GHANA SCHOOL OF LAW STUDENT JOURNAL

Volume V, 2020

ARTICLES

A Publication of the Students' Representative Council & Sponsored by CBOD Ghana

GHANA SCHOOL OF LAW
STUDENT JOURNAL

Editor-In-Chief

Abena A. Awuku-Larbi

Volume V 2020

ISSN: 2720-7757

This journal should be cited as (2020) 5 GSLSJ

Publisher

The Students' Representative Council
Ghana School of Law
Accra

Editorial Office & Address

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Ghana School of Law, Accra
E-mail: theeditorialboardgsl@gmail.com

Printed By:

Type Company Limited
Email: info@typecompany.com

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ACKNOWLEDGEMENTS

This publication would not have been possible without the support and guidance of His Lordship, Justice Sir Dennis Adjei (FGA), Justice of the Court of Appeal

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OF ROOTS AND BRANCHES; THE CURIOUS CASE OF ORDER 81[1]

Bobby Banson, Esq, FCIArb[2]

Abstract

The High Court (Civil Procedure) Rules, CI 47 contains the rules of court that regulates Civil Proceedings the High Court. In Re Cole's v Ravenshear [1907] 1 KB 1, it was held that, "a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

Nonetheless, though the High Court rules are to be a guide, there are some acts of non-compliance which cannot be overlooked by the Courts. In this article, the author examines the conditions under which non-compliance with the rules of Court may or may not be disregarded by the Courts, as well as the implications that non-compliance of rules could have for all parties involved in a matter.

1 Order 81 of High Court (Civil Procedure) Rules, 2004, CI 47.

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Introduction

"If your knowledge of substantive law is brilliant and you have no knowledge of the rules of Court then you cannot be a "proper" lawyer." These were the words of Anin Yeboah CJ, during one of his lectures in 2010. In his estimation, and like those of many Legal (Court room) Practitioners, a good lawyer must know the rules of Court "by heart". After my first Civil Procedure Class with the brilliant Ace Ankomah, I wondered how someone would be expected to know all the 82 orders of the High Court "by heart". Some of the Orders have as many as 60 rules. I immediately appreciated how "long" this journey to becoming a "proper" lawyer will be.

I soon realized there could be a way out of this task of knowing the rules of Court "by heart". My escape route was found in Order 81. I loosely understood Mr. Ankomah's lecture on Order 81 to mean that I do not need to know everything in the rules book. If I sin against the rules, Order 81 rule 1 will be the blood, which will wash away my sins and grant me access to the "throne of mercy". In my infantile mind, if there would be a cure for not knowing the rules, why do I have to know them? I must admit that in hindsight, I have realized that I was a "child" then and like a "child" I thought and spoke. I have, in my few years in practice, however found the provisions of Order 81 very curious. For me, it is akin to an unruly horse. It leaves so much to the discretion of anyone who is in the position to interpret and apply same and as such can be interpreted by each individual to have a different meaning.

The purpose of this article is to discuss how the Courts have over the years interpreted and applied the provisions of Order 81 and its predecessor rule to "apparently" prevent the multiplicity of suits and avoid delays, cost and unnecessary expenses in civil litigation as Order 1 rule 1 (2) provides.

Background

The High Court (Civil Procedure) Rules, CI 47 were enacted in 2004 to replace the L.N.140A, which had been the applicable civil rules of the High Court in Ghana since 1954. Yes, it took 50 years for us to change our rules of Court.

The parallel provision in the L.N. 140A was Order 70, r. 1 which provided as follows:

"Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit."

These provisions obviously meant that where there has been a non-compliance with the rules of Court, the judge has the discretion to do any of the following:

I. To declare any proceedings emanating from such breach as void.

II. To save any proceedings emanating from a breach of the rules either in part or in whole on terms as the Judge may deem fit.

This means that where there is a breach of the rules in any proceedings, the judge has the right to determine whether he will declare the proceedings a nullity or a mere irregularity. Unfortunately, the rules did not provide any criteria to guide the judge in deciding which of the options he would take. This is where case law stepped in.

The Two Types Of Non-Compliance Under LN 140A

As pointed out earlier, under LN 140A, a non-compliance with any of the rules could result in a proceeding being declared null and void or an irregularity. Because the rules were silent on any criteria, case law attempted to differentiate between the kinds of non-compliance, which could result in proceedings being declared a nullity and those, which would not.

TAYLOR JSC, in attempting to categorize the kinds of non-compliances envisaged under LN 140A stated as follows in the case of **Amoakoh v. Hansen [1987-1988] 2 GLR 26 at 37:** "If however it is an irregularity that **goes to the root of the trial** and fouls the springs of the judicial process and thus disabling the machinery of law from advancing the course of justice, then the whole proceeding is void and a nullity..."

APAU J further held in **Bonsu v. Eyifah & Anor [2001-2002] 1 GLR 9 at 16-17** that "...I have to state the point clearly here that the only irregularities that can be cured by order 70 of LN 140A are those that border on the non-compliance with the rules of court or any rules of practice, but even then, it is not in cases, for where the courts think that injustice will be caused to the other party when a rectification is allowed, the court shall decide otherwise. However, where the irregularity is not a non-compliance with the rules of court but borders on non-compliance with the requirement of statute or other authority...then the whole action become a nullity."

Now, there are two points which stand out from the dicta of Taylor JSC and Apau J viz:

I. The non-compliance must go to the root of the trial.

II. The effect on the non-compliance on the course of justice.

For the avoidance of doubt, the saving grace under LN 140A did not apply to breaches of statutory provisions. So for instance, where the State Proceedings Act, 1998, Act 555 requires that the Attorney General must be given 30 days' notice before any action is commenced against the Republic of Ghana[3], a Judge does not have any discretion in such a breach of this statutory provision. Any proceedings subsequent to the breach shall be declared a nullity. In this article, I will attempt to use the ratio in the two (2) cases above to explain how the courts decided to exercise their discretion under LN140A to determine which non-compliance will render a proceeding a nullity and which non-compliance will make a proceeding irregular.

In **Ameyibor v. Komla [1980] GLR 820-825**, it was found that "the failure by the bailiff to make the indorsement required by the rule resulted in no injury or prejudice to the defendant. The learned judge ought not to have treated the irregularity as a nullity and proceeded to dispose of the matter on that basis. He should have brought the failure to make the indorsement required by Order 9, r.17 as an irregularity within the true intendment of Order 70, r. 1 and done justice as a matter of discretion between the parties". The court was influenced by whether or not the breach would have resulted in an injustice to the other party.[4]

In **Amoakoh v. Hansen [1987-1988] 2 GLR 26**, the Court found that a non-compliance with the requirement for application for directions rendered the proceedings a nullity because the application for directions stage is a fundamental part of a case and if it is not conformed to, it renders the proceedings void.

3 Section 10 of Act 555.

4 This decision overturned the decision of the High Court in the case of ATTOH-QUARSHIE v. OKPOTE [1973] 1 GLR 59-69 where Hayfron-Benjamin J held that "I am of the view therefore that the bailiff who was entrusted with the service of the writ did not carry out his duties properly as provided for by the rules, and that the respondent could not legitimately have proceeded to judgment by default of appearance."

In **Azinogo v. W. E. Augustt & Co. Ltd. [1989-90] 2 GLR 278-282,** the Court of Appeal held that "Since there was non-compliance with the provisions of Order 14, r. 2 (3)[5], I hold that the whole proceedings were null and void".

In **Wusu v. Donkor & Others [1982-83] GLR 616-624,** it was held that "Non-compliance with the provisions of Order 42, r. 46 would not make the proceedings a nullity but voidable, i.e. to be treated as an irregularity which might be set aside. If the immovables of a person had been attached wrongfully and he was aware of the fact, he could apply to the court to have the attachment set aside. Even though under the authorities a return of nulla bona was required before the sale of the immovables, failure to make the return would only be an irregularity. The inactivity of the execution debtor would lend support to the fact that, in fact, he had no goods or movables within the jurisdiction, which could be attached. And since in any case the execution creditor could have the immovables of the execution debtor sold, it could not be said that the attachment and sale were a nullity".

From the authorities above, it is obvious that there was no criterion cast in stone about which non-compliance of a provision of LN140A was an irregularity or which non-compliance was a nullity. Everything depended on the facts of the case and the judge's understanding of what the justice of the case demanded. Hence, a non-compliance, which could be declared a mere irregularity in one case, could be declared as nullifying the proceedings in another case.

The Provisions Of Order 81 Rule 1 Of CI 47

Since 2004, proceedings in the High Court of Ghana have been regulated by High Court (Civil Procedure) Rules, CI 47.

5 This order required that a Respondent to an application for Summary Judgment must be given 4 clear days' notice of the application.

Order 81 rule 1 (1) of CI 47 provides as follows:

"Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it"[6].

The wording of Order 81 rule 1 of CI 47 is different from the wording of Order 70 rule 1 of LN140A for one basic reason: whereas LN140A gave the discretion to the court to render any proceedings a nullity for non-compliance of the rules, CI 47, gave no such discretion. The only consequence of non-compliance under Order 81 rule 1 is rendering the proceedings an irregularity. The Court under CI 47 therefore has no discretion to declare a proceeding as a nullity due to a non-compliance of a provision of CI 47.

Under CI 47, there is nothing like a breach, which goes to the root of the trial and a breach, which does not go to the root of the trial. There is no non-compliance of the rules, which will be deemed as so fundamental that it would render the proceedings a nullity. In other words, whereas some breaches of the rules were curable whiles others were not under LN 104A, CI 47 makes no such distinction and hence ALL breaches are curable. The power of the Court to either save proceedings by amendment or otherwise or set same aside in exercise of its discretion is however maintained in Order 81 of CI 47.

6 The original text reads: "Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall **not** be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it". However, the Supreme Court in the case of Republic v. High Court, Accra, ex parte Allgate Co. Ltd. (Amalgated Bank) Interested Party [2007-2008] SCGLR 1041 judicially amended this provision to delete the word "not" preceding "be treated as".

This contention is fortified by the decision of the Supreme Court in the case of **Friesland Frico Domo v. Dachel Co. Ltd [2012] 1SCGLR 41 at 43** where it was held that "We agree with Counsel for Plaintiff on his submissions and authorities cited that the words in Order 70 r.1 of LN140 should be given its ordinary meaning in order to serve the ends of justice. In that respect non-compliance with any of the rules does not render the proceedings automatically void".

The Supreme Court further held that "...the distinction between void and voidable proceedings cannot be maintained on account of the plain and ordinary meaning of the said Order".

Irregularities Under CI 47

Despite not having the power to declare any proceedings as a nullity for non-compliance with the rules of Court, the rules gave the Court the power to "set aside either in whole or in part" any proceedings in which there has been a non-compliance with the rules.

