, 1 November 1966) and *Amartey v The State*, (CA, 27 January 1967).

[101] *Kotokoli v The Republic*, (HC, 7 November 1969).

[102] *Ofei v The State* [1965] G.L.R. 680, 686 (SC) [Ollennu JSC]; *Zongo v The State*, (HC, 16 March 1967) [Annan J] applied.

[103] These conditions have been applied in the cases of the *State v. Arthur Seshie*, (HC, 13 November 1964) and *Yeboah v. The State* [1964] G.L.R. 715 where they were examined in relation to section 199 of the Criminal and Other Offences (Procedure) Act, (1960).

6.1 Plea Bargaining and Plea of Guilty

Plea bargaining and plea of guilty should not be treated as same and common. Plea of guilty which is part of the statutory process of criminal trials, cannot be said to be 'plea bargaining' ipso facto.

Pursuant to subsection (1) of section 171 of Act 30, the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty to the offence(s) charged or claims to be tried. According to section 171 (3) of Act 30, a plea of guilty shall be recorded as nearly as possible in the words used, or if there is an admission of guilt by letter under section 70 (1), the letter shall be placed on the record and the Court shall convict the accused and pass sentence or make an order against the accused unless there appears to it sufficient cause to the contrary. The Court is not obliged to convict an accused once he pleads guilty to a charge; trial may proceed accordingly.

It is noteworthy that proceeding with trial in spite of the entry of "plea of guilty" does not amount to "plea bargaining".

6.2 Plea of Guilty and Confessions

Guilty pleas and confessions, however, are very different. A confession is evidence that must be considered with other evidence. Confessions do not directly determine the outcome of a case. A guilty plea, on the other hand, is not evidence, but a formal agreement by the defendant to enter a plea of guilt. A guilty plea's effect is to produce direct conviction.

The US Supreme Court distinguished a guilty plea from a confession as follows: 'a plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.'[104]

The American Bar Association in the Minimum Standards for Criminal Justice shed light on the substance of a plea of guilty, 'while a confession only relates a set of facts, and thus only requires knowledge of the factual situation, a plea is an admission of all the elements of the charge, and thus requires a sophisticated knowledge of the law in relation to the facts.'

6.3 Plea Bargaining and Confession

Plea bargaining and confessions do not have the same regulations. With confession, there is an interrogation by the police which may be coercive. Typically, confessions are obtained after hours of interrogation by the police in a confined space. This procedure differs from that of plea bargaining, where either the prosecutor or an accused may negotiate a plea agreement. Interrogations by the police do not always result in confessions or convictions. All plea

[104] *Machibroda v United States*, 368 U.S. 487, 493 (1962), quoting *Kercheval v United States*, 274 U.S. 220, 223 (1927).

bargains, however, produce convictions unless withdrawn by the parties or rejected by the court.

Plea bargaining and confessions have different procedures and are also substantively different. In criminal cases, the rule has crystalised into a voluntary confession being a sufficient ground for conviction, thereby discharging the prosecution from its burden of proof. This is pursuant to section 120 of NRCD 323.[105] Where an accused person's confession to the police is retracted by him on oath in court, the court is entitled to convict on the confession statement if it is satisfied that the confession statement is the truth and his evidence on oath is false.[106] This differs from plea bargaining which allows an accused person to withdraw at any stage of the proceedings without suffering any consequences from the court by way of conviction and sentencing.[107]

Additionally, a confession statement will not be rejected on ground of illegal means of obtaining it. That is, the extraction of a confession statement or evidence, regardless of the means by which it was procured, is not a cause for its rejection at the trial. Fundamentally, the veracity of evidence is not tainted by the illegal or inappropriate way of obtaining it. So far as the evidence is relevant and persuasive, it is deemed as if it was procured in a right way. In the event that there is any objection to the evidence, the objection would affect the admissibility of the evidence and to a large extent, credibility of the witness. Whereas a plea agreement may be rejected on grounds of illegality such as fraud, misrepresentation, undue influence, mistake, or duress, pursuant to Act 1079, the court is entitled to reject a plea agreement in accordance with law.[108] The court may set aside a judgment premised on a plea agreement on application by the accused person or prosecutor on stated grounds.[109] This implies that the court can reject the plea agreement if it is tainted with illegality since that will be in consonance with law.

7.0 CONCLUSION

In this article, we compared and contrasted plea bargaining, plea of guilty and confessions, paying particular attention to their features and the contexts in which they arise. It is noted that plea bargaining and plea of guilty when accepted by a judge with respect to the charge or offence, cease evidence taking and immediately move the case to the conviction and sentencing stage. This cannot be said of confession, where even a trial de novo may be conducted to determine the voluntariness of the statement. Also, it is noted that not all cases that result in plea of guilty are the result of plea bargaining. Again, there may be instances where confessions would have a place in negotiating plea bargains due to the evidence

[105] *Anas A. Anas v Kennedy Agyapong*, (HC, 15 March 2023).
[106] *Sewonomim and Others v The Republic* [1976] 1 GLR 15.
[107] Criminal and Other Offences (Procedure) (Amendment) Act 2022 (Act 1079), s 162K.
[108] Ibid, s162J.
[109] Ibid, s 162M.

adduced. This would have a bearing on the terms of the plea agreement. Nonetheless, not all plea bargaining entail confessions, and not all confessions lead to plea bargaining.

Also, we noted that while appeals are allowed with respect to plea of guilty under some conditions, same cannot be said for plea bargaining. It is trite that the right to appeal is sacrosanct, nonetheless, we are of the considered view that an accused person convicted and sentenced by means of a plea bargain should be allowed to challenge the judgment on grounds of defects either jurisdictional or non-jurisdictional, as applicable to plea of guilty. This will not only protect the criminal defendants but would also help maintain the integrity of the criminal justice system.[110]

The introduction of plea bargaining in Ghana is timely. Plea bargaining is just one of the mechanisms through which a criminal conviction is concluded. It is neither the same as plea of guilty nor has any semblance of confessions.

[110] Steven Schmidt, 'The Need for Review: Allowing Defendants to Appeal the Factual Basis of a Conviction after Pleading Guilty' (2010) Minnesota Law Review 434.

IS AN ARBITRATION MANAGEMENT CONFERENCE MANDATORY OR DIRECTORY? AN ANALYSIS OF SECTION 29 OF GHANA'S ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 (ACT 798)

Prince Kanokanga* and Regina Apaloo**

ABSTRACT

In Ghana as elsewhere, the practice of arbitration is recognised. The Alternative Dispute Resolution Act, 2010 ("the ADR Act") provides not only for the resolution of arbitration disputes but also for mediation and customary arbitration. It is not the purpose of this article to discuss issues about mediation and customary arbitration. There is an increase in arbitration disputes, hence, the need for arbitration. The article analyses section 29 of the ADR Act which provides for the holding of an 'arbitration management conference'. The analysis contained herein will define arbitration and an arbitration management conference. It also seeks to answer the question of whether an arbitration management conference is mandatory or directory in Ghana. In answering this critical question, an exploration of the concept of "party autonomy" will be made. Taken together, it will be observed that in practice, it is rare for an arbitration to proceed without the holding of an arbitration management conference to determine the nature of the claims and counterclaims, the date, time, place and estimated duration of any hearings as well as issues relating to discovery, production of documents, the rules of evidence, and the communication and receipt of the facts, exhibits, witnesses and related issues. Additionally, the issues of costs and the arbitrator's remuneration, the applicable arbitration rules, the language(s) to be used, the place of arbitration, and interim relief are also discussed.

Beginning with an introduction on the subject, we proceed to define what arbitration is and more importantly what an arbitration management conference is. After this, the focus of the article shifts to the conduct of an arbitration management conference. It discusses what happens during an arbitration management conference, such as, a tribunal imposing its authority on the arbitral process, becoming acquainted with the parties, and making

*LL.B, Cavendish University, Zambia; BLP, University of Zimbabwe.
**LL.B, University of Ghana; B.L Candidate, Ghana School of Law.

disclosures to the parties regarding issues that may give rise to doubts about independence and or impartiality. The nitty-gritty issue of whether an arbitration management conference is mandatory or directory remains the crux of this treatise. A discussion on this pertinent question is answered in the conclusion.

1.0 INTRODUCTION

With the promulgation of the ADR Act on 30 May 2010, there has been heightened awareness of Alternative Dispute Resolution ("ADR") in Ghana.[1] ADR is a 'democratization imperative through the multiple door principles of access to justice.'[2]

The ADR Act regulates the collectively recognised ADR methods of resolving disputes, which include arbitration, mediation, and customary arbitration, rather than the normal trial process.[3]

The ADR Act is by and large modelled on the Model Law on International Commercial Arbitration ("Model Law") adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985. The UNCITRAL Model Law aims to harmonise and modernise national arbitration legislation.[4] Another significant thing about the ADR Act is that it gave effect to the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958 (the New York Convention).[5]

The Supreme Court in *De Simone Ltd v Olam Ghana Ltd* held that 'it is quite convenient to make reference to the relevant provisions of the model law which have been incorporated in national laws, and to see how the courts in the various countries have applied them.'[6]

Because the Model law is a collaborative effort among nations to facilitate the resolution of international commercial disputes through arbitration,[7] expressions to which a meaning has

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[1] See Edward Torgbor, *'Ghana Outdoors: The New Alternative Dispute Resolution Act 2010 (Act 798): A Brief Appraisal' (2011)* 77 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 211 – 219*, Emilia Onyema, *'The New Ghana ADR Act 2010: A Critical Overview'* (2012) 28 Arbitration International 101 – 124.

[2] Henry Murigi, '*Contending with the Schools of Thought on ADR before and during Arraignments: A Departure from the Old Cultural Order'* (2021) 9 Alternative Dispute Resolution 202.
See, Richard Frimpong Oppong, *The Government of Ghana and International Arbitration* (Wildy, Simmonds & Hill 2017); Ayo Ayoola-Amale, *Alternative Dispute Resolution (ADR) and Justice in Ghana* (LAP Lambert Academic Publishing 2018

[3] Bakhita Koblavie & Christopher Nyinevi, *A Review of the Legislative Reform of Customary Arbitration in Ghana* (2019) 45 Commonwealth Law Bulletin 587 – 607; Adenike Aiyedun and Ada Ordor, *'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa'* (2016) 20 Law, Democracy & Development 154-173.

[4] Carl-August Fleischhauer, *'UNCITRAL and International Commercial Dispute Settlement'* (1983) 38 Arbitration Journal 9 – 13; Gerold Herrmann, *'UNCITRAL Model Law – its Background, Salient Features and Purposes'* (1985) 1 Arbitration International 6 – 39; Michael Kerr, *Arbitration and the Court: The UNCITRAL Model Law* (1985) 34 International and Comparative Quarterly 1 – 24; Saturnino Lucio, *'The UNCITRAL Model Law on International Law'* (1986) 17 University of Miami Inter-American Law Review 313 – 322.

[5] Alternative Dispute Resolution, Act 2010 (Act 789), s 59(1)(c).

[6] [2018] GHASC 22.

[7] *Corporation Transnacional de Inversiones, SA de CV v STET International, SpA* [1999] Carswell Ont 2977.

been assigned in the Model Law should equally bear the same meaning in the interpretation of the ADR Act in Ghana.

Without a doubt, it can be said that the Ghanaian judiciary recognises the importance of arbitration and generally will issue a stay of proceedings in favour of arbitration where there is a valid arbitration agreement, and will recognise and enforce both domestic and international arbitration awards.[8]

The present article aims to analyse section 29 of the ADR Act, which provides for the holding of an *'arbitration management conference'.* Additionally, the article seeks to answer the question of whether an arbitration management conference is mandatory or directory.

2.0 WHAT IS ARBITRATION?

Arbitration is a recognised ADR process where the parties agree in writing to refer any dispute(s), controversies or claims to a neutral third party, chosen directly or indirectly by the parties for a final determination.[9]

It is a condition precedent that 'for there to be a reference to arbitration there must exist a dispute.'[10] It is trite that arbitration is founded on contract.[11] Thus, at the heart of arbitration is the concept of *consent.*[12] Fittingly, one commentator has observed that, '[l]ike consummated romance, arbitration rests on consent.'[13]

In arbitration, instead of parties' dispute being heard in court, thus, publicly,[14] the dispute is determined privately and consensually outside of the court system by an arbitral tribunal which may include a sole arbitrator or a panel of arbitrators.

Arbitration can be conducted on an ad hoc basis,[15] or administered by a permanent arbitration institution[16]or appointing authority, such as the Ghana ADR Hub, Ghana Arbitration Centre (GAC), Ghana Association of Certified Mediators and Arbitrators (GHACMA) and the Marian Conflict Resolution Centre (MCRC).

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[8] *Jesuit Fathers of Ghana Society v Patience Belinda Kofie & Others* [2020] DLCA 10039; *Carbon Commodities DMCC v Trust Link* [2021] DLCA 11553; *Dutch African Trading Company BV (DATC) v West African-Mills Company Ltd* [2022] DLCA 11307.

[9] Thomas Carbonneau, *'The Exercise of Contract Freedom in Making of Arbitration Agreements'* (2003) 36 Vanderbilt Journal of Transnational Law 1189 – 1196.

[10] Andrew Tweeddale and Keren Tweeddale, *A Practical Approach to Arbitration Law* (Blackstone Press 2002).

[11] Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International 2001) 560.

[12] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV & Others and another appeal* [2014] 1 SLR 198, 372.

[13] William Park, *Non-Signatories and International Contracts: an Arbitrator's Dilemma* in Lawrence Newman and Richard Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (Juris 2008) 553.

[14] Ronald Bernstein et al (eds), *Handbook of Arbitration Practice* (Sweet & Maxwell 1988) 9.

[15] Ulrich Schroeter, *'Ad Hoc or Institutional Arbitration - A Clear Cut Distinction? A Closer Look at Borderline Cases'* (2017) 10 Contemporary Asian Arbitration Journal 141 – 199.

[16] Kariuki Muigua, *'Arbitration Law and the Right of Appeal in Kenya'* (2021) 2 African Journal of Arbitration and Mediation 1, 2.

For business people, time is money, and in general, commercial parties prefer a speedy resolution of their cases over ponderous and lengthy litigation. Thus, some reasons why parties opt for arbitration as opposed to litigation, include the cost of litigation and the delays of the courts.[17]

Oswal and Krishnan observed that:

> Arbitration across the globe is based on certain fundamental principles, which include, inter alia, party autonomy in choosing arbitrators, the
>
> process of arbitration and laws, finality of arbitral awards, and minimum judicial interference.[18]

3.0 WHAT IS ARBITRATION MANAGEMENT CONFERENCE?

The concept of Case Management Conference ("CMC") is not unique to litigation,[19] as it also extends to arbitration. Unless otherwise agreed to by the parties, section 29 of the ADR Act *mandates* that an arbitral tribunal should within fourteen days of being appointed and upon giving seven days written notice to the parties, conduct an arbitration management conference with the parties and/or their representatives in person or through electronic or telecommunication media.[20]

The purpose of CMC, also known as preliminary arbitration meeting[21] is two-fold. Its primary aim is to assist disputants resolve their disputes amicably by determining the procedural timetable and the rules to be followed in the proceedings. The secondary aim is to, if the parties have not agreed on any procedural timetables or institutional rules, determine and implement a procedural timeline, to the greatest extent achievable. This includes defining issues for drawing up terms of reference, and making arrangements concerning the date and venue of the hearings without further ado.[22]

The arbitrator at an arbitration management conference should not be a mere observer but an active participant.[23] Thus, a case management conference is not a 'hearing' in terms of which the parties and/or their representatives lead evidence[24] or make oral submissions. This

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[17] *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 445 (H); Peter Ramsden, *McKenzie's Law of Building and Engineering Contracts and Arbitration* (7th ed, Juta & Co 2014) 231.
[18] Arjit Oswal and Balaji Sai Krishnan, *Public Policy as a Ground to Set Aside Arbitral Award in India* (2016) Arbitration International 651, 651.
[19] The High Court (Civil Procedure) Rules 2004 were amended by the insertion of Rule 7A in terms of the High Court (Civil Procedure) (Amendment) Rules 2014.
[20] Act 789 (n 5), s 29(1); See also, the Ghana ADR Hub and Mediation Rules 2020, art 19(3).
[21] Mark Hamsher and Patrick O'Donovan, *'Pre-hearing Procedure in LMMA Arbitrations' (2004) 70 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 284 – 289.
[22] Davison Kanokanga, *Commercial Arbitration in Zimbabwe* (Juta & Co 2020) 99.
[23] *Marijeni v Mufudze & Others* 2000 (2) ZLR 498 (H).
[24] Evidence is a very important part of domestic and international litigation because it helps to determine the truth about disputed issues of fact. See generally, Robert Pietrowski, *'Evidence in International Arbitration'* (2006) 22 Arbitration International 373 – 410; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer 2012); Michal Malacka, *'Evidence in International Commercial Arbitration'* (2013)

'conference' is purely to put things in place for a smooth and successful hearing.[25] In conducting the arbitration management conference, the arbitrator should treat the parties equally, as the system of equal treatment of parties underpins the system of justice generally.[26]

Section 29 of the ADR Act was designed for the efficient management of arbitration.[27] It identifies the nature of the claims, counterclaims and defences thereto which the parties make or raise against each other.[28] The date, time, place and estimated duration of any hearings[29] as well as any issue pertaining to discovery, production of documents or the interrogatories are also decided on.[30]

At the arbitration management conference, the issue of the law, the rules of evidence and the burden of proof that apply to the proceedings are discussed.[31] There is an exchange of declaration regarding facts, exhibits, witnesses and related issues.[32] At a preliminary arbitration conference, the discussion may cover the need to resolve issues of liability and damages, whether these should be discussed separately, and whether the parties' summary of evidence should be presented orally or in writing .[33]

An arbitrator and parties could discuss the nature and form of an arbitral award.[34] In the absence of a discussion on the form of an arbitral award[35], section 49 of the ADR Act applies. Lastly, the issue of costs and the arbitrator's fees are discussed,[36] and in general any other issue relating to the Arbitration[37] such as applicable arbitration rules, the language(s) to be used,[38] the place of arbitration,[39] issues of communication,[40] jurisdiction,[41] representation[42] and interim relief.[43]

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13 International and Comparative Law Review 97 – 104; Nathan O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (OUP 2013).

[25] Kanokanga (n 22) 111.

[26] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 185.

[27] Thomas Webster and Michael Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (Sweet & Maxwell 2014) 24-1.

[28] Act 789 (n 5), s 29(1)(a).

[29] Ibid, s 29(1)(b).

[30] Ibid, s 29(1)(c).

[31] Ibid, s 29(1)(d).

[32] Ibid, s 29(1)(e).

[33] Ibid, s 29(1)(f).

[34] Ibid, s 29(1)(g).

[35] Ibid, s 29(1)(h).

[36] Ibid, s 29(1)(i).

[37] Ibid, s 29(1)(j).

[38] Ibid, s 32.

[39] Ibid, s 11.

[40] Kanokanga (n 22) 101.

[41] Act 789 (n 5), s 24.

[42] Ibid, s 42.

[43] Ibid, s 38.

The decisions of an arbitrator at an arbitration management conference should be in writing and should be served on the parties and/or their representatives.[44] It should be borne in mind that once an arbitrator has accepted an appointment to arbitrate, a tripartite contract is formed.[45]

Therefore, where an arbitrator and the parties agree on a procedural timetable or schedule for the conduct of the arbitration, the parties are bound by the terms of the agreement. The parties cannot directly or indirectly disavow that process or resile from that which was agreed to at an arbitration management conference.[46] It should be noted that an arbitrator may hold further arbitration management conferences where necessary upon notice to the parties.[47]

3.1 Conducting an Arbitration Management Conference?

There is no prescribed manner in which an arbitration management conference should be conducted. An arbitrator may request that disputants and or their representatives submit to the tribunal a case management proposal in advance of a case management conference.

Kanokanga & Kanokanga [48]observed that:

> It is not uncommon for the presiding arbitrator, in an arbitration with more than two arbitrators, to dispatch a letter to the parties or their representatives advising on the date, time and location of the preliminary meeting.

Generally, the letter dispatched to the parties and the co-arbitrators also serve as the meeting agenda.[49] The notice which is generally in the form of an email and/or a letter sent by the presiding arbitrator in an arbitration with more than two arbitrators or by a sole arbitrator giving the parties seven days' written notice to conduct the arbitration management conference in essence 'tells the parties what they should be prepared to discuss and decide' at the arbitration management conference.[50]

One commentator has observed that:

> This meeting allows the arbitrator to begin to impose their authority on the arbitral process, to become acquainted with the parties, to disclose to the parties if there is anything which might reasonably raise doubts as to their independence or impartiality in the conduct of the arbitral proceedings, and

[44] Ibid, s 29(2).
[45] Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 34 -
[46] *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) 614B-C; *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd & Another* (2000) 21 ILJ 142 (LAC) [20] – [21].
[47]Act 789 (n 5), s 29(3).
[48] Davison Kanokanga and Prince Kanokanga UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act [Chapter 7:15] (Juta & Co 2022) 214.
[49] Ibid.
[50] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (CUP 2017) 175.