Order 81 rule 2 of CI 47 provides as follows:

"The Court may, on the ground that there has been such a failure as stated in subrule (1), and on such terms as to costs or otherwise as it considers just

a. set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein; or

b. exercise its powers under these Rules to allow such amendments to be made and to make such order dealing with the proceedings generally as it considers just.

In the recent case of **Standard Bank Offshore Trust Co Ltd (Substituted by Dominion Corporate Trustee Ltd) v. NIB (Suit No: Civil Appeal J4/63/2016);** the Supreme Court

held that "But Order 81 rule 2(a) entitles the court to set aside either wholly or in part the proceedings in which the failure to comply with a rule occurred, including any judgment or order made therein. What this means is that even after judgment, the entire proceedings may be set aside for non-compliance with a rule of practice. It depends on the particular breach complained off. What the Court discountenanced was the view that non-compliance automatically resulted in an invalidation of the proceedings in which the breach occurred. [7]

Now, herein lies the curiosity!

Under LN 140A, once a judge has found that a proceeding should be declared a nullity because of non-compliance with the rules, that proceeding will be set aside. Now under CI 47, even though the Judge cannot render proceedings a nullity due to non-compliance, that judge has the right to set aside a proceeding, which he finds as irregular due to non-compliance. The question then is why would a proceeding which has not been declared a nullity be set aside? To be able to answer this question, one must appreciate the difference between a proceeding, which is a nullity and a proceeding, which is "invalid" or irregular.

The explanation of the effect of a proceeding been declared a nullity lies in the words of Akuffo Addo J.S.C. (as he then was) in **Mosi v. Bagyina [1963] 1 G.L.R. 337 at 342** where he said: ". . . where a court or a judge gives a judgment or makes an order which it has no jurisdiction to give or make or which is

7 At this stage, I wish to respectfully register my contrary opinion to the decision of the Supreme Court to render the proceedings a nullity. My dissent is based on the fact that having participated in the proceedings culminating in the judgement; it did not lie in the mouth of the Defendant to now complain that because the Plaintiff did not provide full names of the beneficiaries of the Trust, the proceedings were irregular. My contention is fortified by the fact that the requirement to "identify" the parties to a suit is a requirement of the rules of court which when breached can always be cured by an amendment. However, when the Parties to a suit did not exist at the time of commencement of the action, then there is no party and the case suffers a still birth and is rendered void.

The obiter dictum of Justice Atuguba JSC in the review judgment on this case is worth noting. See the cases of BOATENG V BOATENG [2009] 5GMJ and KIMON COMPANIA NAVIERA SARP & ORS V VOLTA LINES LTD [1972] 2GLR 140 at 143.

irregular because it is not warranted by any enactment or rule of procedure, such a judgment or an order is void, and the court has an inherent jurisdiction, either suo motu or on the application of the party affected, to set aside the judgment or the order."

This means that where a proceeding is declared to be a nullity, the Court suo motu can set same aside anytime the attention of the court is brought to such void proceedings. However, where a proceeding is deemed to be irregular/invalid, that proceeding is valid and binding until the affected party brings the requisite application to have same set aside[8]. An understanding of the difference between when a proceeding is declared a nullity and when a proceeding is irregular/ invalid or voidable will greatly enhance one's appreciation of the essence of Rule 2 of Order 81 of CI 47.

Order 81 rule 2 provides as follows:

1. "An application may be made by motion to set aside for irregularity any proceedings, any step taken in the proceedings or any document, judgment or order in it, and the grounds of it shall be stated in the notice of the application.
2. No application to set aside any proceeding for irregularity shall be allowed unless it is made within a reasonable time and the party applying has not taken any fresh step after knowledge of the irregularity."

These provisions clearly mean that an Applicant will not be entitled to have a proceeding set aside as of right for non-compliance with the rules. That Applicant must satisfy the conditions set out in Order 81 rule 2 (2), which are that the application should be brought within a reasonable time and the Applicant should not have taken a fresh step. Hence, if there has been a non-compliance with any of the provisions

8 Please see WUSU v. DONKOR AND OTHERS (supra).

of the CI 47, it behooves on the affected party to immediately bring the attention of the Court to that non-compliance. The Court cannot on its own, unlike as was the case under LN 140A, identify the non-compliance and make consequential orders.

How The Courts Have Treated Order 81 Under CI 47

There have been some interesting judicial pronouncements on the effect of CI 47. I will attempt to analyze a few of those in this part.

In **Boakye v. Tutuyehene [2007-2008] SCGLR and Ankumah v. City Investment Co Ltd [2007-2008] 2 SCGLR,** the Supreme Court rejected the invitation to set aside proceedings as a nullity because there was no application of the directions prior to the commencement of the trial. The Court was of the opinion that having participated in the proceedings without complaint even after the non-compliance was occasioned; the Defendant cannot now be heard complaining about the irregularity[9].

In **Republic v. High Court, Accra, Ex Parte Allgate Co. Ltd. (Amalgated Bank) Interested Party [2007-2008] SCGLR 1041**, the Supreme Court refused to set aside proceedings because the Defendant fully participated in the proceedings despite him having been given only 3 clear days' notice of the application for summary judgment instead of the 4 clear days as prescribed in Order 14 of CI 47. Date – Bah JSC in this case stated that "what is intended to be covered by Order 81 are irregularities, short of situations of want of jurisdiction or infringements of statutes other than the High Court Rules... thus, whilst Order 81 rule 1 treats non-compliance with the Rules as not nullifying the non- complying proceedings, the rule **DOES NOT** apply to non–compliance which is so fundamental as to go to Jurisdiction, or which is in breach of a Statute other than the civil procedure rules; breach of the Constitution; or the breach of the rules of natural justice."

9 This ratio overturned the decision in Amoako v Hansen (Supra)

The implication here is that, Order 81 cannot be invoked to cure breaches of Statutes, Constitution and Rules of Natural Justice or jurisdictional matters.

The situation was no different in the case of **Friesland Frico Domo v. Dachel Co Ltd [2012] 1 SCGLR 41,** where the Supreme Court held that having participated in the proceedings which culminated in the judgment, it was too late in the day for the Defendant to apply to have the judgment set aside on grounds that leave was not obtained from the Court prior to the issuance of the Writ of Summons and service of notice of on the Defendant outside the jurisdiction; contrary to the provisions of Order 8 of CI 47. From this line of authorities, it is obvious that the Supreme Court has moved away from the categorization of the kinds of non-compliance, which was accommodated under LN 140A to the position espoused by the provisions of Order 81 of CI 47.

Conclusion

From the new line of decisions from the Supreme Court, a "proper" Legal Practitioner must know his rules "by heart" for two reasons:

I. A non-compliance of the rules could have the proceedings set aside

II. Taking a fresh step due to ignorance that there has been non-compliance could result in you being deemed to have waived the non-compliance.

Having said that, I wish to end by saying that under Order 81 of CI 47, any action, which is commenced or initiated in conformity with the applicable statutory prescription would be so rooted in the court of law that a non-compliance of any of the rules of court cannot uproot the action. The non-compliance, if identified and raised timeously by the other party, may only result in the pruning of a branch of the action on terms such as cost and permit the action to remain in the court of law.

THE RULE AGAINST DEPARTURE: A RULE OF CIVIL PROCEDURE AND A RULE OF EVIDENCE

Gideon Bisilki[*]

Abstract

Pleadings play a central role in all civil judicial proceedings. Accordingly, in order to forestall surprises to parties at trial, certain rules exist to streamline civil proceedings. The rules of pleadings bring to light two instances of the application of the Rule against Departure:

1. A party's subsequent pleading being inconsistent with the averments contained in an earlier pleading; and
2. A party seeking to adduce evidence of facts which have not been pleaded.

Case law reveals that there is a conflation of the two rules stated above whenever reference is made to the Rule against Departure. The essence of this essay is to distinguish between these two instances as illuminated by judicial pronouncements, and to elucidate the instance which properly defines the Rule against Departure. It would be further argued and concluded that, the rule in **Abowaba v Adeshina** is not an exception to the Rule against Departure.

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Introduction

Pleadings are 'the formal allegations by the parties to a law suit of their respective claims and defences with the intended purpose of providing notice of what is to be expected at the trial'.[1] In the case of **Ambrose Dotse Klah v. Phoenix Insurance Co Ltd,**[2] the Supreme Court defined pleadings as, 'written statements of the parties setting out in summary form the material facts on which each relies in support of his claim or defence; thereby enabling each party to state and frame the issues in dispute between them'. Pleadings include a Statement of Claim, Statement of Defence, Counterclaim, Defence to Counterclaim, Reply, Rejoinder and further and better particulars of any specific type of pleading.[3]

In civil proceedings, the parties are required to be firm in allegiance to their pleadings. Accordingly, parties are bound by whatever statements are made in their pleadings. At the trial stage, it is incumbent on parties to lead sufficient evidence in support of the averments contained in their pleadings. Therefore, evidence adduced at trial must be to establish only facts alleged in a party's pleadings. Where evidence is led in proof of facts not pleaded, the party against whom the evidence is so adduced may object to the admission of such evidence. However, failure to object timeously would entitle the judge to consider the said evidence in the overall assessment of the case where the evidence in question is not inadmissible per se.[4]

Also, pleadings of material facts must be the same. Consequently, where parties want to derogate from facts which have been pleaded earlier, they must do so by an amendment of their pleadings[5]. Failure to amend would entitle the court to reject averments of facts in subsequent pleadings which are inconsistent with earlier pleadings as that would offend the Rule against Departure.

1 High Court (Civil Procedure) Rules, 2004 (C.I 47), Order 82.
2 [2012] 2 SCGLR 1139 (Akoto Bamfo JSC).
3 Justice Samuel Marful-Sau, A PRACTICAL GUIDE TO CIVIL PROCEDURE IN GHANA (Adwinsa Publications) 50.
4 Abowaba v Adeshina (1946) WACA 18.
5 See C I 47, Order 16.

The Rule Against Departure.

In drafting pleadings, it is the duty of parties to state all relevant/material facts in support of their respective cases although this is subject to an amendment of pleadings by a party. It is therefore a cardinal rule of pleading that a party shall not make allegations of facts in subsequent pleadings which are inconsistent with facts contained in previous pleadings. **Order 11 Rule 10(1) of the High Court (Civil Procedure) Rules, 2004 (C.I 47),** provides that, '[a] party shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with a previous pleading made by the party.' This is referred to as the Rule against Departure. The courts have in a number of cases emphasised this principle, both under the present C I 47 and its predecessor, LN 140A.

In the case of **Hammond v. Odoi**[6], the plaintiff instituted an action in the High Court, claiming against the defendant, inter alia, a declaration of title to a parcel of land. The plaintiff averred in his statement of claim that the land was conveyed to him by the Nii We family in 1949. The defendants, in their statement of defence, denied the plaintiff's allegation of customary grant to him by the Nii We family and the plaintiff's alleged grantor's ownership of the land. Paragraph 15 of the Statement of Defence (as reproduced in the judgment), read;

"15. The defendants will further contend that if in fact there has been any customary grant to the plaintiff as alleged herein and denied by the defendants, the said plaintiff...would have answered the ex-Mantse's notice to obtain a valid grant from the Osu stool...."