> to define and shape the entire arbitral process. These preliminaries [are] held to ensure that the arbitral tribunal and the parties have a common understanding of how the arbitration is to be conducted and also make possible the establishment of a carefully designed framework for the conduct of the arbitration.[51]

It has been observed that by drafting an agenda the parties and/or their representatives know what to expect in advance, and it may encourage the parties and/or their representatives to agree in advance for the efficiency and effectiveness of the arbitration management conference.[52]

The agenda helps the arbitral tribunal and the parties set up a procedural timetable, which in turn assists the arbitral tribunal render an arbitral award which is final and binding on the parties.[53] The arbitration management conference meeting agenda which is accompanied by the notice for the arbitration management conference also serve as notice to the parties on the conduct of the arbitration, whether it will be in person, telephone or online.

An arbitration management conference can be conducted in person where the arbitrator and the parties and/or their representatives meet physically.[54] Another means may be through telecommunication.[55] In other words it can be conducted via conference call or voice over internet protocol (VOIP).[56] An arbitration management conference may also be conducted through electronic means.[57]

Before deciding to hold an arbitration management conference by any of the recognised methods, an arbitrator has to consider the various issues[58] as the 'attitudes and practices around conducting arbitral hearings remotely that seemed impracticable or impossible a few months ago have fast become the norm.'[59]

Therefore, before deciding to conduct an arbitration management conference,[60] it is essential for an arbitrator to consider whether telecommunication media or electronic media will allow

[51] Kanokanga (n 22) 99.
[52] Moses (n 63) 175.
[53] Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers 2017) 122.
[54] Act 789 (n 5), s 29(1).
[55] Ibid, s 29(1).
[56] African Institute of Mediation and Arbitration (AIMA) Rules of Procedure for Arbitration 2017, art 21 (2).
[57] Act 789 (n 5), s 29(1).
[58] Maxi Scherer, *'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37 Journal of International Arbitration* 407 – 448.
[59] Austin Ouko, *'The Disruptive Impact of Covid–19 on Arbitration Practice in the East African Region'* (2021) 9 Alternative Dispute Resolution 219, 221.
[60] In practice, it is generally important for the parties to agree by themselves regarding an agreed date which is convenient for them, and to enquire with the arbitrator whether such a date is convenient for all parties.

the parties and/or their representatives an adequate, fair and equal opportunity to participate.[61]

Where the arbitration management conference is to be conducted online, the arbitrator must disclose to the parties the most suitable virtual platform[62] for holding the meeting, as well as outline the technical requirements and provide the parties with the necessary login details.[63] The beauty about virtual platforms is that they can be accessed anytime, anywhere. [64]

Where an arbitration management conference is held online, it is generally the responsibility of each party to the dispute to test their virtual platform connectivity before the meeting.[65] It is important for the participants to log in as early as possible and to ensure that they are as far away as possible, from any background noise.[66] If the participants decide that they are going to use their cameras, the cameras should be at a correct angle and if possible away from bright lights or glares from windows.[67]

Just like any other meeting, the participants at an arbitration management conference should not speak at the same time as other participants.[68] They should use physical gestures to indicate that they wish to speak,[69] and at all times, mute their microphones unless speaking.[70]

4.0 WHETHER AN ARBITRATION MANAGEMENT CONFERENCE IS MANDATORY OR DIRECTORY

Section 29 of the ADR Act affirms the principle of party autonomy.[71] *Kanokanga and Kanokanga* observed that 'Party autonomy is the backbone and cornerstone of arbitration, and provides the 'freedom of the parties to construct their contractual relationship in the way they see fit.' Put differently, 'the Grundnorm of arbitration is party autonomy.'[72]

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[61] The Association of Arbitrators (Southern Africa) NPC, *The Association of Arbitrators (Southern Africa) Member's Handbook* (Juta & Co 2022) 96.
[62] Some of the virtual platforms include Google Meet, Microsoft Teams, Skype, WebEx Meetings Zoom etc.
[63] The Association of Arbitrators (Southern Africa) NPC (n 73) 97.
[64] Alex Lo, *'Virtual Hearings and Alternative Arbitral Procedures in the COVID–19 Era: Efficiency, Due Process, and Other Considerations'* (2020) 13 Contemporary Asia Arbitration Journal 85 – 98
[65] The Association of Arbitrators (Southern Africa) NPC (n 61) 99.
[66] ibid.
[67] ibid.
[68] ibid.
[69] ibid.
[70] ibid.
[71] Rachel Engle, *'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability* (2002) 15 (2) The Transnational Lawyer 324 – 356; Mia Louise Livingstone, *'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?'* (2008) 25 Journal of International Arbitration 529 – 535; Samuel Anu Fagbemi, *'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?'* (2015) 6 Afe Babalola University Journal of Sustainable Development Law & Policy 222 – 246; Moses Oruaze Dickson, *'Party Autonomy and Justice in International Commercial Arbitration* (2017) 60 International Journal of Law and Management 114 – 134; Yifang Gao, *'A Brief Analysis of Party Autonomy in International Commercial Arbitration* (2021) 50 Advances in Social Science, Education and Humanities 123 – 127.
[72] Kanokanga & Kanokanga (n 48) 28 – 29.

Therefore, Section 29 of the ADR Act encapsulates the concept of party autonomy. It is a non–mandatory provision of the ADR Act in terms of which the parties have the right to agree on whether to conduct or waive the need for an arbitration management conference. This is evidenced by the words 'unless the parties otherwise decide' which appear in section 29(1) of the ADR Act.

As a general concept, section 29(1) of the ADR Act 'codifies' the right of the parties to agree on any matter of procedure or the conduct of the arbitration including procedure and evidence.[73] Matters of procedure include:

(a) the time and place for holding any part of the proceedings;[74]

(b) the questions that should be put to and answered by the parties and how the questions should be put; [75] and

(c) the documents to be provided by the parties and at what stage of the proceedings,[76] and the application or non-application of the strict rules of evidence as to admissibility, relevance or weight of any material sought to be tendered and how the material should be tendered.[77]

It is pertinent to note that, subject to the ADR Act, an arbitrator can conduct an arbitration in a manner that the arbitrator considers appropriate.[78]An arbitrator as a 'master of its own procedure'[79] in the event the parties do not agree, they could exercise their discretion to conduct an arbitral management conference.[80]

The words 'subject to' which appear in section 31(2) of the ADR Act which deals with the duties of an arbitrator, have been interpreted to mean 'except as curtailed by'.[81] Put differently, an arbitrator's discretion[82] in terms of section 31(2) of the ADR Act is 'curtailed by' or 'subject to' the rights of the parties to agree on any matter of procedure.[83]

5.0 CONCLUSION

An arbitration management conference is procedural. It does not delve into the substantive issues of a dispute, but it defines and shapes the entire arbitral process. Generally, the

[73] (n 40), s 31(3).
[74] Ibid, s 31(4)(a).
[75] Ibid, s 31(4)(b).
[76] Ibid, s 31(4)(c).
[77] Ibid, s 31(4)(d); This provision is similar to the Model Law, art 19(2).
[78] Ibid, s 31(2).
[79] Kanokanga & Kanokanga (n 48) 216.
[80] Act 789 (n 5), s 29(1).
[81] *Commissioner of Police v Wilson* 1981 ZLR 451 (A); *S v Pillay* 1995 (2) ZLR 313 (H).
[82] *Giya v Ribi Trading* 2014 (1) ZLR 103 (H) 109C – D; *Makonye v Ramodimoosi & Others* 2014 (1) ZLR 111 (H) 116.
[83] Act 789 (n 5), s 31(3).

arbitration management conference can be convened by the parties and or the arbitrator before exchanging documents in arbitration to agree on the arbitral roadmap.

It can be convened by conference call, video conference or in person, that is face-to-face. Thus, an arbitration management conference is not mandatory as the parties have autonomy to agree on any issues of procedure and evidence. However, as a matter of practice, one cannot conduct an arbitration without conducting a preliminary meeting to discuss the essential issues concerning the arbitration, including the exchange of documents, the language to be used, the law applicable, the venue of the arbitrator, the tentative dates and time for the hearing, the duration of the hearing, the arbitrator's remuneration, the form of the arbitral award and the deadline for the delivery of the award.

THE CURRENT LEGAL FRAMEWORK FOR SURROGACY IN GHANA AND THE INHERENT NEED FOR COMPREHENSIVE LEGISLATION ON SAME

Benedicta Fosuhene Agyen*

ABSTRACT

Procreation is crucial for the survival of any species. It refers to the production of offspring and is considered the primary reason for marriage in African societies. In Africa, once a woman is married, having children is expected of her. Her inability to do so after a few months of marriage can become a serious concern, potentially jeopardising her position in her matrimonial home. In addition, her husband may fall victim to the constant pressure from his family to bear children, which may cause him to take another wife or even divorce his wife. The shame and stigma of being tagged as barren could drive a woman to depression even though sometimes the woman may not be the cause of the couple's infertility. Couples in such situations could resort to adoption, however, most mothers-in-law and even the spouses themselves are not necessarily thrilled with this option in Africa. The aforesaid begs the question of what an African woman who is unable to get pregnant or carry a baby full-term can do to secure her position in her matrimonial home. One answer to this question is surrogacy. The purpose of this article, therefore, is to examine the current legal framework for surrogacy in Ghana, the loopholes that cause hesitation among Ghanaian women to adopt this method, and the inherent need for extensive laws on surrogacy in Ghana.

* BL Candidate (Ghana School of Law); LL.B, Kwame Nkrumah University of Science and Technology. I am grateful to Michael Fosu Agyen who gave me the idea of the subject matter and all who assisted with editing the initial manuscript.

1.0 INTRODUCTION

Assisted Reproductive Technology ("ART") is a term used to describe medical procedures that are designed to help individuals or couples achieve pregnancy. These procedures can include In Vitro Fertilisation (IVF), Intracytoplasmic Sperm Injection (ICSI), Intrafallopian Transfer and other techniques that are used to overcome fertility issues. ART has helped many people who otherwise may not have been able to start families, do so.[1] For women who have had hysterectomy, abnormal wombs, recurrent pregnancy loss and excessive health risks associated with pregnancy, surrogacy may seem like the next best option. The Collins English Dictionary[2] defines surrogacy as an arrangement by which a woman gives birth to a baby on behalf of someone who is physically unable to have babies herself and then gives the baby to that person. Emphasis must be placed on the last phrase in the aforementioned definition. Essentially, upon the birth of the child, the surrogate is required to give the baby to the intended parents and relinquish all rights or claims that she may have over the baby. Failure to comply with the aforesaid could lead to the institution of civil actions against the surrogate for breach of the surrogacy agreement.

There are two forms of surrogacy- gestational surrogacy and traditional surrogacy. Gestational surrogacy occurs when eggs from the intended mother are fertilised with sperm from the intended father through IVF, and the embryo is inserted into the womb of the surrogate mother. In essence, gestational surrogacy entails the use of the egg and sperm of the intended parents, which are eventually implanted into the surrogate.[3] This is illustrated in the case of *Johnson v Calvert*[4], where a surrogate mother called Anna Johnson sought custody of a child she carried on behalf of the Calverts. The courts ruled in favour of the Calverts on the basis that since it was a gestational surrogacy, the Calverts were the biological relations of the baby.

Traditional surrogacy, on the other hand, occurs where the egg of the surrogate mother is fertilised by the sperm of the intended father, either through sexual intercourse or IVF, thus, making the surrogate the biological mother of the child.[5] This is also illustrated in the *Baby M case*[6] where a custody dispute arose between a traditional surrogate mother and the intended parents. This case highlights the need for clarity and consensus in drafting surrogacy agreements.

Surrogacy has been in existence since time immemorial, with evidence of its use dating back to ancient times in the Bible. Surrogacy has been mentioned in various ancient texts, including the Bible. In fact, the story of Abraham and Sarah in Genesis chapter 16 is often

[1] Nova IVF Fertility, 'Best Fertility Clinic - Top Infertility Hospital/Centre in India: Nova IVF' <https://www.novaivffertility.com> Accessed 21 November 2023.
[2] Mark Forsyth, *The Collins English Dictionary* (12th edn, Harper Collins 2014).
[3] Carol A wheeler, 'Eight things you should know about gestational surrogacy' (Women & Infants, 21 March 2022) <https://fertility.womenandinfants.org/blog/gestational-surrogacy> accessed 21 November 2023.
[4] Johnson v Calvert 5 Cal.4th 84 [1993].
[5] Creative Family Connections, 'History of Surrogacy' https://www.creativefamilyconnections.com/blog/history-of-surrogacy accessed 21 November 2023.
[6] In re Baby M 537 A.2d 1227, 109 N.J, 02/03/1988.

cited as an example of traditional surrogacy. Particular reference is made to Genesis chapter 16:1-4, which details the story of Abraham and his wife Sarah, and the fact that traditional surrogacy occurred, when Sarah presented Hagar, her Egyptian maid servant, to her husband to be impregnated by him and eventually birth a child for him. Considering the Biblical traces of surrogacy, the stigma against the concept of surrogacy by "Ghana's Christian community" leaves much to be desired. This paper, thus, calls for comprehensive laws on surrogacy in Ghana.

2.0 GHANA'S CURRENT LEGAL FRAMEWORK ON SURROGACY

Surrogacy has a rich history and many interesting cases. This procedure has garnered much attention and praise since its discovery several years ago. As a developing nation that has been independent since the 6th of March 1957, Ghana ought to embrace the concept of surrogacy. In Ghana, citizens have the freedom to contract and contracts are enforceable. However, with the absence of comprehensive legislation regulating surrogacy in Ghana, a surrogacy agreement may leave a lot to be desired.

It can be argued that the passage of the Registration of Births and Deaths Act, 2020 (Act 1027) indicates that Ghana is gearing towards accepting surrogacy as a method of ART. The Act defines assisted reproductive birth as 'the use of modern technological advancement including fertility medication, artificial insemination, and in vitro fertilisation to cause reproduction and childbirth other than by the orthodox means.'[7] Surrogacy is also defined as

> an arrangement where an embryo formed from an egg and sperm of persons other than a surrogate mother and the partner or husband of that surrogate mother is implanted into the surrogate mother, or an arrangement where a gamete from a person other than the partner or husband of the surrogate mother is introduced into the surrogate mother to fertilise the egg of that surrogate mother, to enable the surrogate mother carry the foetus for the period of the pregnancy and give birth at the end of the period on behalf of another woman or the intended parent.[8]

The Interpretation section of Act 1027 also defines a surrogate mother as 'a woman who has accepted under a surrogacy agreement to carry a foetus for the period of the pregnancy and give birth to a baby at the end of the period on behalf of another woman or the intended parent'.[9] The definitions and provisions on surrogacy under this Act show that Ghana is now willing to give legal backing to the use of ART, and Ghanaians can enter into surrogacy agreements as provided for under Act 1027. Notwithstanding all the positive aspects of Act 1027, the law on surrogacy seems vague and insufficient. Section 22 of Act 1027[10] enables an

[7] Registration of Births and Deaths Act, 2020 (Act 1027), s 48.
[8] Ibid.
[9] Ibid.
[10] Ibid, s 22.

application for a pre-birth parental order.[11] Specifically, section 22(2) provides that within twelve (12) weeks after an embryo is introduced into a surrogate mother, the intended parent must apply to the high court for the grant of a pre-birth parental order to allow the intended parent or surrogate mother or both to be named as the parent of the child born through surrogacy, provided that the birth of the child occurs within twenty-eight (28) weeks of the order of the High Court. The consequence of this provision is that in the absence of such an order, the surrogate mother will be deemed as the mother of the child. However, this does not automatically imply that an intended parent would lose parental rights over the child, to the surrogate mother. The law allows an intended parent or surrogate mother to make an application for the grant of a post-birth parental order or a substitute parentage order after the birth of the child through surrogacy.

From the provisions of Act 1027, there's a clear indication that the law seeks to protect the rights of both the surrogate mother and the intended parents, but this is not sufficient. The Act is silent on issues concerning compensation of surrogates, qualifications of surrogates, and many more. The silence of the Act on these very important issues has made it quite difficult for Ghanaian women who are unable to carry a child full-term, or who for other health reasons cannot bear children to go in for this mode of conception.

3.0 REASONS WHY THERE IS AN INHERENT NEED FOR COMPREHENSIVE LEGISLATION ON SURROGACY IN GHANA

Ghana is a developing nation and must adopt a more progressive approach in terms of legislation. Should Ghanaian courts be confronted with a case concerning surrogacy, determining the case may be difficult due to the absence of comprehensive legislation on the subject matter. Such legislation will go a long way to help women who are unable to conceive or carry a pregnancy full-term due to health issues, find solace in allowing other women to carry their children for them with little to no risks. There must be express provisions in the law on who qualifies to be a surrogate mother. Act 1027, merely defines the process of surrogacy and who a surrogate mother is, but does not present the qualifications that one must have to serve as a surrogate mother.

In my considered view, a surrogate mother must have capacity - age. Surrogacy agreements are also contracts, and one of the essentials of a valid contract is that the parties must have the capacity to contract. In Ghana, despite the existence of statutes such as the Children's Act[12] which defines a child as a person below the age of 18 years, the age for entering into contracts is set at 21 years. Thus, comprehensive legislation on surrogacy in Ghana must set the age for persons who wish to enter into surrogacy agreements at 21 years or above.

The Children's Act, 1998, Act 560 enunciates what has become generally known as the Welfare Principle**.** The principle is simply that 'the best interest of the child, shall be

[11] Ibid, s 22.
[12] Children's Act, 1998 (Act 560).

paramount in any matter concerning a child.'[13] Prohibiting persons who suffer from terminal illnesses or illnesses that may be transferable to the foetus, aligns with the welfare principle. Furthermore, a mandatory requirement that surrogate mothers should provide full disclosure of their health history is of utmost importance to ensure the health and well-being of the foetus as it develops in the womb of the surrogate mother.

In light of the aforementioned, prohibiting persons who are of unsound mind from serving as surrogate mothers is also essential, subject to some exceptions. Section 1(2) of the Wills Act[14] provides that persons suffering from insanity cannot make a will. However, the case of *Cartwright v Cartwright*[15] is an exception. The court held in that case that a mentally unsound person can make a will during a lucid moment as long as he/she understands the nature and effect of the will. This is similar to the rule in Contract law, which provides that a contract entered into by a mentally incompetent person during a lucid interval is valid, thus, binding on the party. This is supported by the case of *Selby v Jackson*.[16] Another common concern in the law of contract, pertaining to mentally unsound persons, is whether they are capable of understanding the nature and effect of the contract they have entered into. A comprehensive legislation on surrogacy must address similar concerns as surrogacy agreements are essentially contracts. Furthermore, Act 560 provides that no child shall be discriminated against 'on grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth or other status.'[17] The phrase 'other status' should be interpreted to include the method by which the child was conceived (ART), to ensure that the enactment of more concise legislation to regulate surrogacy connotes not only acceptance of this mode of reproduction but also axes any form of discrimination or disdain against children born via this method.

The next point of consideration is that extensive legislation on surrogacy must contain an express provision that the surrogate mother must not be someone who is married. Ghana is a multi-cultural country with customs and beliefs dating back to ancient times. For example, in some Northern parts of the country, customs and traditions dictate that if a married woman is impregnated by another man, the child is deemed to be that of the woman's husband. Surrogacy can be gestational or traditional, and either way, both forms of surrogacy entail impregnating the surrogate mother. Looking at how important customs and traditions are to the Ghanaian society, if married persons are allowed to be surrogates, there may be issues concerning the heritage of the child. In some extreme situations, accusations of adultery may be levelled against these married surrogates. Therefore, prohibiting married persons from serving as surrogates would prevent custodial battles over children born through surrogacy.

[13] Ibid, s 2(1).
[14] Wills Act, 1971, (Act 360) s 1(2).
[15] Cartwright v Cartwright [1775-1802] ALL ER 476
[16] Selby v Jackson (1844) 6 Beav 192.
[17] Children's Act (n 12), s 3.

Assessing the situation from another tangent, if a married woman is allowed to serve as a surrogate mother to a married couple who cannot have children themselves, it would be an awkward situation.

The element of consent is crucial to a surrogacy agreement. The Merriam-Webster Dictionary[18] defines consent as 'to give assent or approval.' Consent exists through various aspects of the Law –there is the element of consent in rape cases, in cases of battery under the law of torts, in marriage contracts, among others. Consent may be express or implied, and the absence of it renders an agreement void. The Criminal Offences Act provides some instances under which consent is void.[19]

First, consent is void if given by a person under 12 years of age or if given by a person suffering from insanity or immaturity or if given under intoxication, so that the person is unable to understand the nature and consequence of the act to which the consent is given.[20] Essentially, persons below 18 years should not serve as surrogate mothers and the consent of a surrogate mother should be obtained while she is in a clear and stable state of mind. Hence, any form of consent obtained via intoxication or when the person is in such a state that she is incapable of understanding the nature of the act she consents to, is void.