In paragraph 4 of the plaintiff's reply to the Statement of Defence, he averred as follows;

"4. The plaintiff therefore says that as subjects of the Osu stool their title to the said land which was originally occupied by their ancestors and which has been in their possession since 1949 is a good one."

6 [1982-83] 2GLR 1215 (SC)

The trial High Court Judge granted the reliefs of the plaintiff. On appeal to the Court of Appeal by the defendant, the majority of the Court of Appeal held, inter alia, that the plaintiff by his reply did set up a case which was completely inconsistent with his former pleadings without asking leave to amend his Statement of Claim, and as such the learned trial judge should have disregarded those portions of the reply and the evidence in support thereof which were at variance with the case put forward in the Statement of Claim. The Supreme Court, affirming the Court of Appeal's decision, held (Holding 1) that:

"Nowhere in the statement of claim did the plaintiff aver that his ancestors, being Osu subjects, settled on the disputed land as of customary right. The plaintiff's pleading in the statement of claim only conveyed the impression that he and his brother were owners of the land in dispute because they took their grant from the Nii We family of the Osu Blohum quarter. Consequently, when he subsequently pleaded in his reply that he and his ancestors occupied the land in dispute as Osu subjects he committed a decessus by changing his radical title and making new allegations of fact. He thus raised a new matter which was not intended to be a set-off nor did it controvert anything pleaded in the statement of defence. On the contrary, the reply raised a new matter and abandoned the earlier stand and that amounted to a departure from his pleadings contrary to Order 19 r. 17 of L.N 140A."[7]

Discernible from the holding of the Supreme Court in the case, is that the plaintiff was not allowed to rely on the new averment contained in his reply that, he came by the land in question as a subject of the Osu stool. This latter averment contravened his former position in the statement of claim that he came to own the land in dispute by a customary grant made to him by the Nii We family. The effect of this inconsistency was that, the court did not allow the plaintiff to rely on the latter averment in the absence of an amendment

7 Order 11 r 10(1) of C I 47 is in pari materia with Order 19 r 17 of LN 140A.

of his pleadings. It was an instance of an inconsistency between the plaintiff's averment in his subsequent pleadings and his previous pleadings.

In **Nyamaah v. Amponsah**[8], the appellant, seeking to establish that a house in question was not a matrimonial property, averred in his pleadings that the house belonged to his father. In his subsequent pleadings, the appellant set up a new averment that the said house belonged to him alone. The Supreme Court held that the appellant could not rely on the subsequent averment, having failed to amend his pleadings. It was an offence against the Rule of Departure as contained in **Order 11 Rule 10(1) of C I 47.** The court said;

"The appellant in his pleadings...asserted that the Odeneho Kwadaso house belonged to his father. By the pleadings of the appellant, he cannot now claim that the house belonged to him alone. This conduct of the Appellant offends against the Rule of Departure."

A court should not accept in favour of a party a case different from that which the party has put forward by their pleadings. The Supreme Court, in the case of **Dam v. Addo**[9] held as follows:

"The process of consideration and weighing up of the respective cases of the parties by which the learned judge arrived at the conclusion at which he did arrive, would appear to have involved the substitution by him proprio motu of a case substantially different from, and inconsistent with, the case put forward by the respondents and the ultimate acceptance by him of that substituted case which was not the respondents' case at all. This acceptance in favour of a party of a case different from and inconsistent with that which he himself has put forward in and by his pleadings, has been consistently held to be unjustifiable and fundamentally wrong both by the English superior courts and our local superior courts."

8 [2009]SCGLR 361.
9 [1962] 2GLR 200 (Adumua Bossman JSC).

Evidence adduced at trial should be to establish facts contained in a party's pleadings. Evidence, therefore, is generally inadmissible if it is adduced to prove facts which are not contained in a party's pleading. In **Malm v. Lutterodt**,[10] Crabbe JSC (as he then was) expressed as follows:

"To my mind, to raise an issue of abandonment is to allege estoppel by conduct which was not pleaded by the plaintiff and in support of which he led no evidence whatsoever. In my view, therefore, the learned trial court judge erred in basing his judgment on a point which was not a triable issue on the pleadings." On the same legal position in the case of **Appiah v. Akers Trading Co.**[11], the defendant was sued by the plaintiffs for wrongful dismissal. The defendant pleaded that the plaintiffs had been properly dismissed in accordance with the plaintiffs' conditions of service. In his address, however, defence counsel contended that the plaintiffs were not employees of the defendant at all. Rejecting the later submission, the court per Abban J (as he then was) held that: "[i]n the first place, this defence was not pleaded and it was therefore not put in issue. In the circumstance, I will not countenance the submission. A party is bound by his pleadings and cannot at the trial set up a case different from that which he has pleaded."

New Allegations And Evidence At Trial In Proof Of Facts Which Have Not Been Pleaded – The Case Of Abowaba v. Adeshina.

In the case of Abowaba, one O. allotted a piece of land, which the subject matter (land) in the case formed part, to one S. by native custom. S's administrator sold the land to the respondent's predecessor in title, who then sold to the respondent. As the land was sold without O's consent, the land became liable to forfeiture to him under native custom, but O. took no steps to enforce his right.

10 [1963]1 GLR 1.
11 [1972]1 GLR 28, citing with approval Dam v Addo [n 9].

The learned trial judge found it proved by the evidence that O. had waived the forfeiture in consideration of £ 10 paid to him by respondent. Subsequently, the right title and interest of O. was purported to have been sold to the appellant at a public auction, whereupon the appellant brought an action claiming possession and a declaration of title.

In answer to the appellant's claim, the respondent pleaded that the land was a portion of S's allotment sold to him by the purchaser from S.'s personal representative.

The appellant in his reply, pleaded that S.'s allotment had become forfeited as a result of the unauthorised sale by his administrator. The respondent made no plea to this. The respondent nevertheless led evidence of the waiver of the forfeiture, which evidence the trial judge accepted and, upon it, gave judgment dismissing the appellant's claim.

The appellant appealed on the ground, inter alia, that

1. The learned trial judge misdirected himself by basing his judgment on an issue which was not pleaded by the defendant [ie respondent] on the defence filed by him, to wit: payment of money by the defendant to O. and family for confirmation of the sale of the property to the defendant and the waiver by O. and family of the right to claim forfeiture.

This argument on appeal animated the rule in the case as identified above. The respondent's evidence of waiver of the forfeiture was therefore admitted by the court.

In the case of **Abowaba v. Adeshina**[12], it was held that the penalty for failing to plead a material fact is the exclusion, upon objection being taken, of evidence to establish it. The court proceeded to state as follows:

"There are certain type of evidence,...which are inadmissible per se, they cannot form the basis for a decision, and objection

12 Ibid [n 4] 20. See also Marfo and Others v Adusei [1963] 1 GLR 225-232; Amoah v Arthur [1987-88]2 GLR 87; Tormekpey v Ahiable [1975]2 GLR 432.

to them may be taken at any stage of a trial or on appeal, but in our opinion, the case is different where evidence, which could have been ruled out as inadmissible because it is adduced to prove a material fact which was not pleaded, has nevertheless been adduced without objection and is before the Judge. In our opinion the evidence as to waiver of forfeiture in this case falls within the latter class, and the trial Judge was bound to take it into consideration, and the appellant not having raised his objection at the trial is precluded from doing so on appeal."

That is, evidence adduced to prove a material fact not pleaded by a party ought to be excluded by the court upon a timeous objection being taken.

The case of **Abowaba v. Adeshina**[13] is celebrated for this principle of civil procedure and has been adopted and affirmed by the **Evidence Act, 1975 (NRCD 323)** and in subsequent cases respectively. Section 6(1) of the Evidence Act provides:

"(1) In an action, and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered." An objection to evidence in proof of material facts which are not pleaded must be raised at the time the evidence is offered. A party who fails to do so may suffer the consequence of its admission, especially where the evidence in question is not inadmissible per se.

Another case that followed the reasoning in the Abowaba case is the case of **Edward Nasser and Co.LTD v. McVroom and Anor**[14]. The plaintiff, resident director of the defendant company, sued the defendant alleging negligence on the part of the latter after a furnished accommodation provided for him by the defendant caught fire resulting in the destruction of personal properties belonging to himself, his

13 Abowaba, Ibid.
14 [1996-97] SCGLR 468.

wife and dependants. In establishing negligence on the part of the defendant company, the trial High Court admitted and relied on the plaintiff's evidence of the facts that the accommodation (house) in question did not have a building permit and certificate of occupancy. These facts were however not pleaded by the plaintiff. The trial High Court gave judgment for the plaintiff and its decision was affirmed by the Court of Appeal. Defendant appealed to the Supreme Court on ground, inter alia, that:

The trial High Court judge and the Court of Appeal judges glossed over the fact that the plaintiff did not plead the absence of a building permit and certificate of occupancy but however admitted evidence led to establish same.

In addressing this ground of appeal, the Supreme Court held:

"In the instant case, the evidence on the building permit, certificate of occupancy, construction and age of the house are not the type of evidence described as inadmissible per se.

And since no objection to them was taken at the trial, no objection to them would be entertained on appeal. The trial judge and the majority of the Court of Appeal were therefore right in considering them as part of the evidence in the overall assessment of the case."

The appellant's argument was that the trial High Court Judge and the Court of Appeal Judges glossed over the fact that the plaintiff did not plead the absence of a building permit and certificate of occupancy in relation to the house in question but however admitted evidence led to establish same. The issue on the point was whether once the evidence had been led without objection, it was open to the trial court Judge to consider them in his assessment of the case. The Supreme Court delivered itself as follows:

"In the instant case, the evidence on the building permit, certificate of occupancy, construction and age of the house

are not the type of evidence described as inadmissible per se. And since no objection was taken at the trial, no objection to them would be entertained on appeal. The trial judge and the majority of the Court of Appeal were therefore right in considering them as part of the evidence in the overall assessment of the case...."

In this sense, **Edward Nasser v. McVroom** resonates the principle in **Abowaba v Adeshina** as stated above.

The Two Instances Contrasted

Will a party be offending the Rule against Departure by alleging new facts other than those pleaded or by adducing evidence, at trial, to prove facts which the party has not pleaded? This question has been succinctly dealt with by the courts.

In **Akufo Addo v. Catheline**[15], a testator, O.P, by his will devised his estate to his children. Included in the estate were a house at K. and 97.5 per cent of shares in B.F.C Ltd. The plaintiff, a sister of the testator, brought an action against the defendants, the executors of O.P's will, for a declaration that the shares held by O.P in B.F.C were held by him in trust for the plaintiff's late husband, A.A., or for his estate. In support of her claim, the plaintiff testified, inter alia, that O.P. had fraudulently sold eight trucks which A.A. had purchased for O.P. and another person to use for business for their mutual benefit and invested the proceeds in paying the deposit on the house at K. and in establishing O.K. cold store. And that the cold store, O.K., having flourished, O.P. had invested part of the moneys realised from its operations in incorporating and funding B.F.C.

During the course of the trial the plaintiff applied for and was granted leave to amend her statement of claim to include an order that the shares held by O.P. in B.F.C. be registered in her name and that she be declared the owner of the legal estate in the house at K.

15 [1992] 1 GLR 377 (SC).

The trial judge granted the plaintiff all the reliefs she had sought.

On appeal by the defendants from that decision, the Court of Appeal found that the plaintiff did not file any amendment pursuant to the leave granted her by the trial court to include the reliefs for which the leave to amend was granted, and accordingly, held, suo motu, that there had been no amendment of the statement of claim and therefore the order decreeing title in the house was a nullity.[16] That is, the implication of the plaintiff's failure to amend her statement of claim to include the declaration of ownership in her of the house at K., was that she had not pleaded that fact. Aggrieved by that decision, the plaintiff appealed to the Supreme Court. The Supreme Court held, dismissing the appeal, that there had been no amendment to the statement of claim to reflect the prayer for an order in respect of the house at K. The order by the High Court, therefore, was a nullity. Having failed to plead the fact of the house at K., it was improper for the trial court to admit evidence in establishing the plaintiff's claim regarding same.

Did the plaintiff offend the Rule against Departure?

Osei Hwere JSC (as he then was) discussed the law as follows:

"The law on departure from pleadings is disabling in that the court must not allow a party to make a case which is contrary to his pleadings....This departure rule is strictly applied to pleadings, and not to evidence which seeks to contradict pleadings."[17]

The tenor of this dictum is that, the Rule against Departure applies to pleadings only. It is not the same as when evidence is adduced at trial to prove facts which have not been pleaded by a party.

16 It is, however, worth noting that, the Court of Appeal raised the matter in the absence of an objection by the defendant.

17 Ibid [n 15] 426.

The rule was espoused again by the Supreme Court in the case of **Iddrisu Tifuuro Tatali v. Alhaji Saaka Yakubu[18].**

The Plaintiff/Respondent/Appellant (herein referred to as Appellant) issued a writ against the Defendant/Appellant/ Respondent (herein referred to as Respondent) in the High Court seeking, inter alia, a declaration of title to a piece of land. The Respondent counterclaimed for declaration of title to the piece of land. At the time of the action, the Respondent was in possession of the said piece of land. The Appellant, head of his family, was found to have pleaded in his statement of claim as follows:

"8. In the course of time a sister of the plaintiff's family married a man from Fongo but not a relative of the defendant.

9. The said sister approached the plaintiff's grandfather for a land for her husband to farm and feed her children.

10. That my grand-father obliged and gave her a portion of the Northern part of their land."

From these paragraphs, the Court found that the Appellant had asserted that a female member of his family married a man from Fongo but not someone related to the respondent.

Meanwhile, in the Appellant's testimony to the court, he gave a different account of events thus:

"My father gave the disputed land to Maamani. The Defendants are relations of Maamani and they have taken over the land"

By this, the court found that the appellant in his testimony in court was now saying that his father not grand-father gave land to a relation of the respondent whom he had previously said was not a relative of the person the sister of his family married. The evidence of the Appellant clearly was inconsistent with his pleadings in the statement of claim.

18 Unreported Cases of the Supreme Court of Ghana 2018. Civil Appeal No. J4/32/2014. Delivered on 9th May, 2018.

Commenting on the inconsistency, the Court of Appeal said;

"Despite plaintiff's pleading that it was their sister the land was given to by their ancestor for the use of her unnamed husband and non-relative of the defendant herein, the plaintiff gave the following evidence;

'My father gave the disputed land to Maamani. The defendants are relations of Maamani and they have taken the land Maamani was farming on....Maamani is deceased but his family is still on the land....'

In the instant case, the defendant has completely denied all the claims of the plaintiff and put him to strict proof. In fact he denied knowledge that the woman Maamani married from Fongo was a sister of the plaintiffs let alone that she was granted any portion of land to feed on. So the evidence led by the plaintiff that the portion of the land was given to Maamani whose descendants are now farming on it is a material departure from his pleadings which the trial court instructing itself, should not have countenanced."

The High Court's decision was overturned by the Court of Appeal in favour of the Respondent.

The Appellant, therefore, mounted an appeal against the decision of the Court of Appeal to the Supreme Court on grounds, inter alia, that;

"The Court of Appeal erred when it held that the trial judge ought to have rejected plaintiff/respondent/appellant's evidence because it conflicted with plaintiff/respondent/appellant's pleadings."

Whilst the appellant in his written submission argued that there was no departure in their pleadings and also that the appellant's evidence was in fact in accord with his pleadings, the respondent disagreed with the appellant and argued that the Court of Appeal was justified in ruling against the appellant.

The Supreme Court once again explained the rules as follows:

"What is the rule against departure? The rule against departure states a party will not be allowed to set up a claim in a subsequent pleading inconsistent with his previous pleading. This has been applied and expatiated upon in several cases particularly Odoi v Hammond [1971] 1 GLR 375. However, the issue in this case can be distinguished from the rule against departure....The issue in this case has to do with where a party's evidence in court is inconsistent with his pleadings."

The Court held further that:

"...the case of Appiah v. Takyi (1982/83) 1 GLR 1...held that where there is a departure from pleadings at a trial by one party whereas the other's evidence is in accord with his pleadings, the latter's case was as a rule preferable...." The plaintiff in the case of Appiah v. Takyi in his reply and evidence in court departed from his averment in his statement of claim. The case of Appiah v. Takyi is case which deals with the rule against departure."

From the foregoing, it could safely be argued that there is a case of the Rule against Departure only when there are inconsistencies of facts in the pleadings of a party. These rules are of essence in civil proceedings. Failure to observe them may cause irreparable damage to a party's case. For instance, in **Hammond v. Odoi,**[19] the learned trial judge considered the plaintiff's subsequent pleading and evidence in proof of the fact that he came to possess the land in question as a subject of the Osu stool contrary to his former pleading that the land was conveyed to his family by the Nii We family. Having found that the plaintiff's pleadings were in conflict, the Court of Appeal and the Supreme Court ignored the subsequent facts and evidence which obviously weighed upon the trial Court judge to find in the plaintiff's favour, and thereby gave the defendant judgment. It was a clear case of the plaintiff offending the Rule against Departure.

19 Ibid [n 7].

In **Nyamaah v. Amponsah,**[20] the Appellant in his pleading asserted that a house which his spouse sought to be divided as a matrimonial house belonged to his father. Subsequently in his statement of case, he pleaded that he was the sole owner of the house in question and that the Respondent had even admitted that the house was the sole property of the Appellant. Although the court found that the building permit and the allocation papers were in the name of the Appellant, the Appellant was not allowed to now rely on sole ownership of the house against his previous pleading that the house belonged to his father. That is, the Rule against Departure did not permit the Appellant to change his story despite an admission by the Respondent that the house was the sole property of the Appellant. Accordingly, the said house was treated as a matrimonial property.

It is observed from these cases, together with the express pronouncements by the courts, that, where the conflict is between pleadings the court easily makes reference to the Rule against Departure. It is not the same with instances where evidence of facts which have not been pleaded is adduced. **Abowaba v. Adeshina** reflects the evidential aspect of the rule. It is important to emphasise that Abowaba was not a case of subsequent pleadings conflicting previous pleadings. **Edward Nasser v. McVroom**[21] was another case of evidence. **Malm v Lutterodt**[22]**; Appiah v. Akers Trading Co.**[23] above also reflect the evidential aspect of the rule.

20 Ibid [n 8].
21 Ibid [n 14].
22 Ibid [n 10].
23 Ibid [n 11].

Conclusion

The exposition by the courts, as observed above, clearly illuminates the distinction between the Rule against Departure as envisaged by the rules of civil procedure, and where evidence is adduced at trial to prove facts which have not been pleaded by a party. The rule in **Abowaba v. Adeshina** appears to deal with the latter. The Rule against Departure strictly applies to pleadings only and does not include evidence in proof of facts which have not been pleaded. Therefore, one could reasonably argue or conclude that, **Abowaba v. Adeshina** neither reflects the Rule against Departure nor state an exception to the rule.

It is respectfully submitted that, the courts' exposition of the Rule against Departure to exclude instances where evidence is adduced at trial to prove facts which have not been pleaded, is in consonance with the real meaning of the Rule as envisaged by C I 47. **Order 11 Rule 10(1) of C I 47,** the current provision on the Rule, is explicit on the word "pleading". Evidence at trial, it is humbly submitted, does not constitute "pleading". The Rule against Departure and evidence at trial in proof of facts which have not been pleaded are, thus, distinct rules of civil procedure.

REDEFINING THE GROUNDS FOR ENTRY OF CONDITIONAL APPEARANCE; THE CASE OF NII AMANOR DODOO (SUING AS RECEIVER OF THE BEIGE BANK LTD) & ANOTHER V. MICHAEL NYINAKU & 12 OTHERS

Emmanuel Yeboah Gyan[1]

Abstract

To the practitioners of our courts, academics and students of civil procedure, the 2019 ruling of the High Court of Ghana, in the case of **Nii Amanor-Dodoo and The Beige Bank v. Michael Nyinaku & 12 Others**[2], presents genuine thoughts on what constitutes the true position of the Ghanaian law on conditional appearance. This article discusses the ruling of the High Court and the Court's test on how such applications to move the court to strike out a writ must be treated. The discussion is presented by tracing the historical antecedents and essence of appearance as a procedural step in order to guide the analysis of the Court's proposition.

1 BA (Hons), LLB (Ghana)
2 Suit No. CM/RPC/0962/2019 dated 30th July, 2019 (Dennis Law Online Report)

Introduction: Brief facts of the case

The 1st Plaintiff, Nii Amanor Dodoo, suing as receiver of The Beige Bank Limited issued a writ of summons against the Defendants. The Beige Bank Limited was, subsequent to an application for joinder by the Bank, joined as a 2nd Plaintiff to the action. The 1st Defendant was the Chief Executive Officer of the 2nd Plaintiff. The other 12 Defendants were companies incorporated under the law of Ghana

The Plaintiffs alleged that they had identified a number of transactions executed by the 1st Defendant for his and the benefit of the other Defendants. These transactions, the Plaintiffs considered unlawful.

The Plaintiffs, among others, sought a declaration that the transactions identified in the Statement of Claim and executed by the Defendants were unlawful; an order for the recovery of specific sums, jointly and severally from the Defendants; an order for the Defendants to account and refund to the Plaintiffs any profits resulting from specific transactions; and an order for the tracing of assets belonging to the 2nd Plaintiff and within the possession and control of the Defendants.