Additionally, consent is void if it is obtained by or under the exercise of official, parental or any other authority and this authority is not exercised in good faith.[21] For example, a mother compelling her daughter to agree to act as a surrogate mother against her daughter's wishes, to obtain the financial benefits associated with the procedure, would invalidate such consent.

Again, consent is void if it is obtained by deceit, duress or undue influence.[22] This buttresses the fact that consent must be freely given, and the absence of the exercise of such freedom invalidates the said agreement.

The issue of consent can be tricky, as a person can initially consent to do something, but later claim that he or she did not consent. It is my humble submission that additional laws on surrogacy must be passed, particularly, for the requirement of a 'consent clause' in all surrogacy agreements. The said consent clause should be signed by the surrogate mother and the intending parents to avoid future disputes.

Also, remuneration should be considered in the promulgation of comprehensive laws on surrogacy in Ghana. Surrogacy can either be commercial or altruistic. As regards commercial surrogacy, the surrogate mother is compensated for her services and her medical expenses are catered for. This means that the intended parents would not only pay a lump sum to the surrogate mother for carrying their baby, but they would also be responsible for her medical

[18] Merriam-Webster, Merriam Webster's Collegiate Dictionary (11th edn, Merriam-Webster Inc 2022).
[19] Criminal Offences Act, 1960 (Act 29), S 14.
[20] Ibid, s 14(a).
[21] Ibid, s 14(c).
[22] Ibid, s 14(f).

bills. In contrast, altruistic surrogacy occurs when a surrogate mother volunteers to carry a baby for the intended parents without any monetary compensation.[23]

Carrying a pregnancy is no mean feat and women in such situations stand at the crossroads of life and death. Additionally, the emotional and mental turmoil associated with pregnancy, the distress, back pains and even post-partum depression must all be considered in surrogacy agreements. Some critics of commercial surrogacy argue that it reduces human life to a mere business transaction, and subjects vulnerable women to exploitation. However, giving the surrogate mother no monetary compensation for her services seems unfair. The addition of a range of reasonable amounts of money to be paid to the surrogate mother in further laws on the subject matter, could aid in curbing the exploitation of the surrogate mother by the intended parents and vice versa. This notwithstanding, altruistic surrogacy must also be encouraged and regulated, especially among close friends and family.

Ultimately, comprehensive legislation on surrogacy could also include crimes related to surrogacy and their corresponding penalties. The Constitution provides that 'no person shall be convicted of a criminal offence unless the offence is defined and punishment for it is prescribed in a written law.'[24] Crimes related to surrogacy on the part of the surrogate mother could entail providing false health history, absconding with the baby, and concealing a miscarriage to extort money from the intended parents, inter alia. Comprehensive legislation on surrogacy could include such offences and impose penalties. This would go a long way in protecting the interests of the intended parents and those of their unborn children. Provisions on the punishment to be imposed on the intended parents should they abandon the surrogate mother during the pregnancy or after the birth of the child, as well as failure on the part of the intended parents to pay the surrogate mother for her services must also be included. In addition, the surrogate mother is a human being so her autonomy over her own body must be protected.

There must also be provisions protecting the surrogate mother in instances where the intended parents seek to terminate the pregnancy after the surrogacy procedure is set in motion. Being a parent is an arduous task, and this could prompt people to change their minds about having or even wanting children. It is proposed that a comprehensive legislation on surrogacy in Ghana could indicate that termination of the pregnancy can only be possible with the consent of the surrogate mother and that the pregnancy will not be terminated despite the desires of the intended parents if doing so would pose serious health risks to the surrogate mother, such as haemorrhage or uterine rapture. Additionally, the intended parents must pay an additional amount of money to further compensate the surrogate mother for time wastage, energy and effort, once the pregnancy is terminated.

[23] Brilliant Beginnings, 'What Is The Difference Between Altruistic Surrogacy And Commercial Surrogacy' <https://brilliantbeginnings.co.uk/what-is-the-difference-between-altruistic-surrogacy-and-commercial-surrogacy/> accessed 21 November 2023.
[24] 1992 Constitution of Ghana, art 19(11).

There could also be provisions for dispute resolution between the parties to a surrogacy agreement. Alternative Dispute Resolution, which includes arbitration, mediation and customary arbitration, as provided for under Ghana's ADR Act[25] is recommended.

4.0 CONCLUSION

In conclusion, ART is here to stay, and it is only appropriate that a democratic nation such as Ghana, which prioritises the rights of women and children, embraces the technology fully. Although the current situation requires extensive laws to regulate such a delicate subject matter, a lot of other factors require consideration. The ordinary Ghanaian woman who is unable to conceive or carry a child full-term could explore such potent methods which when properly regulated, could enable her experience and relish the joys of motherhood. The time has thus come for comprehensive legislation on surrogacy to be enacted in the Republic of Ghana.

[25] Alternative Dispute Resolution Act, 2010 (Act 798).

WHISPERS OF AN ERRANT GAVEL: UNRAVELLING THE DENIAL OF JUSTICE IN *EDMUND ADDO V THE REPUBLIC*

Frederick Agaaya Adongo*

ABSTRACT

The Supreme Court of Ghana recently decided a case, Edmund Addo v The Republic, in which it held that ongoing criminal trials are not terminated by the repeal or revocation of the crime-creating enactments, even if the repealing enactments fail to provide for the saving of same.[1] The decision was justified on the general saving provisions in the Interpretation Act, 2009 (Act 792). That decision has brought to light a critical issue regarding the alignment of those saving provisions with the principle of legality and the presumption of innocence which undergird the criminal justice system. By analysing established precedents on the issue, this brief note argues that the meaning placed on the saving provisions in the Interpretation Act, 2009 ("Act 792") by the Supreme Court contravenes these principles and precedent, thereby creating tension between the application of the general saving provisions in the Act and the constitutional rights of accused persons.

* Bachelor of Laws (LL.B), University of Ghana, Legon (2021); BL Candidate, Ghana School of Law, Accra.
[1] Criminal Appeal No. J3/04/2022 dated 31st May, 2023 (Unreported).

1.0 INTRODUCTION

The principle of legality under the Criminal law and the presumption of innocence until guilt is proved or pleaded are fundamental bedrocks of modern Criminal Justice systems. They aim at ensuring that individuals accused of criminal wrongdoing are treated fairly and justly. On its part, the principle of legality ensures that an individual is not penalised for any prohibited act or omission, unless he/she was warned in clear terms in a written law promulgated in advance of the doing of the act or omission thereof, that that act or omission is prohibited. The presumption of innocence on the other hand, seeks to maintain the status of individuals, protecting their innocence until guilt is proved or pleaded.

However, an interesting legal quandary arises when we consider the interaction between ongoing criminal trials and the provisions of Act 792 that pertain to the effect of the repeal or revocation of enactments. This brief note examines the applicability of the general saving provisions in Act 792, in the context of ongoing criminal trials. It argues that, the saving provisions in Act 792 do not affect individuals undergoing criminal trials, on account of the principle of legality and the presumption of innocence.

The aim of this paper, therefore, is to demonstrate that the case of *Edmund Addo v The Republic* which was based on the assumption that the saving provisions in Act 792 could be applied to save ongoing criminal trials, was incorrectly decided by the Supreme Court.

The argument is substantiated by two reasons. Firstly, the decision is nakedly at odds with the established precedent which generally binds the Supreme Court, unless the Court departs from it if it is right to do so. Secondly, persons undergoing criminal trials are presumed innocent until they plead guilty or their guilt is proved in accordance with the requisite standard of proof applicable in criminal law. Accordingly, to talk of trying a person for a criminal offence under a repealed or revoked enactment on the loose ground of an offence having been 'committed against the enactment that is repealed or revoked', as the interpretation given by the Court to one of the provisions relied on by it suggests, is of no moment. Its real effect is to impute guilt on a person even before he pleads guilty, or his guilt is proved. On the premise of established precedents and the presumption of innocence, therefore, the repeal or revocation of a crime-creating law without saving ongoing criminal trials, when the accused is yet to plead or be found guilty means, there would be no written law to justify conviction.

2.0 FACTS OF THE CASE

The appellant was undergoing trial at the High Court on one count of defilement, contrary to section 101(2) of the Criminal Offences Act, 1960 (Act 29) and three counts of child pornography, contrary to section 136 of the Electronic Transactions Act, 2007 (Act 772). During the pendency of the trial, the Cybersecurity Act, 2020 (Act 1018) was enacted. Section

98 of the Cybersecurity Act repealed section 136 of Act 772, saving only 'notices, orders, directions, appointments or instruments issued or made under the repealed provisions'.[2]

The accused then applied to the trial High Court without success to have the three counts of child pornography struck out since the law under which he was charged with those counts, had been repealed without saving ongoing criminal trials which were commenced pursuant to the repealed provision. He appealed to the Court of Appeal and lost. Dissatisfied, he further appealed to the Supreme Court.

3.0 DECISION OF THE SUPREME COURT

The Republic justified the continued prosecution of the accused on the three counts of child pornography with section 34(1) of Act 792, which provides in respect of the effect of repeals and revocations:

> Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,
>
> (a) revive an enactment or a thing not in force or existing at the time at which the repeal or revocation takes effect;
> (b) affect the previous operation of the enactment that is repealed or revoked, or anything duly done or suffered under the enactment;
> (c) affect a right, a privilege, an obligation or a liability acquired, accrued or incurred under the enactment that is repealed or revoked;
> (d) *affect an offence committed against the enactment that is repealed or revoked, or a penalty or a forfeiture or a punishment incurred in respect of that offence; or*
> (e) *affect an investigation, a legal proceeding or a remedy in respect of a right, a privilege, an obligation, a liability, a penalty, a forfeiture or a punishment and the investigation, legal proceeding or remedy may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed or revoked.* [Emphasis added]

The appellant, on the other hand, argued that the repeal of section 136 of Act 772 essentially obliterated that section as if it were never enacted, and based on the principle of legality which is embedded in the fair trial rules in the Constitution, there was no written law under which he could have been prosecuted for the three counts of child pornography.

The Supreme Court was, however, convinced that paragraphs (d) and (e) of section 34(1) as reproduced above sufficiently saved the repealed provisions for the purpose of ongoing criminal trials, including the trial of the appellant. Hence, the continuation of the trial of the

[2] Cybersecurity Act, 2020 (Act 1018), s 98(2).

appellant did not contravene the principle of legality as enshrined in the Constitution. In the exact words of the Court:

> [A]s far as the prosecution of the accused person is concerned, the law regards section 136 of Act 772 as not repealed and it continues to serve the purpose of the law under which the accused is charged notwithstanding the repeal. In short, by virtue of section 34(1)(d) and (e) of the Interpretation Act, 2008 (sic), Act 792, the written law, that is, section 136 of the Electronic Transactions Act, 2008 (sic), Act 772 under which the accused was charged and his prosecution began, shall continue to be the written law under which the accused shall continue to be prosecuted and if convicted (sic) punished. There is no missing link here and article 19(11) of the 1992 Constitution is thereby observed.[3]

This decision immediately brings to the fore questions regarding its appropriateness, in view of the principle of legality, established precedent and the presumption of innocence. It is these questions that are to be explored in this paper.

4.0 THE PRINCIPLE OF LEGALITY

The principle of legality, one of the fundamental pillars of the criminal justice system, requires that individuals are informed in clear terms well in advance of the commission of a prohibited act or omission that, the said act or omission is prohibited and carries with it criminal sanctions. By this principle, a person may only be convicted for an act or omission if, prior to the commission of the act or omission, there existed a duly enacted law that explicitly declared the specific act or omission as a punishable offence, while prescribing the corresponding punishment for such offence.

This time-honoured principle, encapsulated in the Latin maxim, *nullum crimen sine praevia lege*, finds expression in article 19(5) of the 1992 Constitution: '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.' This means that a person may be charged with or held to be guilty of a criminal offence only if at the time the act or omission allegedly constituting the offence took place there was a written law that prohibited the said act or omission.

Not only does the principle of legality concern itself with ensuring the presence of a duly enacted law prohibiting or requiring a certain conduct, it requires that at the time of conviction, the law creating the crime under which a person is being prosecuted must still be in force for any conviction to be lawful. This latter leg of the principle of legality, expressed in Latin as *nulla poena sine praevia lege*, is given constitutional blessing in article 19(11) of the 1992 Constitution: '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.' This constitutional provision, the

[3] *Edmund Addo* (n 1) 14.

Supreme Court has held, is far from requiring a semantic signification of each word used in a crime-creating provision.[4] What is required is that there be a written law that spells out in clear and unmistakable language the prohibited act or omission, rather than a lexicon of the words used in the crime-creating enactment.

It is noteworthy that whereas article 19(5) of the 1992 Constitution concerns itself with the time that the act or omission allegedly constituting an offence occurred, article 19(11) of same focuses on the time of conviction. This is made clear by the use of the operative word "is", rather than "was" in article 19(11). The use of the word "is' by the framers of the Constitution is not accidental. It must have been deliberate. Linguistically, the word "is", a present tense, suggests that something is in existence at the point of reference.[5] Accordingly, at the time a person is being convicted of an offence, there must be in the statute books a written law that prohibits the doing of that particular act or omission constituting the offence and such law must be such as to clearly delineate what is prohibited from what is not.

Synthesising clauses (5) and (11) of article 19, it is more than clear that at the time of the conviction of a person for a criminal offence, two things need be met. First, the person must have been charged with a criminal offence under a law which was in force at the time she did the act or omission said to be prohibited. And secondly, the conviction of the person on that charge can only be sustained if at the time of conviction, the law under which she was charged is still in force. Accordingly, if a person was charged with an offence existing in the criminal statutes, and before conviction that crime-creating law is repealed without any saving provision in the repealing enactment that saves ongoing criminal trials under that repealed enactment, the accused ought automatically to be discharged.

5.0 EARLIER PRECEDENT

The Supreme Court had occasion in the case of *British Airways and Another v Attorney-General*[6] to consider the effect of certain provisions in the repealed Interpretation Act, 1960 (CA 4) which are *in pari materia* with those in section 34 of Act 792.

In *British Airways*, the plaintiffs were undergoing criminal trial at the Circuit Tribunal for allegedly committing certain offences contrary to the External Companies and Diplomatic Missions (Acquisition or Rental of Immovable Property) Law, 1986 (PNDCL 150). Before the institution of the action at the Supreme Court, PNDCL 150 was repealed by the Statute Law Revision Act, 1996 (Act 516). Even after the repeal of PNDCL 150, the plaintiffs were still being tried by the Circuit Tribunal for the charged offences. They, accordingly, instituted an action at the Supreme Court for, among others, a declaration that PNDCL 150 was inconsistent with certain provisions of the Constitution and therefore unconstitutional; and more importantly

[4] *Tsikata v Republic* [2003-2004] 2 SCGLR 1068.
[5] See *British Airways* (n 6) 70.
[6] *British Airways and Another v Attorney-General* [1997-1998] 1 GLR 55.

that the prosecution of the plaintiffs by the defendant under the repealed PNDCL 150 was unlawful.

While holding that the original jurisdiction of the Supreme Court could not be invoked to declare unconstitutional a repealed law, the Court proceeded to determine whether the continued prosecution of the plaintiffs under the repealed law was unlawful.

The Attorney-General sought to support the continued trial of the plaintiffs with section 8(1), particularly paragraph (e), of the then Interpretation Act, 1960 (CA 4). That paragraph provided for the saving of 'any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment', adding that 'any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as, if the enactment had not been repealed or revoked.'[7]

The Supreme Court did admit, quite frankly, that in the scheme of things, when a law is repealed, the repealing enactment may repeal entirely an offence created thereunder and the punishment thereof without saving. On the other hand, the repealing enactment or some other enactment may save an offence and the corresponding punishment under the repealed enactment.[8] In the former case, the Court noted that there would be no existing law to support the continued trial, conviction and punishment of a person pursuant to that repealed law. However, the Court observed that in the latter case, it would be in perfect keeping with the fitness of things to continue investigation or prosecution under the repealed enactment, since the repealing enactment or some other law saved the repealed enactment for the purpose of those ongoing investigations or prosecutions.

Notwithstanding this observation, the Court was quick to note that article 1(2)[9] of the 1992 Constitution extols the Constitution above every other law, including enactments of the legislature. Thus, although there was a saving provision in section 8(1)(e) of CA 4, that saving provision was subordinate to the constitutional provision respecting the principle of legality, namely, article 19(5) and (11). Hence, due to article 19(5) and (11) of the 1992 Constitution, section 8(1) of CA 4 did not apply to pending criminal trials. In other words, the Court held that it is unconstitutional to convict any person of a criminal offence unless there exists a written law that clearly defines the offence and stipulates appropriate sanctions as mandated by article 19(11) of the Constitution. Thus, the repeal of PNDCL 150 meant that the pending trial against the plaintiffs had to abate.

[7] Interpretation Act, 1960 (CA 4), s 8(1)(e).
[8] The word "offence" as used here may be construed as connoting not merely a criminal offence, since the court proceeded to hold that the general saving provision in CA 4 did not apply to criminal trials.
[9] Article 1(2) of the Constitution provides: "The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution should, to the extent of the inconsistency, be void."

It is worth pointing out that in this case, the Court did not so much say that the construction of section 8(1) of CA 4 was not enough to save ongoing criminal trials. Rather, in the opinion of the court, the said section, though a sufficient saving provision, was unconstitutional to the extent that it was sought to be applied in criminal trials. This means, in essence, that it was not very much a question of the construction of the saving provision that led the Court to its conclusion, but the question of the compatibility of the saving provisions with the Constitution.

Notably, among the three judges who authored opinions in the case, only Atuguba JSC, went beyond the question of the constitutionality of section 8 of CA 4 and considered the import of the various saving provisions in that section and concluded that they did not apply to the plaintiffs. This is what he had to say:

> I have considered closely the provisions of section 8(1) of the Interpretation Act, 1960 (CA 4) and have come to the conclusion that they cannot save the criminal proceedings in the Circuit Tribunal, Accra against the plaintiffs. The pertinent provisions thereof, namely *section 8(1)(c), (d) and (e) relate to liability, penalty, punishment etc but each of them is governed by the words "acquired, accrued or incurred thereunder," respectively. [...]* Since the proceedings in this case show that the plaintiffs have not yet been convicted of their charges, they have incurred no liability or punishment which can be enforced in any legal proceeding or remedy in respect thereof.[10]

Based on this observation, he concluded that where an accused person has already been convicted but not yet sentenced and the crime-creating law is repealed, such a person may be sentenced based on the repealed law because a criminal liability had already been incurred, by virtue of the fact that the accused was found guilty before the repeal of the law creating the offence. If, on the other hand, the accused was merely undergoing trial without any pronouncement made as to guilt, the trial must be terminated.

Bamford Addo JSC who wrote the lead opinion and Acquah JSC in his concurring opinion bluntly regarded the saving provisions in section 8 as unconstitutional to the extent of their applicability to criminal trials. Hear what Bamford Addo JSC said:

> ... in view of article 19 (11) of the Constitution, 1992, section 8 of CA 4 is inapplicable to the criminal cases pending against the plaintiffs. It is unconstitutional today to convict or punish any person unless a written law defines the offence or provides sanctions for same as required under article 19(11) of the Constitution, 1992, and the criminal case against the plaintiffs falls within the prohibition in article 19(11). For this reason, the provision of

[10] British Airways (n 6) 73.

> section *8(e) (sic)* of CA 4 is inapplicable to the criminal matters pending against the plaintiffs at the circuit tribunal.[11]

Hear also the conclusion of Acquah JSC:

> Now, article 19(5) and (11) by virtue of article 1(2) of the same Constitution, 1992, overrides section 8 (1)(e) of CA 4 in respect of criminal investigations and trials. The two formulations, therefore represent the current legal position, and article 19(11) of the Constitution, 1992 applies to the pending criminal trial of the plaintiffs at the Circuit Tribunal, Accra.[12]

These conclusions by the learned Justices of the Court, imply that whatever the meaning of the saving provisions in CA 4 were, those provisions were inapplicable to save a criminal trial due to article 19(5) and (11). Put differently, the saving provisions in CA 4, even if the meaning of those provisions was enough to save an ongoing criminal trial, cannot save an ongoing criminal trial because they offend article 19(5) and (11) of the Constitution.

For clarity, the Supreme Court noted that section 8(1) was unconstitutional, not in every respect, but to the extent that it relates to pending criminal trials. Thus, the saving provisions therein remained applicable to pending civil matters.

The Court also intimated that the saving provisions would have had a different effect on criminal cases if they were embodied in the repealing enactment rather than CA 4. Basically, the Court seemed to suggest that, had the saving provisions been in the repealing enactment, it would have been sufficient to save the criminal trial against the plaintiffs. This is found in the words of Bamford Addo JSC who, after pronouncing that section 8 of CA 4 was unconstitutional, noted thus:

> It would have been a different matter if the plaintiffs had been convicted before the repeal of PNDCL 150 by Act 516 or *if Act 516 had saved offences committed before the repeal of PNDCL 150, but Act 516 was silent on this*, it merely repealed PNDCL 150, and consequently the provision of Article 19(11) of the Constitution, 1992 came into play in respect of the criminal case pending against the plaintiffs.[13] [Emphasis added]

It is doubtful, as will be demonstrated subsequently, whether an offence can be said to have been committed against an enactment when a trial is still pending. However, taking the expression 'offences committed before the repeal of PNDCL 150' lightly, the Court could be understood as saying that the effect would have been different if the repealing enactment rather than an Interpretation Act had saved ongoing criminal trials which were based on the repealed enactment.