Upon service of the Writ on the Defendants, they caused to be entered a conditional appearance and subsequently brought of an application invoking the original jurisdiction[3] of the High Court to strike out the suit. The grounds for the application was that the writ was a nullity, since it was commenced by a person **without the requisite capacity.** To the Applicants, once the 1st Plaintiff lacked capacity at the time of commencement of the suit, the court ought to hold that no suit was commenced at all. Thus, the subsequent joinder of the 2nd Plaintiff Bank was also a nullity; since you cannot put something on nothing and expect it to stand.[4]

3 The Applicants ought to have invoked the inherent jurisdiction instead of the original jurisdiction. The Court correctly held thus: "Nonetheless, the invocation of the original jurisdiction instead of the inherent jurisdiction is of no consequence. To hold otherwise and strike out this motion, in respectful view, would be 'pursuing technicalities to an absurdity..."

4 A paraphrase of the oft-cited dictum of Lord Denning, MR in the case of Macfoy v. United Africa Co. Ltd [1961] 3 All ER 1169: '... you cannot put something on nothing and expect it to stay there, it will collapse.'

The Applicants contended that the question of capacity is not necessarily a substantive defence which must be argued on the merits. They argued further that the question of capacity is a question of law and can be raised any time at all by any of the parties.

The Respondents raised a preliminary objection in opposing the application. They argued, that pursuant to Order 9 rule 8 of C.I 47[5], a defendant who enters conditional appearance must limit his application to the reliefs specified in the rule. They submitted, therefore, that to the extent that the application was to strike out the suit, it was incompetent; since it does not form part of the reliefs captured under the rules of Court. Further, the Respondents argued, that the question of capacity was not a matter of irregularity or jurisdiction, but a substantive defence which ought to be pleaded and evidence led at trial. They submitted, in any event, that the 1st Plaintiff having assumed office as a receiver of the 2nd Plaintiff, he had capacity to sue in his own name. The 1st Plaintiff argued that having assumed the rights and powers of the members of the 2nd Plaintiff, he could sue in this own name by operation of law.

The Ruling

The High Court, Her Ladyship Justice Jennifer Abena Dadzie coram, held, rejecting the Respondents' argument, that on the preliminary issue of conditional appearance, the grounds upon which an application to strike out a suit, upon entry of conditional appearance are not exhaustive.

Her Ladyship further stated that the "**application can be premised on any ground so far as that ground is sustainable in the eyes of the court."** Having cited the

5 Order 9 rule 8 of C.I 47 provides: A defendant may at any time before filing appearance, or, if the defendant has filed conditional appearance, within fourteen days after filing appearance, apply to the Court for an order to:

a) Set aside the writ or service of the writ

b) Declare that the writ or notice of it has not been served on the defendant; or

c) Discharge any order that gives leave to serve the notice on the defendant outside the country.

decision of Amissah-Abadoo v. Abadoo[6], Her Ladyship continued thus: **"What is set out in Order 9 rule 8 of C.I. 47 then are not grounds as deemed by counsel but applications/reliefs. These applications as I have already stated can be grounded on any reason."**

The Court then sought to lay a broad and expansive test upon which applications brought pursuant to entry of conditional appearance must be treated. Call it the sustainability test. Her Ladyship stated: **"The question of whether that reason is sustainable is then left to the court to decide. If it is, the result will be a grant of the application as laid out, otherwise, it fails and the case proceeds on its normal course."**

Having earlier opined that "what is set out in Order 9 rule 8 of C.I. 47 are not grounds as deemed by counsel but applications/ reliefs", Her Ladyship proceeds, in effect, to overrule the decision in the Amissah-Abadoo case by suggesting: "It is my considered opinion that **the three (3) grounds** that the court in Amissah-Abadoo v. Abadoo proceeded to state, that is, the "ground of irregularity of the writ or the service of it or to deny jurisdiction" **are not the only grounds** that could be canvassed when bringing an application to set aside a writ of summons."

On the question of capacity, the court held that the Respondents lacked the capacity to bring their action. Her Ladyship held thus: "A lack of capacity to initiate proceedings would therefore render the writ defective. This, the courts have held to have the effect of invalidating the writ and nullifying any proceedings ensuing therefrom."

The main focus of this article is to ascertain whether the law on conditional appearance, as has been known and taught to students of civil procedure, admits of the broad and expansive test laid by Her Ladyship in her judgment.

6 [1973] 1 GLR 490

Appearance: Brief Overview

The Black's Law Dictionary[7] defines appearance as the coming into court as a party or interested person, or as a lawyer on behalf of a party or interested person, especially, a defendant's act of taking part in a lawsuit, whether by formally participating in it or by an answer, demurer, or motion, or by taking post-judgment steps in the lawsuit in either the trial court or an appellate court.

A brief historical overview on appearance would give perspective to the discussion on conditional appearance. According to Shipman, in the Handbook of Common Law Pleadings[8] "the English Courts did not, until modern times, claim jurisdiction over the person of the defendant merely by service of summons upon him. It was deemed necessary to resort to further process by attachment of his property and arrest of his person to compel 'appearance', which is not mere presence in court, but some act by which a person who is sued submits himself to the authority and jurisdiction of the court".

As pointed out by Odgers[9], in the early days, a defendant who wished to contest an action had to physically appear before the court, and submit to or protest against its jurisdiction, and state publicly that he intended to defend the action and on what grounds. In the course of time, physical appearance as a method of responding to the service of proceedings was replaced by the formal procedure of "entry of appearance". In England, the procedure of entry of appearance has been replaced by "acknowledgement of service"[10]. Under the new procedure, a defendant who wishes to defend an action must complete the acknowledgement of service, which accompanies the writ served on him, and return it within the prescribed period to the court office out of which the writ

7 Black's Law Dictionary (8th ed. 2004)

8 Handbook of Common Law Pleadings, (Benjamin J. Shipman, at 24 (Henry Winthrop Ballantine ed. 3d ed. 1923) cited in the Black's Law Dictionary supra

9 S. Goulding, Odgers on Civil Court Actions (1996) (24 ed) London, Sweet & Maxwell

10 ibid

was issued. If the defendant wishes to object to any irregularity in the writ, or in the issue or service thereof, or if he wishes to dispute the jurisdiction of the court, he should complete and return the acknowledgment of service in the normal way and then apply to the cour within 14 days of the acknowledgement for an appropriate order. In modern times, however, the term appearance is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction, although, in a broader sense, it embraces the act of either plaintiff or defendant in coming into court. An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction[11].

As noted above, the essence of entry of appearance or as is known in England, acknowledgment of service, is no different from what pertains in Ghana. Indeed, as a common law country, these procedural rules are simply an adoption and adaption of what pertains in England.

Conditional Appearance

The Irish authors of McCann FitzGerald in a briefing[12] described the essence of appearance as follows: An appearance is a standard form entered by the defendant in person or through his lawyer. In it, the defendant acknowledges two things. The first is that the plaintiff's originating document has been served on him, in accordance with the relevant rules of service. Second, that the court properly has jurisdiction over him. Where the defendant disputes either of the two matters stated, he may enter a conditional appearance, signalling his doubt about whether the plaintiff has properly brought him before the court. If he does, the defendant must promptly apply to the court to decide that doubt, so that the case can move on or be struck out.[13]

11 Odgers on Civil Court Actions supra

12 McCann FitzGerald, Conditional Appearances: Not Conditional for Long, May 2016, published on www.mccannfitzgerald.com

13 ibid

The Rt. Hon. Lord Justice Maurice Kay, notes in Blackstone's Civil Practice[14], that acknowledgment of service may be filed in cases where **a)** the defendant is not able to file a defence within 14days after service of the particulars of claim; or **b)** the defendant wishes to dispute the court's jurisdiction. He cautions that where a defendant signs an acknowledgment without indicating an intention to challenge jurisdiction, a party waives any defects in service. For this, he cites the authority of Brooks v. A.H. Brooks and Co.[15]

The Common law jurisdictions appear to converge in procedure that a defendant who intends to challenge either the issuance of the writ on him, service of the writ thereof or a contest to jurisdiction, ought to enter conditional appear or appearance under protest. Thus, the scope appears limited and not based 'any other reason which may be sustainable in the eyes of the court' as contended by the Court in the Beige Bank case under consideration

The Law On Conditional Appearance In Ghana

The law on conditional appearance in Ghana is not markedly different from the other common law jurisdictions discussed above. For starters, the procedure by which a party commences an action before the High Court in Ghana is regulated by the High Court (Civil Procedure) Rules, 2004, (C.I. 47). The C.I.47 also applies to the civil proceedings before the Circuit Court, mutatis mutandis. A party vested with a cause of action is required to adhere to the provisions of the rules of court.

The writ of summons in Ghana, is issued under the command of the Chief Justice to the defendant to, within eight days after service of the writ on him, cause an appearance to be entered; default of which judgment may entered against him without further notice to him.[16] Order 9 rule 7 provides that

14 Maurice Kay, The Rt. Hon. Lord Justice, Blackstone's Civil Practice (2012) Oxford University Press

15 [2010] EWHC 2 7220 (Ch).

16 See Form in the Schedule of C.I. 47 pursuant to Order 2 rule 3(1)

a defendant may file a conditional appearance. The rules require a defendant who enters conditional appearance to bring an application to set aside the writ within 14days after, filing the appearance. The application may seek the following orders. To:

a. Set aside the writ or service of the writ

b. Declare that the writ or notice of it has not been served on the defendant or

c. Discharge any order that gives leave to serve the notice on the defendant outside the country[17].

The basis upon which application may be brought upon entry of conditional appearance has received several judicial pronouncement in Ghana. In the case of Republic v. High Court, Denu; Ex parte Avadali IV[18], Adade JSC quotes the note on conditional appearance in the White Book (1959) at page 566 of the judgment thus: **"The term conditional appearance means an appearance in qualified terms, reserving to the appearing defendant the right to apply to the court to set aside the writ, or service thereof, for an alleged informality or irregularity which renders either the writ or service invalid or for lack of jurisdiction..."**.

Earlier, the High Court, per Wiredu J. in the case of Amissah-Abadoo v. Abadoo[19]at holding 2 of the report stated the law on the grounds for the entry of conditional appearance thus: "A defendant might enter a conditional appearance where he intended to have the writ or the service of the writ set aside on the ground of irregularity in the writ or the service of it or to deny jurisdiction. **Irregularity here included the irregularity in the issue or service of the writ or in the form of the writ.** The defendant's application did not attack the plaintiff's writ on any of the above, grounds. Her sole complaint that the writ did not disclose any reasonable cause of action was not among the grounds which justified

17 Order 9 rule 8
18 [1993-94] 1 GLR 561
19 [1973] 1 GLR 490

her entering a conditional appearance and consequently the conditional appearance would be treated as an unconditional appearance which would entitle her to present her application under Order 25, r. 4 of L.N. 140A."

The question of grounds upon which an application may be brought upon the entry of conditional appearance came before Commercial Division of the High Court coram His Lordship Eric Kyei Baffour in the case of West Blue Ghana Ltd v. Ghana Link Network Services Ltd and 3 Others[20]. The Defendants/Applicants in that case applied to strike out the suit of the Plaintiff/Respondent on the grounds that it was scandalous, frivolous and vexatious or was otherwise an abuse of the process of the Court pursuant to Oder 11 rule 18 (1) (b) and (d). The application was sequel to an entry of conditional appearance. The respondent took a preliminary objection on the grounds that the application was not properly founded on any of the grounds upon which such an application may be brought upon entry of conditional appearance as was stated in the Supreme Court case of of Republic v. High Court, Denu; Ex parte Avadali IV supra. The respondent contended, that it was not a carte blanche for a defendant who had entered a conditional appearance to move the court to have the writ set aside because he had a legal defence, even if unimpeachable, to the action. His Lordship however, waived the palpable irregularity on the part of the Applicants and determined the application on its "merits".

This author is of the view that His Lordship's waiver, well-accords with the stated objectives of the C.I. 47. He renders it exquisitely at page 3 of the judgment thus: "It is true that a correct appreciation of the Rules of Court is that the spirit that animates its application is for the court to strive so as to achieve speedy and effective justice, avoid delays and needless expense and ensure that matters in dispute are completely, effectively and finally determined and multiplicity of suits or proceedings is averted."

20 Suit No: CM/0320/2019 dated 14th March, 2019 (available on Dennis Law Online Report)

Comments On And Implication Of The Beige Bank Ruling

First, the Court takes the position that an application to move the court to dismiss a suit upon entry of conditional appearance, admits of a broad, expansive grounds which must be entertained and determined so long as it is sustainable. The Court stated thus: the **"application can be premised on any ground so far as that ground is sustainable in the eyes of the court."**

The Court continued: **"What is set out in Order 9 rule 8 of C.I. 47 then are not grounds as deemed by counsel but applications/reliefs. These applications as I have already stated can be grounded on any reason."**

The Court, however, did not provide any authority for this attempted re-statement of the Ghanaian law on conditional appearance. The statement is a roll-back of all the gains of settled authority made by the Ghanaian courts, including the Supreme Court on the grounds upon which a defendant may move the court to dismiss a plaintiff's suit upon entry of conditional appearance. By stating that the application may be based on any reason, the High Court, attempts to overrule a Supreme Court decision in the case of Republic v. High Court, Accra; Ex parte Aryeetey (Ankrah Interested Party)[21]. Holding 3 of the decision reproduced below in detail for analysis:

"A conditional appearance was to enable a defendant who intended to object to the issue or service of a writ or notice of a writ on him, or the jurisdiction of the court, to apply to the court to set aside the writ or notice of the writ or the service thereof on him. Such an application might encompass any irregularity or defect in the issue or service of the writ, or notice of the writ. Thus, it was not permissible for a defendant who had entered a conditional appearance to move the court to have the writ set aside because he had a legal defence, even if unimpeachable, to the action. Accordingly, such an

21 [2003-2004] SCGLR 398

application was not available to the respondent who after entering a conditional appearance to the applicant's writ at the High Court sought to rely on a plea of res judicata since that plea, to be successful, had to satisfy certain requirements which could only be revealed through evidence. Moreover, the respondent had no right to apply to set the applicant's writ aside because he had a good defence to the action."

If the High Court's broad and expansionist view that any reason could be offered to move the Court upon entry of conditional appearance were to be followed, it would mean that:

a. Where the applicant believes he has a legally unimpeachable defence to the action, he may enter conditional appearance to the suit. The unintended consequence would be that the floodgates would be open for any application to be brought "for any reason" and the Court would only be called upon to determine if it is sustainable. For the party with a smooth taste for litigation, this would be a handy tool. This author doubts if such an applicant may be mulcted in heavy cost for bringing a frivolous application, since by the "any reason" expansion, he would have a reason so to move the court. Indeed, any such holding would be contrary to the decision in Ex parte Aryeetey supra which is binding on the High Court by reason of Article 129(3) of the 1992 Constitution which provides that all other courts shall be bound to follow the decisions of the Supreme court on questions of law.

b. Where there is an application to strike out a pleading for disclosing no reasonable cause of action, or otherwise an abuse of the court process, the defendant may enter conditional appearance and subsequently move the court to determine if that ground is "sustainable" in the eyes of the Court.

It is apparent, that the "any reason" sustainability test may lead to manifestly unsustainable levels of frivolous applications to move the High court to dismiss a plaintiff's case upon entry of conditional appearance.

It is the view of this author, that having regard to all historical overview presented and the authorities on the subject as discussed above, the High Court's attempt to restate the law on conditional appearance is not maintainable. The essence of entering appearance as noted above, is not to immediately call the courts to halt the case in its tracks. Rather, it is to acknowledge receipt of the writ. Such acknowledgment may be regular or it may come under protest. The basis for such entry of conditional appearance have not been set at large in law.

It is particularly so, when no authority was provided for the court's far-reaching proposition. Thankfully, the decision of a Court of coordinate jurisdiction such as the High Court, is not binding on other High Courts. The author invites the Supreme Court, to, at the earliest opportunity restate the Ghanaian position of the law on conditional appearance so that students of Civil procedure are not left in doubt as to the how to approach exam questions. In the absence of such earliest opportunity, it has to be stated for emphasis, that the case of **Republic v. High Court, Accra; Ex parte Aryeetey and Republic v. High Court, Denu; Ex parte Avadali IV (supra)** are the most authoritative pronouncements on the subject of conditional appearance in Ghana.

Second, though the focus of this article is mainly to assess the Court's decision on conditional appearance, the author notes that the High Court did not make a definitive pronouncement on Counsel for the Applicant's contention that the issue of capacity was a question of law. At page 3 of the ruling, the court presented the case of the Applicants thus: **"Relying on the case of Akrong v. Bulley [1965] GLR 469-478 and Standard Bank Offshore Trust Company Ltd v. National**

Investment Bank & 2 Ors (Civil Appeal No. J4/63/2016; delivered 21st June, 2017), and other writings, counsel submits that the question of capacity is not necessarily a substantive defence which should be argued on the merits. Rather, counsel contends that the issue of capacity could be raised as a question of law anytime at all by any of the parties. Thus, capacity must be found to be existent before the issuance of the writ else, the writ is a nullity".

The above proposition is frontally in conflict with the holding in **Republic v. High Court, Accra; Ex parte Aryeetey.** Having cited the dictum of Verity Ag. P in the case of Sokpui II v. Agbozo III on the catastrophic effect lack of capacity can have on the fortunes of a case, the Supreme Court then went ahead to state as follows:

> "The above dictum, in our view, includes the submission that whether a person who sued in a representative capacity indeed has the capacity he claims to have or not, **is a question of fact** and if challenged, he must prove same to avoid his suit being dismissed since it is analogous, in our view, to taking an action against a non-existent defendant. But, if the representative capacity he claims is not challenged, naturally a plaintiff assumes no such burden".

Even if the capacity in which the Plaintiff sues was not disclosed, the cardinal test ought to have been the whether it is just to allow the party to amend the suit in order to avoid cost and multiplicity of suits. Order 16 rule 5 (4) of C.I. 47 provides that an amendment to alter the capacity in which a party sues may be allowed... if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired. Sub rule 5 of Order 15 rule 5 also provides that "an amendment may be allowed... notwithstanding that the effect of the amendment will be to add or substitute a

new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

The combined effect of Order 16 rule 5(5) and (6) is that the Courts must hasten slowly in taking issues of capacity as one of the grounds upon which conditional appearance may be entered.

As cautioned earlier, however, the issue of capacity is not the focus of this article and a more detailed paper on the subject may be desirable. Except to add, that in the instant case, the Court treats the question of capacity as one of law and hence affecting the issuance of the writ.

This author holds the view that the overall intendment of the C.I. 47 was not realized in the instant case since the issues raised in the ruling on the issue of capacity could have been cured by an amendment and not striking out of the suit.

Conclusion

This article has sought to explain the Ghanaian position on the law on conditional appearance as a procedure available in civil proceedings. As can be seen from the above, the High Court's attempt to expand the scope and meaning of "grounds' upon which an applicant may move the court to set aside a writ are not maintainable in law. The Court's proposition attempts to overrule the decision of the Supreme Court and must not be followed by even the Circuit court in its modified application of the C.I. 47. As an ancillary matter, the author notes, if the Ghanaian courts adverted its mind to the effect of Order 16 rule 5(5) and (6), they would be slow to treating the issue of capacity as one upon which conditional appearance may be competently entered. Rather, a defendant must enter 'normal' appearance. In filing his statement of defence, the defendant may raise the issue of capacity and may elect to bring a separate application for the court to determine that sole question before the case may proceed. In such case, where evidence is required to be adduced, it may then be put before the court for such a determination.

By way of statutory option, the Rules of Court Committee may consider the New Zealand option of providing a ticking box of options on the standard form a defendant may return upon service on him of the writ. This may limit the abuse of entering conditional appearance for any reason to be determined by the Courts.

INTERNATIONAL TOURISM LAW: A TRAVELLER'S MYSTERY

Kobby Afari Yeboah *

Abstract

There exists a thing such as international tourism law with an untapped legal resource. In fact, the tourism industry boasts of a broad framework under international law, lending room for expansion to accommodate the increasing needs of the modern tourist. So long as people leave their territorial borders with the intention of entering another's for the purposes of tourism, international law will strive to be relevant. The corpus of international tourism law establishes guidelines and principles and recommends a universal standard that countries are entreated to adhere to when dealing with an international visitor. This paper engages its audience by evaluating the terrain of international tourism law. It then enlightens readers on the potential conflicts that may ensue between municipal law and international law on tourism matters. The article identifies, assesses and critiques unworkable principles applicable to tourism under the international legal order and proposes more suitable guidelines.

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Introduction

International Tourism Law is a wide legal discipline that governs the relationship between rules of tourism under the international and domestic legal setting. This subject area consolidates international laws on thematic aspects of tourism such as the right to tourism[1], the rights of tourists[2] and other identifiable rights[3] that may be crucial for the full realization of the right to tourism. Apart from the tourist who takes centre-stage in this regime, the regulations of international tourism law equally impact the legal machinery of the Host government[4]. The law takes into account, compliance with the municipal laws of the Host state, and recognition of the sovereignty of that Host state.[5]

In spite of the significant economic mark made by the tourism industry globally[6], upholding the international regulations of the tourism industry is founded on international courtesy. In other words, there is no legally binding obligation on States to have regard to these regulations because they are considered soft laws[7]. It would not be out of context therefore to suggest that a detraction from these laid down tourism regulations may not attract much international backlash owing to the perception of the international community about the nature of tourism—a mere recreational activity of a visitor.