[11] Ibid, 64.
[12] Ibid, 71.
[13] Ibid, 64.

In the case of *Republic v High Court, Accra; Ex Parte Environ Solutions and Others (Dannex Limited and Others, Interested Parties)*,[14] the Supreme Court affirmed the position taken by it in the *British Airways* case. Therein, it noted essentially that, had the Supreme Court sanctioned the continuation of the trial of the plaintiffs in the *British Airways* case, such endorsement would, no doubt, have amounted to a manifest constitutional sin.

It is true that in *Ex Parte Environ Solutions*, the Court conceded that a repealed law does not lose its efficacy in every respect. Even so, the Court did take cognisance of the fact that the decision in *British Airways* went the way it did because that case 'was in respect of a criminal matter'.[15] This thereby confirms the recognition by the Court of the precedent it had set in *British Airways* —that the saving provisions in CA 4 are unconstitutional in respect of criminal matters.

6.0 DIVERGING STEPS: ANALYSING THE KEY ERRORS OF THE SUPREME COURT IN *EDMUND ADDO*

As noted above, the Supreme Court, in *Edmund Addo*, was convinced that paragraphs (d) and (e) in particular, of section 34(1) sufficiently saved the law under which the accused was being tried. Examined critically, however, the Supreme Court appeared to have been in the wrong in its conclusion.

First, the Court disregarded the precedent set by it in *British Airways*. In so doing, it made an unconvincing attempt to distinguish the *Edmund Addo* case from the earlier precedent in order to justify its position.

Secondly, the decision of the Court was partly based on a mistaken conception of section 34(1)(d) of Act 792. The presence of the general saving provision in that section so obscured the mental vision of the Court as to blind it to the real import of the said section. Hence, it inferentially predicated its decision on the false premise that merely being charged with an offence under an enactment is the equivalent of having committed an offence against that enactment. It is in this respect that the decision of the Court offends the presumption of innocence.

6.1 Disregard of Precedent

The Supreme Court in the *British Airways* case spilled a lot of intellectual ink examining the import of the saving provisions in CA 4 in view of article 19(11) of the 1992 Constitution in particular. It came to the conclusion that the general saving provision in CA 4 that was relied on by the Attorney-General is inapplicable in criminal cases, due to the principle of legality in article 19(11) of the Constitution.

In *Edmund Addo*, rather than departing from the precedent set in the *British Airways* case if there was the need for it, the Supreme Court resorted to distinguishing precedents. An

[14] [2019-2020] 1 SCLRG 1.
[15] Ibid, 45.

examination of the *British Airways* case and the case under review reveals that, the Supreme failed to consider the precedential worth of the former case in attempting to distinguish the latter from it. In the process, it succeeded in chastising the precedential value of the *British Airways* case into irrelevance, without any substantial justification.

In *Edmund Addo*, counsel for the appellant sought solace in the ratio of the Court in the *British Airways* case. He noted that it was on all fours with the case under review. The Supreme Court chastised counsel as having committed the fallacy of false equivalences by comparing the *British Airways* case with the case under review, noting that 'the then Interpretation Act, CA 4 (under which the *British Airways* case was decided), unlike the Interpretation Act, 2008 (sic), Act 792, did not have a saving clause like section 34 of Act 792.'[16]

This claim by the Court—that CA 4 did not have a saving clause like section 34 of Act 792—is quite misleading. Taken by itself, the Court's assertion gives the unmistakable impression that there was no saving provision at all in CA 4. But plainly there was, which makes the statement palpably incorrect. Treated lightly, that assertion may also be regarded as meaning that the saving provisions under CA 4 were materially different from those under Act 792. The latter seemed to have been more likely what the Court meant to say, although its choice of words rather betrayed its intention. Proceeding on the latter—rather charitable—construction of that statement of the Court, it is pertinent to consider whether there were really any significant differences between the saving provisions under CA 4 and those under Act 792.

It is important to note that in the *British Airways case*, the provision in CA 4, which was particularly relied on by the Attorney-General was paragraph (e) of section 8(1). That paragraph has been repeated substantially in paragraph (e) of section 34(1) of Act 792. To ensure ease in comparison, the paragraphs are reproduced below. Section 8(1)(e) of CA 4 provided:

> The repeal or revocation of an enactment shall not—
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as, if the enactment had not been repealed or revoked.

Section 34(1)(e) of Act 792, on the other hand, provided thus:

> Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,

[16] *Edmund Addo* (n 1) 15.

> (e)affect an investigation, a legal proceeding or a remedy in respect of a right, a privilege, an obligation, a liability, a penalty, a forfeiture or a punishment and the investigation, legal proceeding or remedy may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed or revoked.

It would be observed that the only significant differences between the provision in CA 4 and that in Act 792 are the reformulation of the chapeau of the provision and the qualification of the nouns with some articles in the new formulation. The change in the chapeau in Act 792, though significant, does not greatly alter anything that was in CA 4, save the addition of a caveat excepting the provisions in the various ensuing paragraphs from instances where it is expressly provided to the contrary in the section. Aside the chapeau, paragraph (e) of CA 4 is repeated nearly word for word in paragraph (e) of Act 792, except for the qualification of the nouns in the provision with the articles "a', "an" and "the", where applicable.

Was the Supreme Court implying that the reformulation of the chapeau and the addition of the articles "a", "an" and "the" in the new Act was what made the saving provision in paragraph (e) of Act 792 different from paragraph (e) of CA 4? It may be worth pointing out that whereas *British Airways* was decided under CA 4, *Ex Parte Environ Solutions* was decided under Act 792. In endorsing *British Airways* in the more recent case of *Ex Parte Environ Solutions*, the Court did not think that any significant difference exists between the saving provisions in CA 4 and those in Act 792.

The question that may be on the lips of many is this: was the Supreme Court departing from the earlier precedent it set in *British Airways*, which was confirmed in *Ex Parte Environ Solutions*? It is a truism that the Supreme Court is constitutionally sanctioned to 'depart from a previous decision when it appears to it right to do so'; even so, the Court is enjoined to '[treat] its own previous decisions as normally binding'.[17] In fidelity to the language of the Constitution, the Supreme Court has expressed the view that it will only depart from its previous decisions in very genuine circumstances where the need to do justice so demands.[18] Hence, the Court's decisions are generally binding, unless the Court departs from any decision 'when a (previous) decision is shown to be manifestly wrong or (the Court is) faced with different approaches of the Court to the resolution of a particular problem.'[19] In departing from its previous decision, the Court must explicitly say so and not merely render a decision that is nakedly irreconcilable with the previous one.[20]

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[17] 1992 Constitution, art129(3).
[18] *Ogyeadom Obranu Kwesi Atta VI v Ghana Telecommunications Co. Ltd. and Another* [2020] GHASC 16, 11.
[19] Ibid, 14.
[20] Raymond A Atuguba, *The New Constitutional and Administrative Law of Ghana: From the Garden of Eden to 2022* (University of Ghana Press, 2022) 326.

A keener look at the decision in *British Airways* raises pertinent related questions and potential logical pitfalls which the Court may have considered in *Edmund Addo* and perhaps departed from the former, if it was satisfied that it was in the wrong in the earlier instance.

For instance, would the position of the Court regarding the saving provisions in section 8 of CA 8 and their impact on criminal trials have been the same if the saving provision was in the repealing enactment rather than in the Interpretation Act? Indeed, the Court did intimate that a saving provision may be either in the repealing enactment or some other enactment, implying that a saving provision in a repealing enactment has the same worth as that in an Interpretation Act. But in another breadth, the Court remarked that if the saving provision was in the repealing enactment, it would have sufficiently saved the ongoing criminal trial of the plaintiffs. Why cannot a saving provision in an Interpretation Act sufficiently save an ongoing criminal trial but a saving clause in a repealing enactment can? Is it not too simplistic and hairsplitting to treat a saving provision in a repealing enactment as being weightier than that in an Interpretation Act? Yet that is the very thing that is discernible from the ratio of *British Airways* case!

It is also hard to understand how a saving provision—whether in an Interpretation Act or a repealing enactment—cannot save a criminal trial initiated under a repealed enactment. It is not difficult to admit that a repeal with saving means a repeal with specified conditionalities. Granted that it is so, why should not the specification of conditionalities—that an ongoing criminal trial is to be saved despite the repeal of an enactment—be treated as having saved the repealed law for the purpose of that ongoing trial? Why should not the saved law be a sufficient written law to meet the constitutional criteria in article 19(11)? What justification is there, restricting the lawmaker from repealing an enactment to a certain extent, while saving it in a certain respect and for particular purposes? After all, an enactment that is repealed is said to be repealed only to the extent to which it is so declared to cease to have effect.[21] In the *British Airways* case, these significant questions were not answered by the Court. The Court held in a very simplistic fashion that section 8 of CA 4 did not meet the constitutional criteria in article 19(5) and (11) of the 1992 Constitution. It failed to demonstrate how the application of the saving provisions in CA 4 could not sufficiently retain a repealed crime-creating statute or a provision thereof as a written law for the purpose of the continuation of ongoing criminal trials under that statute or provision.

The *Edmund Addo* case presented the Supreme Court with a golden opportunity to critically analyse and provide answers to these questions, and perhaps depart from the *British Airways*, if there was a need for it. Unfortunately, like a fleeting star, this opportunity eluded the Court's grasp! Rather, the Court relied on the somewhat misleading assumption that CA 4, the law under which *British Airways* was decided, did not contain a saving clause like Act 792. It is

[21] Interpretation Act, 2009 (Act 792), s 32.

safe to say, therefore, that so long as the Court in *Edmund Addo* did not expressly depart from the *British Airways* case, the former was rendered *per incuriam*.

6.2 The Veil of Doubt: Section 34's Embrace of Unsaved Trials

Although the precedential value of *British Airways* is enough to impeach the propriety of the decision in *Edmund Addo*, it is significant to consider whether a construction of the provisions relied on by the Court were enough to save the trial of the appellant. The Court relied particularly on paragraphs (d) and (e) of Act 792 to arrive at its decision. I consider these provisions in turn.

6.2.1 Section 34(1)(d) of Act 792

The Supreme Court partially justified its decision on section 34(1)(d) of Act 792. Perhaps, the Court's basis for suggesting that the law under which the *British Airways* case was decided is materially different from the current law was because of the formulation of section 34(1)(d). If my suspicion is correct, it is still difficult to justify how the reformulation is enough to save the trial of the appellant.

It is noteworthy that section 8(1)(d) of CA 4 provided thus:

> The repeal or revocation of an enactment shall not—
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed thereunder.

Section 34(1)(d) of Act 792, on the other hand, provides as follows:

> Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,
>
> (d) affect **an offence committed against the enactment that is repealed or revoked**, or a penalty or a forfeiture or a punishment incurred in respect of that offence.

It would be observed that the only significant difference between the two provisions reproduced above is the addition in section 34(1)(d) of Act 792 of the phrase 'an offence committed against the enactment that is repealed or revoked', which was not present in section 8(1)(d) of CA 8. Does this addition in any way provide sufficient saving for ongoing criminal trials?

From a content viewpoint, the defined periphery of section 34(1)(d) of Act 792 as regards *saving* does not include ongoing criminal trials. The words embodied in the provision are simple, and one does not need an extended vocabulary to understand them. The phraseology of the latter part of the provision shows that it is applicable to liabilities that have already been incurred—in the nature of a penalty or a forfeiture or a punishment. The first part, expressed in the words, 'an offence committed against the enactment that is repealed or revoked', cannot refer to anything other than a pronouncement of guilt by a court of

competent jurisdiction. For, it is unpersuasive and contrary to the best of juristic thought to regard a person as having committed an offence against an enactment when no such pronouncement has (yet) been made by a court of competent jurisdiction. The expression 'an offence committed against an enactment' is both semantically and legally different from an ongoing trial for an offence alleged to have been committed against the enactment.

It must not be forgotten that the presumption of innocence until guilt is proven or pleaded is one of the foundational norms undergirding modern legal systems. By means of it, all persons accused of crime are presumably innocent until their guilt is proved in such a way that meets the requisite threshold of proof required under the criminal law—proof beyond reasonable doubt.

This principle is captured in the fair trial rules in the 1992 Constitution: 'A person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.'[22]

As regards ongoing criminal trials, therefore, no offence has yet been committed by the accused person. The guilt of the accused, at that level, is yet to be proved to the requisite degree. Accordingly, applying section 34(1)(d) of Act 792 to ongoing criminal trials would be a manifest constitutional absurdity. It amounts to the presupposition of guilt even before either any court of competent jurisdiction has found the accused person guilty or the accused has pleaded guilty to a charge(s).

It is not misplaced to argue therefore that, had the Court taken into account the rights of the accused to a fair trial, particularly in ensuring that the presumption of innocence is upheld throughout the trial process, a different conclusion would have been arrived at. The compelling conclusion would have been that section 34(1)(d) of Act 792 could not save ongoing criminal trials. Accordingly, section 34(1)(d) of Act 792 is applicable only in instances where a person has already been found or has pleaded guilty. Were the contrary the intendment of the law, that 'an offence (has been) committed against (an) enactment' by an accused person or that the accused person has incurred a liability in the nature of a penalty or a forfeiture or a punishment, while still undergoing trial, it is doubtful whether the said provision would pass the test of constitutionality. It would undoubtedly offend the constitutional right to the presumption of innocence.

It is fair to argue, therefore, that section 34(1)(d) of Act 792, in its formulation, is intended to target instances where a person has been found guilty of a criminal offence against an enactment before its repeal or revocation and has not yet been sentenced. In that respect, since the guilt of the accused has already been established, the offence was 'committed against the enactment that is repealed or revoked' and the accused may lawfully be punished. It also aims at instances where the accused has already incurred a liability, whether it is a

[22] 1992 Constitution, art 19(2)(c).

penalty or a forfeiture or a punishment for an offence committed against a repealed or revoked enactment before its repeal or revocation.

6.2.2 Section 34(1)(e) of Act 792

It has already been demonstrated that section 34(1)(e) of Act 792 is not materially different from section 8(1)(e) of CA 4 which was the basis of the *British Airways* decision. Thus, if the Court's basis for claiming that CA 4, under which *British Airways* was decided, 'did not have a saving clause like section 34 of Act 792' was rooted in that section, it is difficult to justify. Even so, it is pertinent to examine whether a construction of section 34(1)(e) of Act 792 was sufficient to save an ongoing criminal trial.

It is well to recall that the said section saves 'an investigation, a legal proceeding or a remedy in respect of a right, a privilege, an obligation, a liability, a penalty, a forfeiture or a punishment', thereby allowing 'the investigation, legal proceeding or remedy [to] be instituted, continued or enforced, and the penalty, forfeiture or punishment [to] be imposed, as if the enactment had not been repealed or revoked.'[23]

In search of which of the items saved in this provision is very apposite for the present purpose, one would be impelled almost imperceptibly to fall on the expression, "legal proceeding". "Legal proceeding" is wide enough to cover both civil and criminal cases. The Black's Law Dictionary defines a legal proceeding as 'any proceeding authorised by law and instituted in a court or tribunal to acquire a right or to enforce a remedy.'[24] Clearly, the institution of criminal proceedings against an accused person is sanctioned by law; it is equally instituted in a court of law. And the remedy that is sought to be enforced in a criminal trial is to make the accused, if found guilty, suffer the consequences of the offence committed. An ongoing criminal trial is therefore a legal proceeding, within the meaning of section 34(1)(e) of Act 792.

On the foregoing basis, where there is a repeal of an enactment, pending criminal trials may sufficiently be saved by section 34(1)(e) of Act 792 on account of their being "legal proceeding(s)" which were instituted before the repeal of the enactment.

Notwithstanding that, ongoing criminal trials may, on a construction of section 34(1)(e) of Act 792, be saved on the repeal of the crime-creating laws. There is, as already shown, a decision of the very same Supreme Court to the contrary—that the saving provisions in CA 4, and by extension Act 792, contravene article 19(11) of the Constitution. And so far as there was no express departure from that precedent, with a showing as to why that decision needs to be departed from, it still remains the law and the Court was bound to follow same in *Edmund Addo*.

[23] Interpretation Act (n 21), s 34(1)(e).
[24] Bryan A. Garner (ed), *Black's Law Dictionary,* (8th edn, 2004) 2624.

7.0 CONCLUSION

This brief note has demonstrated that the decision of the Supreme Court in *Edmund Addo* v *The Republic* was erroneous for two reasons. The first is that, there is a precedent binding on the Supreme Court, which if properly applied would have led the Court to a different conclusion. The second reason is based on the assumption that there was no such precedent. It is that one of the provisions relied on by the Supreme Court, *viz*, section 34(1)(d) of Act 792, could not be interpreted as saving ongoing criminal trials, as that amounts to the imputation of guilt on the accused even before guilt is established.

FAILURE TO AMEND AFTER GRANT OF LEAVE: A MERE OR A FUNDAMENTAL IRREGULARITY? THE CASE OF *AKUFO V CATHELINE*

Richmond Agbelengor*

ABSTRACT

The High Court (Civil Procedure) Rules, 2004, ("CI 47") recognises the fallible nature of the users of the court and has therefore made provisions to ameliorate any harsh effect of same. One of such safeguards relevant for the purpose of this article is "amendment", as provided for under Order 16 of CI 47. This article argues that the effect that follows, where a party fails to amend after obtaining leave to amend, no longer holds in its pristine state. This article seeks to demolish the simplistic, mechanical, and monolithic application of the Rules of Court, specifically, Order 16 rule 8 of CI 47. It argues that in spite of the peremptory tone of the said provision, the rule admits of exceptions.

* LL.B, University of Ghana, Legon (2021); B.L Candidate, Ghana School of Law.

1.0 INTRODUCTION

In a lawsuit, the court or a party can make sense of the opposite party's case based on the pleadings of the opposite party. Pleadings are thus, the nucleus around which the case—the whole case— revolves.[1]

The general rule in respect of pleadings which has been rehashed *ad nauseam* is that parties are bound by their pleadings and are not allowed to give evidence of unpleaded facts. A forceful authority on the point is the recent Supreme Court decision of *Mahama v Mensah*[2], where Marful-Sau JSC (of blessed memory) stated as follows: 'A cardinal principle in procedural law is that parties in an action are bound by their pleadings and such parties may only depart from their pleadings through amendments allowed by the law.'[3]

Thus, for a party to be able to escape from the trap of this general rule, one avenue open to such a party is to amend his pleadings by adding material facts in aid of his case or omitting facts which may not help his case.

As a prelude to considering the fulcrum of this paper, it is worth stating that, the pedestal upon which an amendment may be effected, may be with leave of court or without leave of court, depending on the given circumstance.

1.1 Purpose of the Article

The purpose of this article is to examine the scenario where an application for leave to amend is successfully granted by the court, but the applicant takes no implementary steps to formally file the amended process(es), pursuant to the leave granted. The question sought to be answered in this article is whether or not relief(s) granted by the court based on such "supposed" amendment, and not on the basis of the original writ and statement of claim, constitute a mere irregularity or a nullity.

Put simply, but perhaps more elegantly, does an application for leave to amend which has been granted, automatically operate to bring into existence an effective amendment?

2.0 FAILURE TO AMEND AFTER GRANT OF LEAVE TO AMEND: THE CASE OF *CATHELINE V AKUFO-ADDO*[4]

CI 47 provides that, where the court makes an order giving a party leave to amend a writ of summons, pleading or any other document, the party who so applied for the order shall effect the amendment within such period as the court may determine in the order granting leave to amend. If no period is specified in the order granting leave to amend, within 14 days

[1] Hammond v Odoi and another [1982-1983] 2 GLR 1215.

[2] [2020] GHASC 58.

[3] ibid.

[4] [1992] 1 GLR 377 (SC).

after the order is made, the order shall cease to have effect.[5] This is without prejudice to the power of the court to extend the period.

2.1 Facts of the Case

In the case of *Catheline v Akufo-Addo*[6], the deceased (O.P. Ofori-Atta) in his will, devised certain shares in a company (of which he was the Managing Director), and a house at Kaneshie Estate, as the absolute and beneficial owner, to his children.

The plaintiff (Mrs. Akufo-Addo) sued the executors of the will of the deceased and contended that even though the deceased held the legal title to the property, by operation of law, both the Kaneshie house and the shares in the company were held in trust by the deceased for the benefit of the plaintiff's late husband (Edward Akufo-Addo).

The plaintiff therefore sued the executors of the will of the deceased for *inter alia*, an order that the shares held by the deceased in the company were held in trust for the plaintiff's late husband or for the said husband's estate.