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1 Article 7(1) of the Global Code of Ethics for Tourism guarantees the right to tourism.

2 These include the right to information, the freedom to move in and out of a country, the right to participate in cultural activities in another country, amongst others.

3 Notably, they are the general conception of fundamental human rights applicable to all persons without exception; for instance, the right to life.

4 The Host government, state or country cited throughout this article is the receiving country of the traveller.

5 International Tourism Law: Description (Bond University, Australia). https://bond.edu.au/intl/subject/laws17-452-international-tourism-law [Accessed on 19th Jan 2020]

6 The World Travel & Tourism Council's (WTTC) research has revealed that in 185 countries and 25 regions, the tourism sector accounted for 10.4% of global GDP and 319 million jobs, or 10% of total employment in 2018. World Travel & Tourism Guide: Travel and Tourism Economic Impact 2019 World (2019 Report) Retrieved from: https://www.wttc.org/-/media/files/reports/economic-impact-research/regions-2019/world2019.pdf [Accessed on 26th Jan 2020]

7 They are laws that create no binding legal obligations despite the language of their drafting. An infringement or infraction does not give rise to enforceability in a court of law. See Ilhami Alkan Olsson, 'Four Competing Approaches to International Soft Law' (1999-2015) Scandinavian Studies in Law pp. 177-196 at p. 181

Regardless of the restriction on the enforceability of the rules of international tourism law, since 1946 when the First International Congress of National Tourism Bodies met in London to create a new international non-governmental organization[8], and with arrival of the United Nations World Tourism Organization (UNWTO)[9] some twenty-eight (28) years later, international and national organizations with shared interests in tourism have made commendable progress in generating world consensus on some necessary guidelines that seriously impact the tourism industry. These guidelines, however soft, are the core starting points in achieving a harmonized body of rules and practices in respect of the treatment of tourists in foreign countries.

Tourism as a Right

Tourism twenty (20) years ago cannot be compared to tourism of this millennium. In this present age, social media is more popular, and millions of people share photos of exquisite vacation destinations. The only logical reaction is that the rest of the world would want to pursue a similar and equally enlightening experience. Thus, it comes with little surprise that the 'right to tourism', fashioned out of the right to rest and leisure[10], has now developed into a full-fledged right.[11]

The right to rest and leisure, the prelude to the right to tourism, had for decades constituted justification for travelling and

8 UNWTO: 'History'. https://www.unwto.org/history [Accessed on 26th Jan 2020]

9 The United Nations World Tourism Organization is a United Nations Specialized Agency "responsible for the promotion of responsible, sustainable and universally accessible tourism". It was formed on 2nd January 1974. UNWTO website. Retrieved from: https://www.unwto.org/about-us [Accessed on 3rd Feb 2020]

10 The right to rest and leisure is enshrined in article 24 of the 1948 Universal Declaration of Human Rights (UDHR). The law as stated is: [e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. The right is further captured in article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

11 Amir Maghami & Mitra Dorudgar, 'Tourism and Foreign Rights in International law'. Journal of Tourism Planning and Development [Vol.6, No. 23, Winter 2018 25-27]. In the abstract of this article, the authors present the right to leisure as an already affirmed human right in documents that can be generalized to the tourism.

touring outside of working hours. The framers of the Universal Declaration of Human Rights (UDHR)[12] must have thought it benevolent that after the right to work had been guaranteed in Article 23 of the UDHR, workers ought to be granted some dispensation from working constantly by undertaking the recreational activity called tourism. According to the United Nations Human Rights Office of the High Commissioner, as far back as the 1800s, it was observed that long, extended hours of working was a threat to the health of workers and their families.[13] The force of the right to rest and leisure sought to maintain complete physical and mental wellbeing of workers.[14] This right, although meeting the legitimate needs of the working class, was rather limited in its scope because it was a labour right[15]. It solely protected the leisurely rights of persons who were "workers"[16] and did not afford the opportunity for rest and leisure for persons who desired a vacation but were not in a working capacity. The global society began its pursuit for a right which would not only guarantee the leisurely activity of workers but would cover and protect children[17], persons living with disabilities[18], non-

12 UN General Assembly, Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., UN Doc. A/180 (1948).
The Universal Declaration of Human Rights was adopted by the UN General Assembly on 10th December 1948. It consists of 30 articles on definitive principles of human rights. It is a milestone document in the history of human rights. United Nations website.
Retrieved from: https://www.un.org/en/sections/universal-declaration/history-document/index.html [Accessed on 3rd Feb 2020]

13 '30 Articles on the 30 Articles, The Universal Declaration of Human Rights at 70 United Nations Human Rights: Still Working to Ensure Freedom, Equality and Dignity for All'. Source: United Nations Human Rights Office of the High Commissioner.
Retrieved from: https://www.standup4humanrights.org/layout/files/30on30/UDHR70-30on30-article24-eng.pdf [Accessed on 31st Jan 2020]

14 Ibid.

15 Mathias Risse, 'A Right to Work? A Right to Leisure? Labour Rights as Human Rights'. Law & Ethics of Human Rights, Volume 3, Issue 1, Pages 1-39, ISSN (Online) 1938-2545. DOI: https://doi.org/10.2202/1938-2545.1028 [Accessed on 3rd Feb 2020]

16 "A worker is any individual who undertakes to do or perform personally any work or service for another party, whether under a contract of employment or any other contract". CIPD, 'Employment status Q & As'.
Retrieved from: https://www.cipd.co.uk/knowledge/fundamentals/emp-law/employees/status-questions [Accessed on 3rd Feb 2020]

17 Reference must be had to Article 31 of the Convention on the Rights of the Child (CRC) which extended the right of rest and leisure to children in 1989. This recognition only took place 41 years after the UDHR was adopted by the General Assembly.

18 Persons living with disability are entitled to the right to participation in cultural life, recreation, leisure, relaxation and amusement under article 30 on the Convention on the Rights of Persons with Disabilities.

working adults and old people under a single instrument. In 1999, the right to rest and leisure welcomed the long-awaited right to tourism.[19]

The right to tourism has been described by some writers[20] as a social right[21] rather than a fundamental human right. This proposition is mainly influenced by the non-civil and non-political dimensions of the right to tourism. Currently, the distinction between civil and political rights as being more fundamental than economic, social and cultural rights is more of an academic argument than a judicial reality. International courts and tribunals[22] have on several occasions affirmed the justiciability[23] of economic, social and cultural [ESC] rights. Further, the UN General Assembly in 2008 dispelled any notion of the non-justiciability of ESC rights by the unanimous adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights[24] which allows victims of violations of economic, social and cultural [ESC] rights to present complaints at the international level to the UN

19 The Global Code of Ethics for Tourism was adopted by resolution A/RES/406(XIII) at the thirteenth UN WTO General Assembly (Santiago, Chile, 27 September - 1 October 1999). It was subsequently adopted by the General Assembly on 21st December 2001 through UN resolution A/RES/56/212.
Retrieved from: https://www.unwto.org/background-global-code-ethics-tourism [Accessed on 15th Feb 2020]

20 Scott McCabe & Anya Diekmann, 'The rights to tourism: reflections on tourism and social rights.' Tourism Recreation Research, Volume 40, 2015-Issue 2.

21 Social rights form a part of the compendium of Economic, Social and Cultural, popularly known as ESC rights. It is legally justified in the International Covenant on Economic, Cultural and Social Rights (ICESCR), a pillar of the International Bill of Rights in addition to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

22 In Social and Economic Rights Action Centre & Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) (Ogoni case) paras 58-68 the African Commission noted that the Respondents had failed to uphold the right to food of the Ogoni people (an ESC right which was gleaned from the right to life, and the right to their economic, social and cultural development).

In Centre for Minority Rights Development & Others v Kenya (2009) AHRLR 75 (ACHPR 2009) (Endorois case) paras 250-251, the African Commission upheld the right to participation in cultural life and the right to development.

In Purohit & Another v The Gambia (2003) AHRLR 96 (ACHPR 2003) para 84, the African Commission held that Gambia had fallen short of satisfying the realization of the right to health-a social right.

23This refers to the judicial enforcement of human right remedies which is pivotal in the functionality of human rights.
See 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights–Comparative Experiences of Justiciability' (Report of International Commission of Jurists, 2008)

24 United Nations General Assembly, Resolution A/RES/63/117 (2008).

Committee on Economic, Social and Cultural Rights pursuant to article 2(1)[25] of the Optional Protocol which is binding on state parties.[26] It is evident that the attention dedicated by the international community in safeguarding ESC rights through judicial settlement mechanisms, prima facie, makes the right to tourism justiciable in spite of the non-enforceability of its accompanying international tourism guidelines.

This right to tourism is specified in the Global Code of Ethics for Tourism[27] (herein referred to as "the Code")—a complete right in and of itself. The right is outlined in Article 7(1) of the Code. It provides:

> "The prospect of direct and personal access to the discovery and enjoyment of the planet's resources constitutes a right equally open to all the world's inhabitants; the increasingly extensive participation in national and international tourism should be regarded as one of the best possible expressions of the sustained growth of free time, and obstacles should not be placed in its way;"[28]

The provision gives impetus to the universal right to tourism. Except that, the law establishing this right does not categorically insert the phrase the 'right to tourism' in the body of the article[29] as one would expect of a right-conferring provision. The article makes use of the words "the prospect of direct and personal access to the discovery and enjoyment of the planet's resources" as an indirect reference to tourism. It is acknowledged that

25 The caveat is that local remedies must have been exhausted. However, article 3(1) of the Protocol permits individuals to submit complaints directly to the UN Committee on Economic, Social and Cultural Rights where the requirement to exhaust local remedies is unreasonably prolonged.

26 International Commission for Jurists, 'Advocates for Justice and Human Rights'. Chapter 1. https://www.icj.org/advocating-esc-rights-at-national-level-chapter-1-introduction/

27 "the Global Code of Ethics for Tourism (GCET) is a comprehensive set of principles designed to guide key-players in tourism development...Although not legally binding, the Code features a voluntary implementation mechanism through its recognition of the role of the World Committee on Tourism Ethics (WCTE), to which stakeholders may refer matters concerning the application and interpretation of the document". Global Ethics of Ethics for Tourism. UNWTO Website.

Retrieved from: https://www.unwto.org/global-code-of-ethics-for-tourism [Accessed on 7th Feb 2020]

28 Article 7(1) of the Code.

29 The heading of article 7 captures the phrase "the right to tourism" but it does not find expression in the main provision.

this does not in any way represent a true reflection of what constitutes tourism, and this would be revealed later on. The absence of such important words invites debate on whether this provision truly establishes the right to tourism. Thrown into a state confusion, we turn to the preamble of the same Code for respite. The preamble to the Code as adopted by the UNWTO "affirms the right to tourism"[30] in plain language. The words in the preamble evince the ultimate purpose of the Code and thus, settles any likely doubt that may arise as to the definitive pronouncement of tourism as a right.