During the trial, the plaintiff obtained leave of the court on two occasions to amend her statement of claim, to include a claim of ownership to the Kaneshie house. There was however no such amendment filed, pursuant to the leave granted by the trial court.

2.2 Decision of the Trial Court

The learned trial judge, relying on the equitable principle of tracing, found for the plaintiff against the defendant and ordered that the shares held by the deceased in the company be registered in the name of the plaintiff as the holder of the legal title. The learned trial judge also decreed that the plaintiff be the absolute owner of the Kaneshie house.

2.3 Decision of the Court of Appeal

On appeal, the Court of Appeal set aside the decision of the trial High Court. The Court of Appeal *suo motu* took issue with the plaintiff's failure to amend pursuant to leave granted by the trial court. The Court of Appeal held that, in law [rules 7-10 of Order 28 of the High Court (Civil Procedure) Rules, 1954 (L.N. 140A)], since the plaintiff after she obtained the leave to amend, failed to amend the writ and statement of claim to include a claim for the Kaneshie house, there had been no amendment of the plaintiff's writ and statement of claim.

Consequently, the trial court had no jurisdiction to grant any relief in respect of same, therefore, the order decreeing title in the Kaneshie house in the plaintiff was a nullity.

2.4 Decision of the Supreme Court

When the matter went before the apex court, the Supreme Court in affirming the Court of Appeal's decision held that, an order for leave to amend lapses if it is not acted upon within the time specified in the order or within fourteen days after the order is made unless the

[5] High Court (Civil Procedure) Rules, 2004, CI 47, Or 16 r 8.
[6] *Catheline* (n) 4.

court extends the order; the order to amend *ipso facto* becomes void and the right to amend lapses, and there will be deemed to be no amendment.

The Supreme Court therefore concluded that, in the instant case, since the claim of ownership to the Kaneshie house was never before the trial court, or was not submitted to the trial court by the parties for adjudication, the trial judge had no jurisdiction to pronounce on same.

3.0 ANALYSIS OF THE COURT'S DECISION

The author of this article is of the view that, the principle that 'an order to amend lapses if it is not acted on within the time specified in the order or within fourteen days after the order is made, and therefore becomes void and the right to amend lapses, unless the court extends the order', **is not an absolute principle of law**.

Under the following exceptional circumstances, the above principle of law may be inapplicable, and its scope may be whittled away.

3.1 Where Amendment is Ordered by the Court Proprio (Suo) Motu

It is now a settled principle of law that, where leave is required before an amendment can be made, the application for leave to amend may be made by a party either formally or otherwise (orally)[7]. Apart from the parties applying to the court for an order of leave to amend, the court may *suo motu* make an order for amendment.

The established principle from case law is that, where the court on its own motion makes an order for amendment, the order automatically operates to bring into existence an effective amendment.

In the case of *Ayiwah and Anor v Badu and ors*[8], the plaintiffs sued for the 'cancellation of a mortgage deed'. Prior to the hearing date, the plaintiffs applied for leave to amend the writ and statement of claim by deleting "cancellation of the mortgage deed" and substituting "re-opening of the loan transaction." Leave for the amendment was granted, but the plaintiffs did not take any further steps to effect the amendment as required by the rules. The trial proceeded on the basis of the original writ and statement of claim, and judgement was entered in favour of the plaintiffs (i.e., the plaintiffs' claim for 'cancellation of the mortgage deed' on the grounds of illegality was granted). On appeal, the defendant (who assumed that the leave granted by the trial court automatically operated to bring into existence an effective amendment) argued that the trial judge erred in law, by allowing an amendment which allowed for the re-opening of the loan transaction.

[7] *Ghana Ports and Harbours Authority v Issoufou* [1993-1994] 1 GLR 24(SC).

[8] [1963] 1 GLR 86 (SC).

The Supreme Court held that, the leave granted by the trial judge for the plaintiff to amend the writ and statement of claim became *ipso facto* void, upon the plaintiffs' failure to take steps to implement it. Thus, no amendment was effectively made to enable the plaintiff reopen the loan transaction.

In this case, however, the Supreme Court gave a caveat. The court stated that, 'Leave [to amend] may operate to bring into existence an effective amendment if the amendment is ordered by the court proprio motu'[9].

Simply stated, where the court on its own motion makes an order for certain processes to be amended and the party concerned fails to effect the necessary amendments, the processes that the court's order affected, would be deemed to have been, in fact, amended and filed.

The writer of this paper is further strengthened on his resolve by an *obiter dictum* in the case of *Abel Edusei (No. 2) v Attorney-General and Others*[10]. In this case which was a review application before the Supreme Court, counsel for the plaintiff who made a clerical error by referring to article 11(1) (2) and (3) instead of Article 17 of the 1992 Constitution, prayed the court in his written submission to correct the error. He did not however make any formal application seeking leave to amend the writ of summons and statement of case, as required by the Rules of Court. The Supreme Court per Kpegah JSC *suo motu* allowed the amendment.

This was what Kpegah JSC said:

> Although he [the plaintiff] did not make a formal application seeking leave to amend his writ and statement of case, as required by the Rules of this Court, I personally, suo motu, allowed the amendment. While those in the minority did not consider and never referred to Article 17 of the Constitution, both Ampiah and Adjabeng JJSC referred to the said article without formally amending the writ and statement of case. Which may indicate an implied acceptance of the proposed amendment[11].

3.1.1 Note of Caution; Where Amendment is Ordered by the Court Proprio (Suo) Motu

The note of caution expressed by the learned Adumua-Bossman JSC, in the case of *Ayiwah and anor. v. Badu and ors*[12], still holds true, that 'It would seem to be advisable, however, for counsel for the party in whose favour an amendment has been ordered, even if on the court's own initiative, to enquire about, and, if necessary, see to its implementation.'[13]

[9] *Ibid.*
[10] [1998-1999] SCGLR 753.
[11] ibid, 773.
[12] *Ayiwah* (n) 8.
[13] ibid, 90.

3.2 Breach of Rules of Court Simpliciter

Among others, a principal objective of the application of CI 47 as set out under Order 1 Rule 1(2) is to achieve speedy and effective justice, and to avoid delays. Towards the attainment of the said objective of the Rules of Court, Order 81 of CI 47 is worth mentioning.

The general rule provided under Oder 81 Rule 1(1) of CI 47 is that, non-compliance with the Rules of Court, whether in respect of time, place, manner, form or content, or in any other respect, does not nullify the proceedings or any part of it; but shall be treated as a mere irregularity. Thus, the default position when it comes to breaches of the Rules of Court is that such breaches do not render any proceedings automatically void.

The only instances where Order 81 of CI 47 cannot be invoked to save a party who fails to comply with the Rules of Court, are where the alleged defect or default is against the *Constitution or statute*, the rules of *natural justice*, or one that goes to *jurisdiction*. Under these three headings, non-compliance with the Rules cannot be saved under Order 81[14].

Thus, whether or not Order 81 rule 1(1) of CI 47 applies to any particular case depends on whether or not the proceeding in issue is a nullity or a mere irregularity. If the procedural blunder is a nullity, then the subsequent proceedings or acts would be automatically void and could not be waived under Order 81 rule 1(1) of CI 47. Simply, Order 81 rule 1(1) does not apply under this circumstance. However, if the procedural blunder is a mere irregularity, then it can be validated by the subsequent acts of the parties such as a waiver or taking any such steps in the action that would be deemed to have amounted to a fresh action.

The author of this article argues that, in light of Order 81 of CI 47, if an order for leave to amend is granted by a court under Order 16 Rule 5 of CI 47 and the party/applicant defaults in carrying out such an order, such non-compliance with the order should under the appropriate circumstances be considered as a mere irregularity. The factors to be considered under the given circumstances would be whether or not the failure to effect the implementary steps has breached a statutory or constitutional provision, whether there has been a breach of the rules of natural justice, or whether there has been a breach of the rules on jurisdiction.

3.2.1 Failure to effect Implementary Steps: *A Breach of Natural Justice?*

In the case of *Catheline v Akufo-Addo*[15], a reason proffered by the Supreme Court that an order for leave to amend became *ipso facto* void on effluxion of time, was that, 'the defendants were denied the chance to file a defence to the amended statement of claim'[16].

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[14] *Republic v High Court, Accra; Ex parte Allgate Co Ltd (Amalgamated Bank Ltd Interested Party)* [2007-2008] SCGLR 1041.

[15] *Catheline* (n 4).

[16] ibid.

In other words, the court inter alia, grounded its decision on the fact that the plaintiff violated the principle of natural justice (*Audi Alterem Partem*).

It is trite learning that no person shall be condemned on a ground of which no fair notice has been given to him or her. That will amount to an injustice. This principle has been established in a litany of cases[17]. This principle is said to be as old as man.

Thus, a very vital role of pleadings is to give notice of one's case to the other party so that the party can have a fair notice of the nature of claim or defence of the other party[18].

It is the view of the author of this paper that, if a party/ applicant obtains an order for leave from the court to effect an amendment but fails to take the implementary steps, and the opposite party under the "erroneous" belief that the party/applicant has taken the implementary steps, thus, also amends or files other process(es) in response to the "amendment", the test of natural justice would be deemed to have been satisfied.

This stance of the author is even fortified the more, where the opposite party who "erroneously" believes that the party/applicant has taken the implementary steps, applies and obtains *adjournment(s),* to enable an amendment or filing of the necessary response(s) to the "amendment".

Under these scenarios, the potential natural justice problem of *surprise* will not arise.

Thus, in the *Catheline case* for instance, if the defendant was to have filed an amended statement of defence, denying the plaintiff's allegation of the ownership of the Kaneshie house, and both parties subsequently adduced evidence to establish their allegations, the test for the principle of natural justice *(Audi Alterem Partem)* would have been satisfied.

3.2.2 Failure to effect Implementary Steps: *A Breach of Jurisdiction?*

Another reason proffered by the Supreme Court in *Catheline v Akufo-Addo*[19] was that, since the claim for the Kaneshie house 'was never before the court, or was not submitted to it by the parties for adjudication, the trial judge had no jurisdiction to pronounce on same'. In other words, the court, inter alia, grounded its decision on lack of jurisdiction.

A starting point in respect of the jurisdiction of the High Court is that the Constitution and the Courts Act confer on the High Court, jurisdiction in all civil and criminal matters as a court of first instance or trial court[20]. I must add that in spite of this general rule, there are

[17] *Aboagye v Ghana Commercial Bank* [2001-2002] SCGLR 797; *Awuni v West African Examination Council* [2003-2004] 1 SCGLR 471.

[18] *Dam v JK Addo and Brothers* [1962] 2 GLR 200, SC. See also *GIHOC Refrigeration and Household Product Ltd (No. 2) v Hanna Assi (No. 2)* [2007-2008] 1 SCGLR 16, where Atuguba JSC said 'It is particularly said that the sole object of pleadings is to give notice of one's case to the other party.'

[19] *Catheline* (n 4).

[20] 1992 Constitution, art 140(1); Courts Act, 1993 (Act 459), s 15(1)(a).

exclusions to the jurisdiction of the High Court as a court of first instance - and these were enumerated by Amua-Sekyi JSC in the case of *Republic v High Court, Cape Coast, Ex parte Kow Larbie*[21].

Concerning jurisdiction, the proper question to ask considering the context of this article is whether a court is sanctioned under any substantive law or rule of procedure to make an order in the nature of relief(s), although parties to the action did not expressly claim for such relief(s)?

The general rule as held in a plethora of cases is that, a court could not *suo motu* grant any relief(s) that a party has not requested for, unless the endorsement on the party's writ has been amended to reflect the said relief(s). Thus, in the case of *Dzefi v Ablorlor*[22], the plaintiff's relief was for a declaration of title to the disputed land, and other ancillary reliefs. The trial court granted a different relief (i.e., an order setting aside a grant as being invalid). On appeal, the Court of Appeal held that the trial court erred since a court could not *suo motu* grant any relief(s) that a party has not asked for, without amending the endorsement on the writ, if appropriate to do so.

Exceptions have been provided to the principle of law stated in the *Dzefi case*[23], due to the development of case law.

An exception to the general rule stated in the *Dzefi Case*[24] is that, a court may grant a relief not sought by a party where evidence is adduced on record, and the relief(s) is not inconsistent with the stand and claim of the party, in whose favour the relief is granted.

In other words, where there is evidence on record to support the grant of a relief(s), the court may exercise its discretion and grant same, although the said relief(s) was not endorsed on the party's writ. In *In Re Gomoa Ajumako Paramount Stool; Acquah v Apaa & Another*[25], the Supreme Court per Acquah did not mince words when he stated as follows:

> It is conceded that in appropriate circumstances, a court of law can grant a relief not sought for by a party. However, any such relief must, first be supported by evidence on record, and secondly, not to be inconsistent with the stand and claim of the party in whose favour the relief is granted.[26]

In the case of *Martin J. Verdoes v Patricia Abena and Verdoes Koranchie*[27], an issue which confronted the court was whether or not a court could *proprio motu* grant relief(s) which a

[21] [1994-1995] GBR 553 (SC).

[22] [1999-2000] 2 GLR 101 (CA).

[23] ibid.

[24] ibid.

[25] [1998-1999] SCGLR 312; [1999-2000] 2 GLR 896.

[26] ibid.

[27] (2015) JELR 64370 (CA).

party did not originally seek, without amending the endorsement on the writ. In this case, the petitioner prayed the court for a dissolution of the parties' marriage, and asked the court to, *inter alia*, settle certain properties in favour of the respondent. The trial court, however, held that the said properties should be held by both parties as joint owners. Dissatisfied with the trial court's decision, the respondent appealed to the Court of Appeal, arguing that a court could not *proprio motu* grant relief(s) to a party which the party did not ask for, without first amending the endorsement on the writ; and neither could a court accept a case in favour of a party which is different from what the party himself put forward in his pleadings.

The Court of Appeal per Dordzie JA, relying on the principle stated in the case of *In Re Gomoa Ajumako Paramount Stool; Acquah v Apaa & Another*[28], as well the objective of CI 47 as contained in Order 1 rule 1(2), held that, although the petitioner's relief was that the said properties be settled in the respondent's favour, evidence led at trial showed that, the ownership of the said properties were in dispute. The Court of Appeal therefore concluded as follows:

> It is erroneous to argue that the court is precluded from determining the issue of the ownership of the properties because it was not a triable issue or that the petitioner did not ask for declaration of title to the properties. The issue of ownership arose out of the evidence adduced to the court and the court is bound to make a determination on the issue.[29]

In the case of *GIHOC Refrigeration and Household Product Ltd (No. 2) v Hanna Assi (No. 2)*[30], the defendant (applicant) at the High Court satisfactorily established facts which could entitle her to a claim of declaration of title and recovery of possession to the disputed land. These reliefs were thus granted in her favour by the trial court. The granting of the said reliefs by the trial court were however reversed by the Court of Appeal. The Court of Appeal's decision was affirmed by a 3-2 majority decision of the ordinary bench of the Supreme Court on the ground that, the defendant (applicant) did not counterclaim for the said reliefs and neither did she amend her pleadings to entitle her to those reliefs.

When the case went on review, the Supreme Court, in exercising its review jurisdiction as conferred on it under article 133 of the 1992 Constitution of Ghana by a 6-1 majority decision, reversed the decision of the ordinary bench of the Supreme Court and granted the reliefs of declaration of title and recovery of possession in favour of the defendant (applicant). The court reasoned that in order to avoid multiplicity or proliferation of suits and to do substantial justice, technicalities should not be allowed to hold sway over substance.

The author of this article argues that, since a core purpose of the Rules of Court is to make access to justice speedy and cost-effective, where an order is given by a court under Order 16 Rule 5 of CI 47 and the party/applicant defaults in carrying out the implementary steps but

[28] *In Re Gomoa Ajumako Paramount Stool* (n 25).
[29] ibid.
[30] [2007-2008] 1 SCGLR 16

has been able to adduce evidence in support of the relief and such evidence is not inconsistent with his claim, the court should favourably exercise its discretion, and grant the relief, albeit that the relief is 'formally' unclaimed for.

Doing so will overcome the likelihood of the party/applicant being confronted with the defence of *res judicata*, if the party/applicant should attempt to retrace his steps to the trial court to file a fresh suit for the claim he was denied.

4.0 CONCLUSION

The Supreme Court speaking through Atuguba JSC in the case of GIHOC Refrigeration and Household Product Ltd (No. 2) v Hanna Assi (No. 2)[31] said as follows:

> The modern attitude of the courts is that, as much as possible, pleadings should not disable the doing of substantial justice, and the power of amendment in particular aids and abets that objective, subject always to the requirements of fairness and justice in the particular circumstance of a case.[32]

It is therefore the view of the author that, every case must be examined in its true perspective, and that, a failure by a party to take a formal implementary step after the grant of an order of amendment, should not automatically be held to have invalidated any proceeding(s) or order(s) given thereunder.

Based on the circumstances of each case, the courts of Ghana being courts of both Common Law and equity, have a duty to ensure justice, equity, fairness, good sense, and judicial economy; and should not let this duty be circumvented by mere technicalities.

A blind application of Order 16 Rule 8 of CI 47 will be an antithesis of the primary purpose and objective of the CI 47, which is to achieve speedy and effective justice, and to avoid delays.

[31] *Ibid.*
[32] ibid.

THE RESILIENT MINORITY: THE EVOLUTION OF GHANA'S COMPANY LAW FROM FOSS V HARBOTTLE ONWARDS

David-Kratos Ampofo*

ABSTRACT

The evolution of corporate law in Ghana showcases a dynamic interplay between the tenets of majority rule and the safeguarding of minority shareholders' rights. Historically anchored in the Foss v. Harbottle rule, Ghanaian corporate law has oscillated between reinforcing majority power and introducing protective mechanisms for minority shareholders. Gower's insights reveal that the traditional majority rule, though predominant, is not unequivocal and has its limitations, particularly in instances where actions transcend a company's powers or rights promised to individual members. Post 1960, Ghanaian jurisprudence further underscores this balancing act, as highlighted by several cases that either fortified or challenged the majority rule. The Companies Act, 2019 (Act 992) is emblematic of Ghana's evolving stance on this matter. While it upholds the conventional majority rule, it simultaneously introduces progressive elements that dilute its absoluteness. This Act, through sections such as 218 and 220, equips minority shareholders with legal tools against potential transgressions by the majority. Such provisions act as robust deterrents against unfulfilled corporate promises, elevating the role of fairness and efficiency in corporate governance. Ultimately, Ghana's corporate law trajectory, culminating in the promulgation of Act 992, encapsulates the challenges and strengths of balancing historical precedents with contemporary imperatives, underscoring the necessity of ensuring equity while facilitating corporate growth.

* LL. B, GIMPA; B.L Candidate, Ghana School of Law.

1.0 INTRODUCTION

In the arena of corporate governance, shareholder rights and company management consistently demand attention. The seminal case of *Foss v Harbottle* from the 19th century stands as a foundational reference for these considerations, with its emphasis on delineating the rightful party to initiate company lawsuits and the supremacy of majority shareholders. As time has progressed, this guiding principle has witnessed various transformations, augmentations, and critiques. This paper ventures into the Ghanaian corporate sphere to discern the nuances associated with the *Foss v Harbottle* rule. Drawing from Gower's erudite observations, Ghana's legislative framework, and judicial decisions, such as the Companies Act, 2019 (Act 992) and *PS Investment v CEREDEC*, the discourse endeavours to elucidate the contemporary relevance of this time-honoured rule in Ghana's corporate governance landscape. Through this analysis, the paper seeks to unravel the relationship between shareholder rights, corporate equitability, and the trajectory of legal developments within Ghana's dynamic corporate legal environment.

2.0 *FOSS V HARBOTTLE AND MACDOUGALL V GARDINER*

The rule arising from *Foss v Harbottle* [1] is fundamental in company law, emphasising the majority's control. It suggests that when there is an injury to the company, the company itself, represented by its majority shareholders, should seek redress. This was demonstrated in a scenario where two shareholders alleged that the company's directors had misconducted themselves with excessive self-compensation. However, the court determined that it was the company's prerogative, not the individual shareholder's, to decide on the legal course of action against the directors.

MacDougall v Gardiner[2] stands as another cornerstone in shareholder rights discussions. The case underscores the importance of proper procedure during company meetings and the majority principle. It affirms the authority of the majority but simultaneously raises concerns regarding minority shareholders' rights. Essentially, *MacDougall v Gardiner* demonstrates the courts' hesitancy to intervene in a company's internal affairs, particularly when perceived anomalies can be addressed by the majority's decision. This stance amplifies the rule in *Foss v Harbottle*, emphasising the relationship between majoritarian governance and a company's independent decision-making process.

The interplay between *Foss v Harbottle* and *MacDougall v Gardiner* merits further examination.

A number of questions arise. Does the judicial deference to the majority, as exemplified by these cases, diminish the robust safeguards that minority shareholders warrant? Or is this deference an essential compromise, upholding both the company's autonomy and the preeminence of the majority?

For those invested in the corporate governance field, it is evident that the rule in *Foss v Harbottle* and its relationship with *MacDougall v Gardiner* is not merely black and white. These landmark decisions present a multifaceted panorama of rights, duties, and exceptions. They accentuate the delicate equilibrium between a company's autonomy and the imperative to shield against potential majority overreach.

[1] *Foss v Harbottle* (1843) 2 Hare 461.
[2] *MacDougall v Gardiner* (1875) LR 1 Ch D 13.

In the post-1960 Ghanaian context, these foundational cases interweave with the fabric of corporate governance. Their application in instances like *Pinamang v Abrokwah*[3] and *Luguterah v Northern Engineering Co. Ltd. & Others*[4] exemplifies this relationship, emphasising the judicious balance courts aim to strike: ensuring that while majority rule is respected, minority rights and expectations are not undermined. The Ghanaian perspective manifests as[5]:

1. The proper plaintiff rule – when the company is wronged, only the company, not its members, should act; and
2. The majority rule – when the majority can redress an issue with a straightforward decision, the court won't impose a contrary course of action.
3.

2.1 Exceptions Created in *Edwards v Halliwell*

The jurisprudential tapestry of minority shareholder rights would be woefully incomplete without a mention of *Edwards v Halliwell*[6]. It remains a watershed moment, illuminating the pathways that minority shareholders could tread, even when ensnared by the behemoth that the *Foss v Harbottle* rule is. In the *Edwards case*, a union tried to change fees without following their Rule 19. This rule stated they needed a two-thirds approval from members before making such a change. Jenkins LJ, in his judgment, made it clear that the *Foss v Harbottle* rule is not absolute. There are exceptions. For example, if an action goes beyond what is allowed (*ultra vires*), or there is deceit towards minority shareholders, or there is a clear invasion of personal rights, then the rule does not offer protection. In the *Edwards case*, the key point was that they had ignored a special procedure in their rules. So, relying on *Foss v Harbottle* was misplaced.

The *Edwards v Halliwell* case showed that the *Foss v Harbottle* rule was not unbreakable. Minority shareholders can find hope knowing that they have rights protected by law.

The crux of the *Edwards v Halliwell* verdict lay in recognising the transgression: the rule breakers had brazenly circumvented a special procedure, a sacred majority ensconced in the union's articles. Thus, invoking *Foss v Harbottle* was a red herring, a misplaced reliance. *Edwards v Halliwell*, in its profound wisdom, ushered in an era of reinterpretation. No longer was *Foss v Harbottle* an impregnable fortress. It had its Achilles' heel, and minority shareholders, bolstered by the elucidations in *Edwards v Halliwell*, found solace in the knowledge that their rights were not ephemeral but anchored in the bedrock of justice.

Edwards v Halliwell serves as a beacon, illuminating the exceptions and nuances that prevent the trampling of minority rights in the shadow of the majority's might.

2.2 Other Exceptions to the *Foss v Harbottle* Rule: Venturing Beyond the Façade

The judicial discourse surrounding corporate governance and minority shareholder rights often takes a backseat to the omnipresent rule of *Foss v Harbottle*. The rule's core tenet—that the company, rather than individual shareholders, should be the proper plaintiff in cases of corporate wrongs—has

[3] *Pinamang v Abrokwah* [1992] 2 GLR 384 (CA).
[4] *Luguterah v Northern Engineering Co Ltd & Others* [1978] GLR 477 (HC).
[5] *PS Investment Ltd v Central Regional Development Corporation and Others* [2012] 1 SCGLR 61.
[6] *Edwards v Halliwell* [1950] 2 All ER 1064 (CA).

indeed dominated legal thought. Yet, legal principles, even those as entrenched as *Foss v Harbottle*, often reveal their limitations when tested against evolving circumstances and the tapestry of corporate realities. As such, the exceptions to the rule have become crucial avenues of redress for shareholders, serving as sentinel checks against majority transgressions. The exceptions are:

1. **Irregular Decision-making**: Resolutions made by companies are crucial, reflecting the combined decision of all involved. If these decisions do not follow set procedures, as shown in *Edwards v Halliwell*, then they can be challenged. This is because these procedures ensure companies maintain their core values. Resolutions in corporate entities are not mere administrative exercises; they are solemn affirmations of collective intent, as underscored by the observations of Lord Loreburn LC in *Quin & Axtens Ltd v Salmon*.[7] *Edwards v Halliwell* offers a lucid exposition of this sentiment. The court's refusal to cloak the executive committee's oversight in the veneer of *Foss v Harbottle* served as a judicial proclamation that acts bypassing entrenched procedures or majorities in a company's articles cannot hide behind the rules.[8] Such procedural safeguards exist to prevent the desecration of foundational corporate values.
2. **Actions Beyond Allowed Limits (*Ultra Vires*):** Some actions go beyond what a company is allowed to do. Acts that are *ultra vires* or beyond the company's powers raise a unique conundrum. In *Prudential Assurance v Newman*[9], the court noted that if an action is *ultra vires*, or beyond a company's powers, then the *Foss v Harbottle* rule should not apply. The court intimated that the rule would be a miscellany if applied to acts which the majority, by definition, could not confirm. An *ultra vires* act is an anathema to the very constitution of a corporate entity; thus, its challenge lies outside the ambit of the *Foss v Harbottle* rule.
3. **Fraud on the Minority**: Sometimes, decisions made by the majority might be unfair or fraudulent towards the minority. Cases like *Menier v Hooper's Telegraph*[10] and *Estamanco v Greater London Council*[11] dive into this. In these cases, the court recognised that certain actions, especially those that cheat or misuse power against minority shareholders, need to be checked. In the *Menier case*, minority shareholders took legal action against the majority for making a decision that hurt the company. This case created a new way for minority shareholders to legally act when they felt cheated. In the *Estamanco case*, a local council changed their property sale plans, and this was seen as a misuse of power. An individual who had already bought a flat tried to continue a lawsuit against them. The court agreed, suggesting that even if the majority is not made up of directors, they can still be held accountable for abusing their power. In both instances, the court was confronted with a reality where the majority's might could perpetuate egregious wrongs. The doctrine thus evolved to recognise that certain acts, particularly those tantamount to fraud on the minority or grave misuse of power, demand minority shareholder intervention. Such acts are not merely corporate wrongs; they strike at the heart of corporate integrity.

[7] *Quin & Axtens Ltd v Salmon* [1909] AC 442 (HL) (Lord Loreburn LC) noted the importance of resolutions by stating that directors must act in good faith without conflicts of interest and that important matters, especially those that might diverge from the usual scope of business, require a resolution. This essentially reinforces the gravity and significance of resolutions within corporate entities.
[8] *Edwards (n 6).*
[9] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* (1982) Ch 204.
[10] *Menier v Hooper's Telegraph* (1874) 9 Ch App 350.
[11] *Estamanco (Kilner House) Ltd v Greater London Council* (1982) 1 All ER 437 (HC).

4. **Violation of Personal Rights**: Actions by a company can sometimes harm the personal rights of its members. The case of *Heron International v Lord Grade* [12]shows this. Here, the company claimed that its chairman had signed a bad contract and breached his duties. The court saw this not just as a poor decision but as an invasion of the company's basic rights, which every member relies upon. The case underscored that when corporate actions impinge on the sacrosanct personal rights of its members, *Foss v Harbottle* offers no sanctuary. Such personal rights encapsulate the very essence of shareholder democracy and warrant protection against any infractions. The judicial outcome bore broader implications. By ruling that the plaintiff company was justified in launching a legal action, the court effectively etched a fresh exception into the annals of corporate law.

These exceptions are more than mere judicial aberrations; they are embodiments of the law's commitment to ensuring that corporate entities do not become hotbeds of injustice and that majority dominance does not subsume the voice of the minority.

3.0 GOWER'S INSIGHT INTO THE APPLICATION OF THE *FOSS V HARBOTTLE* RULE[13]

Section 217 of the repealed Companies Act, Act 179, though replicated in Section 218 of Act 992, harbours in its text a profound departure from the traditional majority rule. But the journey is not always smooth and the journey of the protection of minority rights did not end with section 217 of Act 179 as seen in the next section. Gower clearly notes that Section 217 was not just about supporting the power of the majority. Instead, it stood up for the rights of members to ask for legal help when the company faced harm. He clearly states that the *Foss v Harbottle* rule has its limits. For example, it does not work in cases where actions are illegal or go beyond a company's powers. Also, if a matter concerns rights promised to individual members, this usual rule does not apply.

Gower points out that the application of the Minority rule; acts that might not follow the rules, but can be fixed with a normal decision, stop individual members from taking legal action.

Gower questions this application of the majority rule. He believes that just because a wrong action can be fixed does not mean it should not face legal challenges. Why, asks Gower, should such wrongs be safe from challenge, especially when a member clearly sees the need to question them?

3.1 Application of *Foss v Harbottle* post 1960

The ever-evolving jurisprudence in corporate law has witnessed an intriguing progression in the application of the seminal *Foss v Harbottle* principle. Notably, while one meanders through the intricate maze of the legal landscape, it is prudent to revisit the implications of Section 217 under the erstwhile Companies Act, which, rather than bolstering the majority rule, conferred upon members the right to initiate legal proceedings when the company suffered a detriment. Yet, an assortment of Ghanaian cases, including *Pinamang v Abrokwah*[14], *Luguterah v Northern Engineering Co. Ltd. &*

[12] *Heron International Ltd v Lord Grade, Associated Communications Corp PLC and* Others [1983] BCLC 244 (CA).
[13] Gower's Report & Cases, "Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana" (The Republic of Ghana, 1958).
[14] [1992] 2 GLR 384 (CA).

Others[15], *Appenteng v Bank of West Africa*[16], *Kludjeson International v Celltell Ltd*[17], and *Boohene v Ghana Union Assurance*.[18], have to some extents sought to maintain the majority rule principle.

In *Pinamang v Abrokwah,* the court fortified the majority rule, emphasising the impropriety of courts delving into the internal machinations of a company, particularly when the alleged irregularities could be redressed by an ordinary resolution. A stark contrast emerges in *Appenteng v Bank of West Africa*, where the court underscored the "proper plaintiff rule," positing that shareholders are typically bereft of the right to litigate for damages accruing to the company, save for instances when the company itself is the litigant.

But perhaps one of the most intricate portrayals of this doctrine finds its genesis in the case of *Luguterah v Northern Engineering Co Ltd & Others*. Here, amidst a backdrop of unserved notices, unregistered memberships, and purportedly increased shares, the court ventured beyond mere procedural regularities. Taylor J lucidly articulated that what transpired was not a mere sidelining of procedure, but a blatant transgression of the company's regulations and the overarching Companies Code. Such wrong actions were seen as beyond the company's powers. Such actions were deemed *ultra vires*, thus breathing life into the exception that permits shareholders to champion the cause of ensuring the company's operations remain tethered to its regulations.

It is clear that Ghana's courts value the rule that the majority holds power. However, they will take a closer look at the peculiar circumstances of each to determine whether any particular situation demands its application. The *Foss v Harbottle* rule is well established, but it is not set in stone. The rule must align with the broader goals of fairness and proper company management.

4.0 THE COMPANIES ACT, 2019 (ACT 992) AND THE RULE IN *FOSS V HARBOTTLE*

In the web of corporate law, the Companies Act, 2019 (Act 992) emerges as a seminal legislation which recontextualises the time-honoured rule in Foss v. Harbottle. An analysis of Act 992 paints a vivid picture of a statute that consciously retains the traditional majority rule, but also, simultaneously, inculcates progressive elements that manifestly dilute its unyielding nature. The foundational tenets of Act 992 are encapsulated in Section 18, which bestows upon a company the capacity akin to a natural person of full stature, thereby underscoring its distinct legal personality. Yet, in order to ensure an orchestrated and cohesive corporate governance, section 144(3) vests the management of the company's business with the board of directors encompassing legal pursuits. Section 144(5) also allows members, when they meet, to take legal action. An intuitive reading of these sections seems to reaffirm the sanctity of the rule in *Foss v Harbottle* within the Ghanaian corporate landscape. Yet, as one delves deeper into Act 992, it becomes palpably evident that Act 992, much like its predecessor, has made several nuanced departures from the traditional rule.

[15] [1978] GLR 477 (HC).
[16] *Appenteng v Bank of West Africa* [1972] 1 GLR 153 (CA).
[17] *Kludjeson International v Celltell Ltd* HC (27 April, 2005).
[18] *Boohene v Ghana Union Assurance* HC (18 January, 2006).

5.0 STATUTORY EXCEPTIONS TO THE *FOSS V HARBOTTLE* RULE

A quintessential illustration of an exception to the *Foss v Harbottle* rule is section 29(3) which fashions a unique remedy, allowing a member or officer to enforce obligations under the constitution in a representative capacity.

Section 19(5) lends the court a formidable tool, the power to enjoin the company from executing acts or transactions that traverse the company's powers, or which are ultra vires by way of injunction.

Section 200(1) and 200(5) in Act 992 are pivotal, granting a shareholder the locus standi to initiate proceedings for breaches of directors' obligations, even if the breach inflicts damage exclusively on the company. This paradigm shift, undeniably, punctures the very marrow of the traditional majority rule.

Another noteworthy provision is section 218, which allows a member to wield the powerful legal instrument of injunction to restrain the company from actions breaching either the Act or the company's constitution as discussed in this article.

Section 219 carves out a niche remedy for minority shareholders, an acknowledgment of the potential for oppressive conduct by the majority. By extending relief even to debenture holders, Act 992 cements its stance on bolstering the rights of stakeholders often relegated to the peripheries.

Section 220 of the Companies Act, 2019 (Act 992) is a poignant manifestation of Ghana's commitment to fortify the protective mechanisms available to minority shareholders. This provision distinctly carves a balance between facilitating corporate actions that may be essential for the company's progress, whilst ensuring that such actions do not unduly prejudice the rights of dissenting shareholders. Thus, it balances company growth with protecting shareholders. A standout part, subsection (5), says if a company does not follow through on its plans within a year, a member can get his/ her/ its shares back. This stops companies from making empty promises. It is probably the most progressive aspect of the provision. It recognises that corporate ambitions, no matter how well intentioned, might not always materialise. If the company fails to execute the proposed objectives or business activities within a year of the special resolution, members have the right to apply for the reinstatement of their shares. This acts as a safeguard against potentially speculative or overly ambitious corporate endeavours.

6.0 CONCLUSION

Corporate law's dynamism is both its strength and its challenge, and Ghana's journey in this sphere epitomises this characteristic. The journey began with the ideas in *Foss v Harbottle*. It is all about finding the right mix between majority power and protecting minority shareholders. This mix shows how companies are run and how justice plays a role.

In Ghana, while the majority rule is key, there is also a willingness to change. This is especially true when there is unfairness or when majority decisions hurt minority rights. The Companies Act, 2019 (Act 992) is a key part of this. It does not just stick to old ideas. It brings in new ones, aiming for a fair and efficient way of running companies.

Sections such as 218 and 220 show Act 992's careful approach to protecting minority interests. These sections provide tools and solutions against any unfair actions by the majority. In the event that

company plans do not happen in time, shares can be returned. This shows the Act's focus on fairness and responsibility.

Ghana's corporate law journey depicts growth. It is a story of balancing old and new ideas, where majority power is important but not sacrosanct. The goal is always to match the spirit of the law with how companies are run today.

PRESUMPTION OR PROOF: EXAMINING THE ROLE OF A JURAT IN ESTABLISHING THE VALIDITY OF WILLS

Vanessa Naa Koshie Thompson*

ABSTRACT

The validity of wills is essential for ensuring the proper execution of a testator's intentions. This article explores the significance of a jurat in determining the validity of wills and its evidential value within the legal framework of Ghana.

Notably, the Wills Act allows for the use of a jurat as certification when a will is executed for a blind or illiterate testator. However, a crucial debate arises regarding whether the absence of a jurat invalidates the will or if a jurat holds presumptive value. This article delves into the evolving legal perspective on the use of a jurat and the implications of non-compliance with the Act.

Some argue that the absence of a jurat renders the will null and void, as it fails to provide conclusive evidence that the contents were read and understood by the testator. On the other hand, a counterargument maintains that the presence of a jurat only creates a rebuttable presumption that the testator comprehended the will, and its absence should not invalidate the document if other evidence proves understanding.

Recent court decisions favour the latter viewpoint, emphasising the need to consider all available evidence when determining the validity of a will. While the Illiterates' Protection Ordinance safeguards the interests of illiterates and blind persons, it remains silent on the status of deaf or dumb individuals. The question arises as to whether proficient users of sign language should be considered literate under the law. An amendment to include deaf and dumb individuals in the protected class could be a beneficial step.

In conclusion, the article advocates for a pragmatic approach, focusing on the overarching goal of preserving the testator's true intentions.

* LL. B, University of Ghana; BL Candidate, Ghana School of Law.

1.0 INTRODUCTION

This article delves into the role of a jurat in establishing the validity of wills, particularly in the context of blind or illiterate testators. Wills are intentional documents reflecting a testator's intent, and their interpretation must adhere to established rules of construction. The Wills Act of 1971 sets out the formal requisites for drafting a valid will, including the provision for a jurat to be used in cases involving illiterate or blind individuals.[1] The article analyses the evolution of the law regarding the evidential value of a jurat on wills, exploring two contrasting viewpoints: one advocating strict adherence to the presence of a jurat, and the other considering it as merely presumptive evidence. Recent court decisions seem to lean towards the latter stance, emphasising the need to establish that the testator understood the will's contents, regardless of the presence or absence of a jurat. The article also highlights the need for possible amendments to address the protection of deaf or dumb persons under the law.

2.0 THE LEGAL MECHANICS OF DRAFTING WILLS AND FORMAL REQUISITES FOR A VALID WILL

The courts have a duty to interpret wills in accordance with well-established rules of construction, as far as is reasonably practicable. As per Aharon Barak, a will is an intentional document that reflects the testator's intent, which may be expressed in any lexicon, sign, or language they choose.[2] As long as a will conforms to the necessary formalities, effect will be given to the dispositions made.

According to the Wills Act, a valid will requires that the testator must be at least 18 years old and should not be suffering from insanity or infirmity of mind that prevents them from understanding the nature of the contents.[3] Additionally, section 2 sets out the formal requisites for drafting a valid will:[4]

1. The will must be in writing and signed by the testator or another person at his direction;
2. All dispositions made beneath the signature are void;
3. The signature of the testator must be acknowledged in the presence of at least two witnesses at the same time;
4. Where a party appends their signature at the direction of the testator, the signature by such a person must be made in the presence of the testator and at least two witnesses;
5. The witnesses must attest and sign the will in the presence of the testator though a form of attestation is not necessary; and

[1] Wills Act, 1971 (Act 360), s 2.
[2] Aharon Barak, *Purposive Interpretation in Law* (2005, Princeton University Press) 307
[3] Act 360 (n 1), s 1.
[4] Ibid, s 2.

6. Where the testator is blind or illiterate, a competent person shall carefully read over and explain the contents of the will before it is executed, and that competent person shall declare in writing upon the will that the will had been read over and its contents explained to the testator and that the testator appeared to perfectly understand the will before its execution.

The certification mentioned in the Act could be provided by the use of a jurat.[5] However, the question arises as to whether the absence of a jurat declared upon the will of a blind or illiterate person invalidates the will, or the jurat is merely of presumptive value. This article discusses the progression of the law on the value of a jurat declared upon the face of a will and its evidential value. Further discussion touches on whether non-compliance with the Act renders a will null and void by discussing applicable case law and relevant statutes in the Ghanaian context. [6]

2.1 Legal Interpretations Surrounding the Role of Jurats

The High Court (Civil Procedure) Rules states that a will made for an illiterate or blind person without a jurat shall not be admitted into probate or letters of administration shall not be granted unless the court is satisfied by proof or it appears from the face of the will that it was read over to the testator by a competent person before it was executed, or that the deceased was aware of the contents at the time.[7] The High Court (Civil Procedure) Rules is silent on the definition of an illiterate person.[8] The case of *Brown v Ansah* provides a workable definition of an illiterate.[9] The court stated that whether a person is to be considered illiterate or not depends on the language in which the document is prepared and the ability to read and write such language.[10] Since the testator could neither read nor write English, he was illiterate within the context of the law.[11] Another case, In Re Will of Bremansu held that whether a person was to be considered literate or illiterate in a particular context must be related to the ability to read and write the language in which the document had been prepared.[12] It is such ability that is relevant, not whether a person could be classified as literate or illiterate.[13]

The Illiterates' Protection Ordinance states that if a person of full age and contracting capacity signs a document written in a language they cannot read or understand, it is essential to prove that it was clearly read over and explained to them before it can be enforced.[14] Section 4 also stipulates that anyone writing a letter or document for an illiterate person, for free or reward,

[5] Ibid, s 2(6).
[6] Ibid.
[7] High Court (Civil Procedure) Rules, 2004 (CI 47), Or. 66 r 19.
[8] Ibid.
[9] *Brown v Ansah* [1992] 2 GLR 22.
[10] Ibid.
[11] *Brown* (n 9).
[12] In Re Will of Bremansu [2012] GHASC 53.
[13] Ibid.
[14] Illiterates Protection Ordinance, 1912 (Cap 262) s 3.

must read over and explain the document, and cause the illiterate person to write their signature or make their mark.[15]

3.0 COMPARATIVE VIEWPOINTS: STRICT ADHERENCE V PRESUMPTIVE EVIDENCE

One school of thought holds the view that the absence of a jurat on a will necessarily invalidates it because such noncompliance offends the requisite procedure for proof that the blind or illiterate testator had knowledge of the contents of the will. *Waya v Byrouthy* explained that the burden of proof lay on the party relying on the document to show that it was read over and if necessary, interpreted to the illiterate person in a manner in which he understood, failing which the contents of the document could not be relied upon in court.[16] This position slightly differs from the Nigerian position in the case of *Ezeigwe v Awudu* which established that the burden of proof lay on he who asserts to prove that he is illiterate.[17] *Atta Kwamin v Kufuor*, explained that when a person of full age and capacity signs a contract in his own language, his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments in order to subvert it.[18] However, there was no presumption that a native of Ashanti who did not understand English and could neither read nor write appreciates the meaning and effect of an English instrument because he is alleged to have set his mark to it by way of signature.[19] The case of *Otoo(No. 2) v Otoo(No. 2),* held that because the Illiterates' Protection Ordinance imposes the condition of a jurat, its absence invalidates the document.[20] The learned judge further stated that this position was particularly important in the context of wills since effect is given after the death of the testator who would not be available to say that it was his deed.[21] It is worth noting that this decision departed from the position of the supreme court at the time, enunciated in the case of *Duodu v Adomako and Adomako*.[22] This departure created an unsettled position of the law which was resolved by the case of *Akuteye v Adjoa Nyakoah*.[23]

Another school of thought holds the view that the presence of a jurat on the face of a will or other document is merely presumptive of the fact that the content was read over and explained to the understanding of the testator. Hence, its absence does not per se invalidate the document and it would suffice if evidence could be adduced in proof that the contents were read over and explained to the illiterate/blind person. In *Fori v Ayirebi*, the court acknowledged that oral testimony by persons who prepared a receipt could establish that

[15] Ibid, s 4.
[16] *Waya v Byrouthy* [1958] 3 WALR 413.
[17] *Ezeigwe v Awudu* [2008] 11 NWLR 158.
[18] *Atta Kwamin v Kufuor* [1914] UKPC 67.
[19] Ibid.
[20] *Otoo (No. 2) v Otoo (No. 2)* [2013-2014] 2 SCGLR 810.
[21] Ibid.
[22] *Duodu v Adomako and Adomako* [2012] 1 SCGLR 198.
[23] *Akuteye v Adjoa Nyakoa* [2018] GHASC 31.

the illiterate parties understood the agreement.[24] The learned judge held that failure to endorse a jurat on the will could be remedied by oral testimony that the requirements of the Illiterates' Protection Ordinance had been satisfied.[25] Thus, if a jurat is absent, but it could be proven through the testimony of a witness that the will was the deed of the testator, there is no reason for the court to invalidate the will. *In Re Mensah (Dec'd): Barnieh v Mensah*, the court held that any available proof that the will was read over to the testator would suffice.[26]

Nigerian law seems to subscribe to this school of thought. The court in *Itauma v Akpe-Ime* held that the object of the Illiterates' Protection Law was to protect illiterates from fraud and strict compliance was therefore obligatory.[27] In *Fatunbi v Olanloye*, the court held that the object of the law is to protect the interests of illiterates and a jurat helps to trace the whereabouts of the maker, in order to ensure that the contents of the document reflects the true intention of the illiterate.[28] This proves that the essence of a jurat is to afford the illiterate the opportunity to confirm whether the document reflects his true intentions and since a will takes effect upon the death of a testator, any evidence to prove that the will reflects the true intentions of the illiterate testator would suffice.

Recent decisions of the Ghanaian supreme court also subscribe to this school. In *Duodu v Adomako & Adomako*, it was held that the courts must not make a fetish of the presence or otherwise of a jurat.[29] The presence of a jurat is presumptive of the facts alleged in the document, (which presumption is rebuttable or not conclusive). Therefore any evidence which demonstrates knowledge and understanding by the illiterate settles the issue.[30] In the case of *Akuteye v Adjoa Nyakoah*, the court held that there is no requirement that there be a jurat clause certifying that the document was read over and explained to the illiterate person.[31] Its presence only creates a rebuttable presumption that the document was indeed the deed of the testator.[32] Therefore, mere absence of a jurat does not invalidate the document without any tangible proof that he did not understand the contents of the document.[33]

Given this context, it is reasonable to endorse the current position of the law, as upheld by recent court decisions. If it can be proven that a will is the testator's deed, even without a jurat, why should the court invalidate it? The High Court (Civil Procedure) Rules indicates that probate or letters of administration may be granted if the court is satisfied that the will was read over to the testator or that the deceased knew its contents at the time of

[24] *Fori v Ayirebi* [1966] GLR 627.
[25] Ibid.
[26] *Re Mensah(Dec'd): Barnieh v Mensah* [1978] GLR 225.
[27] *Itauma v Akpe-Ime* [2000] NWLR 156.
[28] *Fatunbi v Olanloye* [2004] 6-7 SC 68.
[29] *Duodu* (n 22).
[30] Ibid.
[31] *Akuteye* (n 23).
[32] *Ibid.*
[33] *Ibid.*

execution.[34] Therefore, it would be erroneous to hold that a will is null and void simply because it lacks a jurat.

The law requires that the contents of a will be read and explained to a blind or illiterate person in a language they understand before they sign it. This fact must also be endorsed on the will. Earlier court decisions suggested that noncompliance with these requirements would invalidate the will. However, recent rulings suggest that the presence of a jurat on a will merely creates a presumption that the testator knew its contents and signed it. This presumption is rebuttable, so that the contents of the will can still be challenged, regardless of the presence of a jurat. Similarly, the absence of a jurat does not necessarily invalidate a will, provided the standard of proof that the testator knew the contents has been met. Its presence is not conclusive of the contents in the document neither is it a sine qua non. While its presence may lighten the burden of proof on its proponent, its absence should not be fatal either. This position is consistent with the Mischief Rule, which requires that statutes be interpreted in light of the remedies they introduce to address specific defects.[35] The Illiterates' Protection Ordinance was introduced to protect the interests of illiterates and blind persons and not to introduce stringent requirements.[36]

4.0 THE NEED FOR FURTHER CLARITY AND INCLUSION IN LEGISLATION.

However, the law is silent on the status of deaf or dumb persons. Does the law regard a deaf or dumb person who is proficient in sign language as literate? This raises questions concerning the definition of language and whether sign language constitutes "language" in this sense. No case law has been pronounced on the matter, but arguments may arise. Perhaps, an amendment of the law to include deaf and dumb persons in the class of persons afforded protection under the Illiterates' Protection Ordinance may be helpful. [37]

5.0 CONCLUSION

In conclusion, this article explores the role of jurats in validating wills, specifically focusing on the legal intricacies faced by blind or illiterate testators, highlighting a legal shift towards prioritising the testator's understanding over strict procedural compliance. It discusses the evolution of jurat-related laws, contrasting views on jurats as either essential or presumptive evidence, and an examination of contrasting judicial viewpoints and recent court decisions highlighting a shift towards recognising the substantial rather than procedural compliance in the verification of a testator's understanding of the will's contents. The need for further clarity and inclusion in legislation, especially concerning deaf and dumb persons reinforces the argument for a legal system that is responsive and adaptable to the diverse needs of society.

[34] CI 47 (n 7), Or. 66 r 19.
[35] *Heydon's case* [1584] 76 ER 637.
[36] Cap 262 (n 14).

[37] Ibid.

In essence, the legal discourse on the role of jurats in establishing the validity of wills encapsulates a broader conversation on the balance between procedural formality and substantive justice. This article contributes to this ongoing dialogue by providing a comprehensive analysis on current practices and calls for legal reforms that accommodate the diverse needs of society, ensuring fairness and equity, especially for the most vulnerable.

UNMASKING THE PARADOX OF UNIVERSAL VALUES: REVISITING THE UNIVERSALITY DEBATE IN HUMAN RIGHTS

Diane E. Kaye*

ABSTRACT

This paper delves into the concept of Human Rights as intrinsic entitlements of all individuals, regardless of variations such as race and gender. The bedrock of Human Rights is found in the Universal Declaration of Human Rights (UDHR), a foundational document in International Human Rights, which asserts the universality of these rights. However, the question arises: Can Human Rights genuinely be universal in the absence of a universally shared culture? Against the backdrop of diverse cultures and socioeconomic structures, the imposition of uniform standards appears contentious.

This paper looks at the history and inception of the UDHR and the apparent non-inclusion of Non-Western States in the making of the document and the content and concept of Universality against the backdrop of cultural diversity. The paper also underscores Western Imperialism and its role in eliciting support from Non-Western States who may not have ratified the UDHR otherwise and concludes that the idea of Universality is merely an avenue by Western States to impose their narrow agenda on cultures that differ from them.

In summary, the paper explores the tension between the global applicability of Human Rights, cultural diversity, and perceptions of Western Imperialism. It delves into the origins of the UDHR, the essence of Human Rights, and the impact of cultural diversity, probing whether the universal assertion of Human Rights reflects an imposition of Western ideals on a global scale.

* BL (Ghana School of Law); LLM (Pennsylvania State University); LL. B (Lancaster University). The Author is grateful to Nana Kwame Agyeman for his invaluable teachings and stirring up the interest in this topic.

1.0 INTRODUCTION

Human Rights are the rights inherent in all human beings irrespective of differences such as race, gender, etc. The very fact of being a human entitles one to Human Rights. The principle of the Universality of Human Rights is arguably the bedrock of International Human Rights as stipulated in article 2 of the UDHR– the milestone document central to the development of Human Rights.

[1] However, where there exists no universally shared culture, can there truly be Universal Human Rights? Particularly against the backdrop of a wide array of different cultures and socioeconomic structures in certain countries, would it be fair to hold them to the same standards? Some countries believe that the views enshrined in the Declaration of Human Rights reflect the values of Western States and not their own and as a result, the West interfere with their internal affairs by imposing their distinct interpretations of Human Rights on them. This and other views have been the premise for countless debates regarding the universality of Human Rights, Cultural Diversity and Western Imperialism. These issues would be further explored in this paper. This essay will explore whether the global applicability of Human Rights is an attempt by the West to impose its own values on the rest of the world by delving into the history and inception of the UDHR, the content and conception of Human Rights, and the influence of cultural diversity.

2.0 HISTORY AND INCEPTION OF THE UDHR

Imperialism is an avenue by which colonisers extend their power or influence beyond active colonisation through economic, political, or social means.[2] It is in effect a mechanism utilised by a powerful country or group of countries to change or influence the way of life of people from poorer countries or former colonies. Thus, Western Imperialism is the influence of the West over former colonies through subtle means such as economic agreements, social systems or policies, etc. Introduced in 1948 by a UN General Assembly resolution, the UDHR aims to exert moral and political influence on states through a series of recommendations. It has been argued that the UDHR omitted the voice and values of states, cultures, and peoples. Why you may ask? A critical look at the document reveals that Western political philosophy and values underpin the UDHR, presenting a singular interpretation of Human Rights.[3] Out of the 58 United Nations (UN) member states at the time of the drafting of the UDHR, 14 were from Asia, 4 from Africa, and 3 from the South Sea Islands. The remaining 37 member states were all Western states.[4] Non-Western States were underrepresented and ironically some of them were still under colonisation by Western powers at that time, yet, "Human Rights" were being promulgated simultaneously.[5]

It is thus inaccurate to believe that the UDHR indeed represented and truly embodied 'a common statement of goals and aspirations' as provided in its preamble, a concept the international

[1] Universal Declaration on Human Rights (adopted 10 December 1948) 217 A(III) (UNGA), art 2
[2] Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?', European Journal of International Law, Volume 18, Issue 3, June 2007, Pages 379–40
[3] Elizabeth Willmott-Harrop, 'The Universal Declaration's Bias towards Western Democracies' (*Liberty Humanity*).
[4] Ibid.
[5] Franck Kuwonu 'Africa's Freedom Struggles and the Universal Declaration of Human Rights (2019) Africa Renewal' (United Nations) <https://www.un.org/africarenewal/magazine/december-2018-march-2019/africa's-freedom-struggles-and-universal-declaration-human-rights> accessed 17 February 2024.

community sought to bring to fruition.[6] How can that be when the international community at that point was far from fully realised? The UDHR therefore only consisted of the views of the colonising states and not the colonised states. This issue was raised at the instance of the Saudi Arabian delegation on article 16, that the UDHR represented '… standards recognised by Western civilisation and had ignored more ancient civilisations.'[7] Not surprisingly, the delegations which abstained from voting in favour of the UDHR were "Non-Western" States.

Conversely, critics argue that historically, a number of developing countries played an active and "highly influential" part in the drafting of the UDHR. Developing countries such as India, Chile, Panama, and Cuba contributed to the drafting process, and third-world states, particularly Ghana and Nigeria maintained the adoption of the Human Rights covenant for more than two decades.[8] They make a case that, the principles of Human Rights have been widely adopted, imitated, and ratified by developing countries, hence, the fact that they were devised by less than a third of the states in existence now is irrelevant. Nonetheless, the ratification and adoption of the UDHR does not belittle or override the very fact that its influence was mainly Western, thus, the UDHR reflected Western values and belief systems. It is also worth mentioning that, Human Rights vary from country to country and continent to continent and arguably, it is stated that Human Rights were imposed on Non-Western States by Western States as a condition for independence which may account for the wide adoption and ratification by developing countries.

3.0 UNIVERSAL HUMAN RIGHTS AND CULTURAL DIVERSITY

It is only within a universe of shared values that the presumption of universality encounters no difficulties. Various Human Rights instruments are highly controversial owing to the fact that they contain values not shared worldwide. The UDHR is argued to be an embodiment of values not compatible with many value systems in the world. As the scholar Sinha puts it, 'one particular ideology or one particular political system claiming to be imposed upon the entire world' is what comes to mind with regard to these rights.[9] A critical look at the UDHR illustrates that, the values it expresses are predominantly Western with a specifically capitalist view of how society operates. Prominence is given to civil and political rights as opposed to economic, cultural, and social rights and it does not acknowledge the key economic inequalities existing among states and their consequences on the implementation of the recommendations. The West is widely acknowledged as having had the most influence on the concept of modern-day Human Rights, its culture dominates the ideas behind the Human Rights instrument, thus, it cannot be assumed to be applicable to other regions. The United Nations Department of Public Information defines cultural relativism as, 'the assertion that Human values, far from being universal, vary a great deal according to different cultural perspectives'.[10] What may be morally right in one culture, may be wrong in another culture which is why, it is based on this premise that Non-Western States view the UDHR as an instrument of oppression or a tool for subjugation as it is viewed as forcing Western values on Non-Western States. To a cultural relativist, the UDHR represents moral principles valid in one culture but not entirely acceptable in others.

[6] Universal Declaration on Human Rights (adopted 10 December 1948) 217 A(III) (UNGA), Preamble
[7] Michael Ignatieff, 'The Attack on Human Rights' (2001) Foreign Affairs, 80(6), 102–116. JSTOR.
[8] Susan Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights' Human Rights Quarterly, vol. 23, no. (1), 44–72.
[9] Alison D. Renteln, 'The Concept of Human Rights' (1988) Anthropos, vol. 83 no. 4/6, 343–364.
[10] All Answers ltd, 'Universalism and Cultural Relativism in Human Rights' (Lawteacher.net, August 2023).

Philosophers have stipulated that nothing can be truly universal and that all rights are values that are limited and defined by cultural perceptions.[11] They further state that Human Rights are founded on a human-centered view of the world based on the individualistic view of man as an autonomous being, whose greatest concern is to be free from interference by the state.[12] However, this ideology clashes with the communitarian view that characterises cultures where the society is conceived of as far more than the sum of its individual members. Individuals are not accorded rights in the same manner in Western States as they are in Non-Western States such as Ghana, Asia, and Nigeria. In Africa, it is the community that protects and furthers the development of an individual. An African writer illustrates this African philosophy of existence as 'I am because we are, and because we are therefore, I am'.[13]

It is argued that in African, Asian, and other non-western societies, group rights take precedence over individual rights as pertains to culture and tradition. Thus, it is said that Universal Human Rights cannot apply to Non-Western States because of the unique nature of their societies, thus, subjecting them to it is a form of Western Imperialism. For example, the individualism of the Human Rights doctrine is not suitable for Asian culture. The Asian value of "community harmony" is a depiction of the differences between Asian and Western societies as the idea of an individual's inalienable right does not suit Asian Societies.[14] For example, in states where arranged marriages are customary, clause 2 of Article 16 of the UDHR would be routinely disregarded as it is incompatible with their tradition.

However, on the other side, critics argue that the concept of Universal Human Rights does not disregard the reality of different cultures in different societies.[15] They argue that the concept is not static but relates to all people and situations and that, the Universality of Human Rights does not mean there is a global imposition of a particular set of Western values. It rather aims to recognise the different cultures, religions, and traditions so far as the difference expresses the dignity of persons. They further assert that, Human Rights principles are found in different cultures and world religions, therefore, values such as freedom, solidarity, and justice are neither Western nor Eastern values but are universal and are expressed in indigenous cultural forms.[16] They also contend that current objections to the Universality of Human Rights reflect the conflict between the primacy of the individual and the paramountcy of society. Civil and political rights tend to protect groups whereas social and economic rights protect individuals.

Nonetheless, whole groups may collectively exercise rights but, the individuals within the group must also have the freedom to exercise their rights within the group without any infringement by the group itself. Again, the danger of cultural relativism lies in the fact that an individual's fundamental Human

[11] Jerome Shestack, 'The Philosophic Foundations of Human Rights' (1998) Human Rights Quarterly, vol. 20, no. 2, 201–34.
[12] Ibid.
[13] Michael Eze, 'I Am Because You Are' (*UNESCO*, 6 September 2018) <https://courier.unesco.org/en/articles/i-am-because-you-are> accessed 17 February 2024.
[14] H.M.D. Shanawez, 'Human Security in Asia: by Universal Human Right or Cultural Relativism?' <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=26855f5a0f23852ee2148bc4f8e4676b74ebb700> accessed 17 February 2024.
[15] Studylib.net, 'Arguments for and against Universalism of Human Rights' https://studylib.net/doc/7792225/arguments-for-and-against-universalism-of-human-rights accessed 17 February 2024.
[16] Ibid.

Rights may be denied dependent on the state that they happen to be in. This they say, is frequently used by states to justify Human Rights violations.[17]

Flipping the coin back, asserting that Human Rights principles are found in indigenous cultural forms all around presumes the existence of a unified group that everyone forms a part of, which is inaccurate. These if they exist at all, vary from one culture and tradition to the other and who is to say which one should exist in all cultures? Who has the right to assert that their views are right and the other views are wrong? The domination of the West through the Universality of Human Rights is indeed akin to Western Imperialism.

3.1 Arguments against Western Imperialism

Article 38 of the statute of the International Court of Justice outlines the general principles of civilised nations as a source of law[18]. This, in itself, signifies a hierarchy of a group of countries wherein a specific cluster of countries wields the influence to dictate norms to other nations. From my perspective, this illustrates a manifestation of Western Imperialism. It is argued that the non-binding nature of the UDHR does not impose any values on others. However, this does not mask the enormous influence the document has had for the past 5 decades of its existence. Western States have used subtle means to ensure Non-Western States ascribe to the document. In certain instances, they have made overseas aid conditional on democratisation as a way to impose Western norms, values, and cultures on African States and developing countries, as in the example of the ex-Prime Minister of the United Kingdom deciding to cut aid to Ghana if Ghana did not legalise homosexuality[19]. That is a classic case of Western Imperialism as it raises questions about one state's authority to prescribe actions for another sovereign nation, particularly if it might undermine the cultural fabric of the latter's society. This highlights a lack of comprehension of our unique traditions as Western ideals are imposed on grounds of superiority of ideas.[20] Throughout Western history, injustices have been committed in the name of Human right jargons.

4.0 CONCLUSION

Undoubtedly, the UDHR exhibits imperfections. How can one single document claim to represent every single person in the world when our experiences are so different? Our roles in the world are shaped by society, our values and morals depend on our cultural upbringing. The UDHR is a document fully rooted in Western values and does not account for the unique cultures and traditions that exist in the world. Its Western-oriented viewpoint leaves gaps in addressing social disparities and proves inadequate in tackling matters concerning minority rights and the rights of distinct cultures and societies. It seeks to establish a shared framework for dignity and justice however, its interpretation and application remain subject to cultural variations and nuances. This then leads to the Universal concept of Human Rights being seen as a form of cultural domination where more economically influential countries wield authority over less developed nations. This perception remains relevant especially when considering the drafting process of the UDHR and the subtle ways Western States got Non-Western States to adopt and ratify the document.

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[17] Shanawez (n 14)
[18] Statute of the International Court of Justice (signed 26th June 1945), art 38.
[19] BBC, 'Ghana Refuses to Grant Gays' Rights despite Aid Threat' (*BBC News*, 2 November 2011) <https://www.bbc.com/news/world-africa-15558769> accessed 17 February 2024.
[20] Willmott-Harrop (n 3).

However, despite these, one cannot undermine the monumental influence it has had as a cornerstone document in establishing global Human Rights norms. It served as a foundational reference point from which substantial progress has been achieved. It acts as a platform for dialogue and advocacy, driving positive change on a global scale. But, by failing to account for the cultural norms and values which exist in the rest of the world, it may be viewed as nothing more than an attempt to impose Western values on the rest of the world as was done during the height of colonialism. "The West now masks its own will to power in the impartial, universalising language of Human Rights and seeks to impose its narrow agenda on a plethora of world cultures that do not share the West's conception of individuality, selfhood, agency, or freedom". To consider the universalisation of the UDHR would imply that, all contradictory elements will be rendered redundant and that, the culture which brought about Human Rights would become a universal culture, a concept which is untenable. Striking a balance between upholding essential Human Rights and respecting cultural diversity will unmask the paradox of Universal Values and lead to less resistance, fostering a more inclusive and harmonious global framework for safeguarding the rights and dignities of all individuals, regardless of their cultural dynamics.

TRACING THE DEVELOPMENT OF SPOUSAL PROPERTY RIGHTS IN GHANA: AN EXAMINATION OF GHANAIAN JUDICIAL DECISIONS AND A PROPOSAL FOR LEGISLATION IN THAT REGARD

Juliet Buntuguh*

ABSTRACT

This article examines the historical development of the distribution of spousal property rights in Ghana, focusing on the changes that have occurred over time, using case law. It begins with the case of Quartey v Martey[1] where women were considered the property of men; consequently, they were unable to own property. Additionally, the article highlights the various principles applied by the courts over the years in deciding matters pertaining to the distribution of spousal property.

Specifically, the article draws upon the principles applied in landmark cases such as Mensah v Mensah[2] (hereafter referred to as Mensah v Mensah No.1) and Gladys Mensah v Stephen Mensah,[3] (hereafter referred to as Mensah v Mensah No.2), Fynn v Fynn[4] as well as Adjei v Adjei,[5] to emphasise the need to harmonise such principles. These cases serve as significant milestones, underscoring the progressive transformation of judicial decisions toward upholding spousal property rights. The paper discusses the customary law principle, the substantial contribution principle, and the equality is equity principle, highlighting their profound impact on the equitable distribution of spousal assets. It concludes by suggesting

* Bachelor of Laws (LL.B), Central University; BL, Ghana School of Law, Accra.
[1] [1959] GLR 377.
[2] 1997-98] 2GLR 193.
[3] [2012] 1 SCGLR 391.
[4] [2013-2014] 1 SCGLR 727.
[5] *Adjei v Adjei* (J4 6 of 2021) [2021] GHASC 5 (21 April 2021).

the enactment of legislation, specifically to regulate the distribution of spousal property in Ghana as prescribed by the Constitution.[6]

Overall, this paper provides a comprehensive understanding of judicial decisions on the distribution of spousal property rights in Ghana and its evolution over time.

1.0 INTRODUCTION

Spousal property rights in Ghana have undergone substantial transformations throughout the years. Prior to attaining independence, the legal system in Ghana was heavily influenced by English Common Law, which imposed limitations on spousal property rights. For instance, under Common Law, married women had restricted rights and were unable to own property, enter into contracts, or sue in their own name. These privileges were exclusively reserved for men, and married women during that era were subject to their husband's authority, lacking autonomy in making independent decisions.

Through case law, the landscape of spousal property rights in Ghana has undergone a transformative journey, evolving from the historical precedent set by the case of *Quartey v Martey*[7] and finding its way to more recent decisions such as *Gilbert Anyetei v Sussana Anyetei*.[8] This article reflects a journey from traditional and restrictive viewpoints to a more inclusive and equitable approach. It calls for a dedicated statute to provide clarity and consistency in addressing disputes related to spousal property. The article also notes that despite legal advancements emanating from case law throughout the years, the absence of a clear statutory framework governing spousal property rights remains a significant challenge to the full enjoyment of spousal property rights.

The call for a comprehensive statutory framework underscores the need for legal norms to align with constitutional mandates, ensuring a fair and predictable resolution of spousal property disputes in the diverse context of Ghanaian marriages.

2.0 PRINCIPLES FOR DISTRIBUTION OF SPOUSAL PROPERTY

2.1 The Customary Law Principle

The true evolution of spousal property rights in Ghana began with the case of *Quartey v Martey*.[9] This case marked the court's endorsement of the viewpoint that any property acquired by a man and woman during their marriage was solely owned by the man, with the woman being entitled only to maintenance after the death of the man, contingent on good behaviour. The court based its decision on the fundamental Ghanaian customary law principle, which asserts that the man is the head of the family and primary provider for his wife and children. Consequently, a wife is deemed dependent on her husband, therefore,

[6] 1992 Constitution, art22(2).
[7] Quartey (n 1)
[8] [2023] DLSC16110
[9] [1959] GLR 377

incapable of independently acquiring property. Ollenu J (as he then was) expressed in *Quartey v Martey*,[10] that:

> By customary law it is a domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, eg farming or business. The proceeds of this joint effort of a man and his wife and or children and any property which the man acquires with such proceeds are by customary law the individual property of the man. It is not the joint property of the man and the wife and or children. The right of the wife and children is a right to maintenance and support.

Although *Quartey v Martey*[11] might appear contentious in modern times, it elucidated the customary law standpoint on spousal property rights prevailing in Ghana at that time. The repercussions of this decision were far-reaching and had a profound impact on how extended family members treated widows in Ghanaian society at the time. One notable consequence was the unjust practice of driving widows out of their homes when their husbands passed away. However, the oppressive nature of this situation did not persist for long as the courts took proactive measures to establish new principles concerning spousal property.

2.2 The Substantial Contribution Principle

The principle of substantial contribution asserts that when a spouse makes a substantial contribution to the acquisition of property during the subsistence of a marriage, that spouse is jointly entitled to the said property.

In 1968, the court, in the case of *Clerk v Clerk*[12], ruled that a woman who was married under the ordinance but remained unemployed throughout her marriage was not entitled to any interest in her matrimonial home. This decision was based on the absence of substantial contribution on the part of the woman to the property acquired. The woman argued that her moral and material support to her husband during the acquisition of the property should entitle her to a share. However, the court rejected her claim, stating that her alleged support merely constituted the duties of a good wife and did not meet the threshold of substantial contribution.

In *Yeboah v Yeboah*,[13] Hayfron-Benjamin J (as he then was) clarified the principle of substantial contribution by emphasising that there was no customary law prohibiting the creation of joint interests among unrelated individuals. This is due to article 18[14] of the 1992 Constitution, which guarantees the right of all individuals to own property, irrespective of

[10] Ibid, 380.
[11] Ibid.
[12] [1968] GLR 353.
[13] [1974] 2 GLR 114.
[14] 1992 Constitution, art18.

their relationship. Additionally, article 22[15] of the Constitution addresses spousal property rights as follows:

> "(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will
>
> (2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.
>
> (3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article,
>
> (a) Spouses shall have equal access to property jointly acquired during marriage;
> (b) Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage."

The above-mentioned constitutional provision ensures that all individuals, regardless of the type of marriage they have contracted (monogamous marriage under Part Three of the Marriages Act,[16] polygamous marriage under customary law and Part One of the Marriages Act[17] or Mohammedan Marriages under Part Two of the Marriages Act[18] in Ghana), are protected.

The principle of substantial contribution was further advanced in *Abrebeseh v Kaah*,[19] where the court ruled that a wife who had contributed half of the land purchase price for her matrimonial home, building materials during construction, and supervised labourers, had substantially contributed to the acquisition of the property and was thus entitled to an interest in the property.

The limitations of the substantial contribution principle are evident, as it fails to recognise unquantifiable contributions made by spouses to property acquisition. This is exemplified in the *Clerk case*, where the court did not consider marital moral support substantial enough to warrant an interest in matrimonial property.

2.3 Equality is Equity Principle

As a general rule, the equality is equity principle posits that jointly acquired property in a marriage should be shared equally, irrespective of the quantity or quality of contributions, for that ensures equity. The principle was initially articulated in the case of *Mensah v Mensah No. 1*,[20] where the court held that a husband and wife were joint owners of their matrimonial

[15] 1992 Constitution, art 22.
[16] Marriages Act, 1884 – 1985 CAP. 127.
[17] Ibid.
[18] Ibid.
[19] [1976] 2 GLR 46.
[20] 1997-98] 2GLR 193.

home due to their contributions to its acquisition. In that case, the couple acquired certain properties during their marriage, and the wife made significant financial and labour contributions to the acquisition of the said properties. Upon divorce, the wife asserted her right to a share of those properties, highlighting her contributions to their acquisition and upkeep.

Applying the equality is equity principle, Bamford-Addo JSC stated as follows:[21]

> The principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce have no application in marital relations between husband and wife who jointly acquired property during marriage…

The court's decision was influenced by article 22 (3) of the Constitution[22] which states that a spouse shall have equal access to property jointly acquired during marriage and that such assets should be distributed equitably between the spouses upon dissolution of the marriage.

In the case of *Boafo v Boafo*,[23] the court provided further clarification on what constitutes an equitable distribution of property. Dr. Date-Bah JSC referred to the decision in *Mensah v Mensah No.1*, supra and further elaborated on the court's position, stating that:[24]

> The spirit of Bamford-Addo JSC's judgment in *Mensah v. Mensah* appears to be that the principle of the equitable sharing of joint property would ordinarily entail applying the equitable principle, unless one spouse can prove separate proprietorship or agreement or a different proportion of ownership. The question of what is "equitable", in essence, what is just, reasonable and accords with common sense and fair play, is a pure question of fact, dependent purely on the particular circumstances of each case. The proportions are, therefore, fixed in accordance with the equities of any given case.

Boafo v Boafo[25] clarified that an equitable distribution of property is not necessarily 50 percent and is determined on a case-by-case basis. The court's intention in applying this principle was to ensure fairness and justice, rather than blindly applying rules without considering the specific circumstances.

[21] Ibid, 355.
[22] 1992 Constitution, art 22(3)(a)(b).
[23] [2005-2006] SCGLR 705.
[24] Ibid, 711.
[25] [2005-2006] SCGLR 705.

The equality is equity principle was further expanded in the case of *Mensah v Mensah No. 2*[26] in 2012. In that case, the court emphasised that a wife's contribution to the joint property of the family includes performing household chores, such as cleaning, cooking, raising children, and providing peace of mind to her husband, allowing him to pursue economic activities.

Jones Dotse JSC stated:

> We believe that, common sense, and principles of general fundamental human rights require that a person who is married to another, and performs various household chores for the other partner like keeping the home, washing and keeping the laundry generally clean, cooking and taking care of the partner's catering needs as well as those of visitors, raising up of the children in a congenial atmosphere and generally supervising the home such that the other partner, has a free hand to engage in economic activities must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved.

This is so because, it can safely be argued that, the acquisition of the properties was facilitated by the massive assistance of the other spouse.

Mensah v Mensah No.2 [27] has had a significant impact on spousal property rights in Ghana. It has contributed to a shift in the way spousal property is shared, emphasising the importance of spousal support and the contributions of both spouses to the acquisition and maintenance of spousal property.

Not long after *Mensah v Mensah No. 2*, the courts employed the equality is equity principle in *Quartson v Quartson*.[28] Here, Dr. Date-Bah JSC emphasised that the courts were bound to adhere to the precedent set by the Supreme Court in *Mensah v Mensah No. 2* since marital property could be understood as property acquired jointly by spouses during their marriage, irrespective of whether the other spouse has made a contribution to its acquisition.

The preceding cases clearly demonstrate that the principle of equality is equity has profoundly reshaped the manner in which Ghanaian courts approach the sharing of marital property and the entitlements of spouses to such acquired assets. *Mensah v Mensah No.2* in particular has clarified the value of domestic work within a marriage and its recognition as a contribution to marital property.

[26] [2012] 1 SCGLR 391.
[27] [2012] 1 SCGLR 391.
[28] [2012] 2 SCGLR 1077.

2.4 The Right to Own Individual Property

It should be noted that the equality is equity principle does not diminish one's right to own personal property even in a marriage. This is guaranteed by article 18 of the 1992 Constitution of Ghana which states:

> (1) Every person has the right to own property either alone or in association with others.
>
> (2) No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."

The right to own property is fundamental and inherent. In line with this reasoning, the court in *Quartson v Quartson* (*supra*), cautioned that the Supreme Court's decision in *Mensah v Mensah No.2* was not to be taken as a blanket rule that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect were intended to be shaped and defined on a case-by-case basis.

This underscores the principle of the presumption of joint ownership of property which could be rebutted by adducing evidence to support individual ownership of property.

In the case of *Grace Fynn v Stephen Fynn & Another*,[29] the court advanced the position that spouses in a marriage are capable of acquiring and owning individual property.

It stated that:[30]

> Indisputably, during the existence of the marriage union, it is most desirable that the couple pool their resources together to jointly acquire property for the full enjoyment of all members of the nuclear family in particular. But, the decided cases envisage situations where within the union, parties may still acquire property in their individual capacities as indeed is their guaranteed fundamental right as clearly enshrined under article 18 of the 1992 Constitution, in which case they would also have the legal capacity to validly dispose of same by way of sale, for example, as happened in this instant case. No court in such clear cases would invalidate a sale transaction on the sole legal ground that the consent and concurrence of the other spouse was not obtained. We would however subject these views we have expressed to this sound caution. Since, the peace, tranquility, harmony, stability and indeed the health and general wellbeing of any marriage union thrives best in the environment of mutual affection, trust and respect for each other as well as

[29] [2013-2014] 1 SCGLR 727.
[30] Ibid, 10.

> transparency; we think a spouse in such a case is under a moral obligation at any given time, (indeed it is most expedient and fair) to apprise the other spouse of the intention to acquire and dispose of self-acquired properties at all material times.

From the foregoing, it is evident that the equality is equity principle was not intended to be applied indiscriminately and universally, but rather on a case-by-case basis, depending on the unique facts and details of each case.

3.0 RECENT JUDICIAL POSITIONS ON THE DISTRIBUTION OF SPOUSAL PROPERTY

Over the years, many new cases requiring the distribution of jointly acquired spousal property have arisen, leading to a further nuanced development of the "equality is equity" principle. To provide context for the prevailing trend of judicial determinations on this matter, two cases will be expounded upon.

First is *Adjei v Adjei*[31] where the Petitioner lodged an appeal against the trial court's decision, which ordered the settlement of the matrimonial residence in favour of the Respondent. The trial court based its judgment on the fact that the Petitioner acquired the property during the course of marriage and that during that time, the respondent supposedly fulfilled the responsibilities typically associated with a stay-at-home partner, such as cooking, cleaning, and other domestic duties, without receiving any compensation.

However, the Court of Appeal overturned the trial court's decision, and subsequently, the Supreme Court upheld the reversal. In a majority opinion delivered by Appau, JSC (as he then was), it was determined that the matrimonial property could not be considered jointly acquired by the couple, and thus did not qualify for distribution based on the principle of "equality is equity." This conclusion was reached because the land on which the property was built was solely acquired by the Petitioner before entering into marriage, and the construction of the property itself was funded solely through an outstanding loan obtained by the Petitioner alone. The Court concluded that the Respondent/Appellant failed to demonstrate how she had contributed to the property and, therefore, was not entitled to any claim on it.

From *Adjei v Adjei*,[32] it becomes evident that the courts do not mechanically invoke the "equality is equity" principle established in *Mensah v Mensah No.2* and as upheld in *Quartson v Quartson* when distributing marital assets. An individual asserting contribution to the acquisition of jointly held property bears the onus of substantiating such contribution, be it through financial means or spousal support during the marital duration.

[31] *Adjei v Adjei* (J4 6 of 2021) [2021] GHASC 5 (21 April 2021).
[32] *Ibid.*

Similarly, in *Gilbert Anyetei v Sussana Anyetei*[33] *("the Anyetei case")* the court deliberately prioritised the equitable distribution of property procured by the parties. Pwamang JSC stressed that the only property available to be distributed by parties upon the irreparable breakdown of a marriage was jointly acquired property and such property had to be shared equitably to conform to the requirements of article 22(3)(b) of the Constitution. In an attempt to distinguish equitable distribution from equal distribution, Pwamang, JSC stressed that equitable distribution of spousal property in some cases was 50/50 but in other cases, it could be 60/40 or less.

From the *Anyetei case* and the other cases above, it is clear that the position of the courts evolve with time and evolve based on the circumstances of each case. There is still no absolute position of the courts when it comes to distributing spousal property in Ghana.

4.0 THE WAY FORWARD

Spousal property rights in Ghana have evolved since the 1950s, yet there remains substantial room for improvement in this crucial area of family law. Despite the progress, a glaring issue persists: the absence of a clear statutory framework to govern spousal property rights. This gap in legislation is particularly puzzling given the explicit directive in article 22(2) of the Ghanaian Constitution, which assigns the responsibility to Parliament to establish such a framework.

In the absence of a dedicated statute, Ghana's courts have been compelled to rely on their own interpretations and judgments to address disputes related to spousal property rights. Consequently, the landscape of judicial decisions in this regard have evolved over time, reflecting the dynamic nature of legal interpretation and the evolving societal context.

One must appreciate the complexity and diversity of Ghanaian marriages to understand the urgency of rectifying this situation. Ghanaian marriages come in various forms, influenced by a myriad of customs, traditions, and cultural values. These factors significantly impact the determination of property ownership within a marital union.

An Act, specifically promulgated to regulate spousal property rights would be a fitting remedy to the inconsistencies that have emerged in judicial decisions. Such legislation would provide much-needed clarity, helping both the judiciary and individuals involved in disputes navigate the intricate terrain of the distribution of spousal property rights within the context of diverse Ghanaian marriages. Furthermore, it would bring legal norms in alignment with the constitutional mandate and create a more equitable and predictable framework for addressing these vital issues in Ghanaian family law.

The author recommends that the suggested statute to regulate the distribution of spousal property should provide a precise definition of what constitutes spousal property. It should also clearly outline the types of marriages that fall under its purview and establish specific

[33] CA/J4/67/2021.

conditions or criteria under which concubines may be entitled to spousal property rights, if ever. This is imperative due to cases, such as *Essilfie v Quarcoo*[34] and *Rene Gorleku v Justice Pobee*,[35] which have demonstrated instances where concubinage could be equated to valid traditional marriages under customary law. For example, in a situation where a man and a woman cohabit, have children, and are recognised as husband and wife by their community, as exemplified in *Essilfie v Quarcoo supra*, the court holds them as husband and wife.

Another crucial aspect of spousal property rights legislation is a clear specification of the proportion of marital property to which a spouse is entitled and the circumstances under which they may receive a greater or lesser share of such property.

In foreign jurisdictions such as Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin, all in the United States, spousal property is treated as community property and subject to equal division upon marriage dissolution.[36] In contrast, the legal landscape in Ghana lacks such clarity, and currently, the courts must handle spousal property distribution on a case-by-case basis.

A novel addition to the law would be the introduction of home rights, a practice in the UK where property is owned by one party to a marriage but the other party has equal rights to the property, meaning that they have the right to live in the family home and not be made to vacate same unless there is an occupation order stating that vacation is mandatory.[37]

This would empower more women in marriages, particularly those who do not directly contribute financially to the acquisition of spousal property.

5.0 CONCLUSION

The evolution of spousal property rights in Ghana has witnessed significant changes throughout the years, marked by notable judicial decisions that have paved the way for greater justice. Beginning with the landmark case of *Quartey v Martey*[38] and progressing through the two pivotal *Mensah v Mensah*[39] cases, and culminating in the *Anyetei case*[40], substantial strides have been taken towards achieving fairness.

In tandem with these legal shifts, the guiding principles applied by the courts in determining spousal property distribution have also evolved. Recent instances show a predominant reliance on article 22(3) of the Constitution, tempered only by the principles of equity.

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[34] [1992] 2 GLR 180.
[35] [2012] 42 GMJ 53 CA.
[36] Internal Revenue Service, 'Community Property' (2020), Publication<555https://www.irs.gov/pub/irs-pdf/p555.pdf>Accessed 11 October 2023.
[37] E Booker, 'What are Home Rights?'[2023]<https://www.stephens-scown.co.uk/family/divorce-and-separation/what-are-home-rights/ >Accessed 11 October 2023.
[38] [1959] GLR 377.
[39] 1997-98] 2GLR 193.
[40] CA/J4/67/2021.

The next step in the evolution of the distribution of spousal property rights, hinges on parliamentary enactment of a comprehensive law. It is proposed that the legislation should explicitly outline guiding principles for equitable distribution of spousal property Ghana, offering a clear framework for anticipating and predicting judicial decisions relating to spousal property.