Article 7(2) of the Code further confirms the right to tourism as a "universal right" which "must be regarded as the corollary to the right to rest and leisure". This particularly brings attention to the overwhelming fact that the right to tourism naturally flows from the right to rest and leisure already assured in other international instruments. The specific mention of the right to tourism as a direct product of the right to rest and leisure makes up for the insufficiency of the wording of article 7(1) of the code which almost impugned the integrity of the right to tourism.

What is Tourism?

It has been sufficiently demonstrated that the right to tourism is a substantial human right. However, more interestingly, knowledge on the legality of the right to tourism excites further intellectual curiosity on the area of its operation. Particularly, what social interest does tourism seek to protect and what is the extent of this social interest? At this juncture, it will be well advised to shed light on "tourism" and its constituent elements in determining what activities would bring the right to tourism to focus.

30 "affirm the right to tourism and the freedom of tourist movements, state our wish to promote an equitable, responsible and sustainable world tourism order, whose benefits will be shared by all sectors of society in the context of an open and liberalized international economy, and solemnly adopt to these ends the principles of the Global Code of Ethics for Tourism". Preamble of the Global Code of Ethics for Tourism.
Retrieved from: http://tafionline.com/PDF/Codigo_Etico_Ing.pdf [Accessed on 3rd Feb 2020]

It should be disclosed that 'tourism' though used loosely, is a term of art.[31] The Code, hailed for putting the right to tourism on the map in 1999, did not clarify the scope and boundaries of the word "tourism". This opened up room for more conjecture as to what act or conduct qualified as tourism, fueling the already existing international discord on the definition of tourism which had been ever present since the term "tourism" originated in the late 1700s[32]. It was not until 2008 that the United Nations World Tourism Organization (UNWTO) in collaboration with United Nations Statistics Division[33] clarified the term "tourism" in its International Recommendations for Tourism Statistics[34] (subsequently referred to as "IRTS").

According to the Glossary Terms contained in the IRTS[35], tourism refers to the activities of visitors[36]. Evidently, the definition of the IRTS serves its role in clarifying divergent opinions postulated about tourism. It establishes global cohesion. Whilst this may be true for the most part of this discussion, the constant reference to other key words in the IRTS such as "activities of visitors" and "visitors" to show the scope of tourism distorts a clear-cut picture of what tourism is. The Glossary Terms of the IRTS does not wholly define

31 The Government of the United Kingdom has recognized that "defining tourism is not a simple matter as it is a complex industry made of many different businesses..." Retrieved from: https://www.visitbritain.org/introduction-tourism [Accessed on 15th Feb 2020]

32 John K. Walton, 'Tourism" Encyclopedia Britannica (Nov 2018) https://www.britannica.com/topic/tourism [Accessed on 26 Jan 2020]

33 The United Nations Statistics Division is committed to the advancement of the global statistical system. We compile and disseminate global statistical information, develop standards and norms for statistical activities, and support countries' efforts to strengthen their national statistical systems. About Us. UNSD Website. Retrieved from: https://unstats.un.org/home/about/ [Accessed on 15th Feb 2020]

34 "The preparation of international tourism recommendations is a part of the efforts of UNWTO and the United Nations Statistics Division to strengthen countries in the methodological and operational foundations of tourism statistics in an integrated manner, including enhancement of the coherence of tourism statistics with other official statistics and further development of tourism satellite accounts". 'International Recommendations for Tourism Statistics 2008', (New York, 2010) United Nations Publication ST/ESA/STAT/SER.M/83/Rev.1. (Foreword) https://unstats.un.org/unsd/publication/Seriesm/SeriesM_83rev1e.pdf [Accessed on 2nd Feb 2020]

35 Id.

36 By paragraph 2.9 of the IRTS: "a visitor is a traveller taking a trip to a main destination outside his/her usual environment, for less than a year, for any main purpose (business, leisure or other personal purpose) other than to be employed by a resident entity in the country or place visited".

tourism in a single frame and this is problematic. Nonetheless, a more comprehensive definition of tourism which also captures relevant parts of the IRTS definition was adopted by UNWTO in the same year in its own Glossary Terms[37].

It states that tourism is:

> "[a] social, cultural and economic phenomenon which entails the movement of people to countries or places outside their usual environment for personal or business/professional purposes. These people are called visitors (which may be either tourists or excursionists; residents or non-residents) and tourism has to do with their activities, some of which imply tourism expenditure."[38]

This definition of tourism reiterated by the Interagency Task Force on Statistics of International Trade in Services (TFSITS)[39] contains clear elements that must be present to ground an activity as tourism.[40] These elements form the basis upon which an international traveller may regard him or herself as a tourist. It suffices to say that unless there has been proof of:

a. Movement of a person to a country or a place outside their usual environment and

b. For personal or business or professional purposes one cannot be a tourist for the purposes of international tourism law.

Movement of a person to a country or place outside their usual environment

37 The Glossary of Terms of the IRTS and the UNWTO may have been produced the same year but there is nothing to prove that they are the same despite the references to the IRTS in the Glossary of Terms of the UNWTO.

38 World Tourism Organization (UNWTO). 'Understanding Tourism: Basic Glossary'. http://www.unite.it/UniTE/Engine/RAServeFile.php/f/File_Prof/VACCARELLI_1399/Glossary.pdf [Accessed on 15th Feb 2020]

39 The Task Force is a coalition that consists of representatives of Eurostat (the Statistical Office of the European Commission), IMF, Organisation for Economic Co-operation and Development (OECD), United Nations Conference on Trade and Development, United Nations Statistics Division (UNSD), and the World Trade Organization.

40 United Nations Statistics Division (2010). "Tourism as an Internationally Traded Service and Beyond." Newsletter of the Interagency Task Force on Statistics of International Trade in Services. No. 6, December 2010, p. 1.
Retrieved from: http://unstats.un.org/unsd/tradeserv/tfsits/newsletter/TFSITS_newsletter_6.pdf [Accessed on 15 Feb 2020]

In initiating a tourist-related act, there must be a positive act of motion by the subject to an intended tourism destination. It is by this act that one assumed the title traveller. i.e. someone who moves between different geographic locations for any purpose and any duration.[41] Movement by the international standards of tourism connotes travelling from one geographic location to another.

Under the recommendations of IRTS[42], movement of tourists or visitors are classified in three forms: Domestic, Inbound and Outbound[43]. Domestic travel is undertaken by persons who are residents of the place of site[44] and this type of travel is without a direct foreign element. Of greater relevance therefore to this discussion are the inbound and outbound travels. Inbound travel refers to the travel into another country by non-residents of that country[45] whilst outbound travel is the movement out of a country by the resident of that country[46]. The outbound traveller moves out of his country of residence into the intended foreign country for some purpose whereas the inbound traveller is typically the non-resident visitor received by the Host country.[47] Whether inbound or outbound, there is a foreign element of captured under these forms of movement since the traveller would spend a night outside his/her country of residence.[48]

41 Op. cit, International Recommendations for Tourism Statistics (IRTS), para 2.4.

42 "The main objective of International Recommendations 2008 is to present a system of definitions, concepts, classifications and indicators that are internally consistent and that facilitate the link to the conceptual frameworks of the Tourism Satellite Account national accounts, the balance of payments and labour statistics, among others. In addition, general guidance with respect to data sources and data compilation methods is also provided and will be complemented by a forthcoming compilation guide". International Recommendations for Tourism Statistics 2008.

Retrieved from: https://unstats.un.org/unsd/publication/Seriesm/SeriesM_83rev1e.pdf [Accessed on 15th Feb 2020]

43 Op. cit, International Recommendations for Tourism Statistics (IRTS), para. 2.5 and 2.39

44 Ibid.

45 IRTS, para. 2.8.

46 Ibid.

47 Their distinction may superfluous because there is a common theme running through them—international travel.

48 Joey Ghanem, 'Conceptualizing "the Tourist": A critical Review of the UNWTO. Master's Thesis (2017) at p. 16
https://core.ac.uk/download/pdf/143490244.pdf [Accessed on 2nd Feb 2020]

Besides movement simpliciter, the IRTS stipulates that movement ought to be connected to a place outside the 'usual environment' of the international traveller. The country of destination must be a place where the traveller would not usually conduct his or normal life processes.[49] According to UNWTO and the United Nations Statistics Division, the concept of usual environment was introduced to exclude from visitors those travellers commuting regularly between their place of usual residence.[50] This includes people who travel for work or to school, and also implicates persons who are regular or frequent visitors of "homes of friends, family, shopping centres, religious and health facilities' that are in a different administrative area.[51] It matters not that these visits or facilities might be a substantial distance away from the home of the traveller.[52]

With the issue of usual environment under consideration, at what point would one cease to be a tourist when they visit Berlin, Germany for the 10th time? The recommended law could be interpreted to mean if one travels to Bangalore, India for medical treatment every quarter of the year, they are likely to lose their status as tourists on the basis that the country becomes inextricably connected to their usual life routine. The question then becomes: how frequent is frequent, and who determines the number of times a visit is construed as regular? Having detected a possible controversy, the IRTS recommends that each country define the precise meaning of what is termed regular and frequent in the context of its tourism statistics.[53] It follows that what is termed a regular or frequent visit to Cyprus might not be regular to Tuvalu. In the midst of the controversy however, it is without argument that the Host country should not be usual to the prospective traveller. His or her travel destination should not be woven with their "current life routine".

49 IRTS, para. 2.21.
50 IRTS, para. 2.23.
51 Ibid.
52 Ibid.
53 IRTS, para. 2.24.

If this is acknowledged as the test for ascertaining the element of movement, how would international law classify a family that is ordinarily resident in Japan but has a vacation house in the Maldives?

Fortunately, the international tourism guideline designates vacation homes[54] as a secondary dwelling[55] and therefore, they do not form a part of a usual environment. The law insists that the traveller must not pay regular or frequent visits to their vacation home and neither should the period of stay be so long so as transform the secondary dwelling into a principal home.[56]

At this point, one may begin to wonder why so many restrictions are placed on a traveller who voluntarily frequents a place that he or she has a sense of attachment to, but in their minds, is convinced that this act is an act of tourism. The answer is simple. Closely associated with the concept of tourism is residence. Some individuals shuttle regularly between countries as part of their life routines. This may have absolutely nothing to do with tourism. Tourists have some rights under international law quite different from the general notion of human rights. To lay claim to these rights, that individual must be able to assert the fact of tourism with cogent evidence. A resident in a country is also amenable to certain laws which may not apply to a foreign tourist. It will detrimental to the smooth running of the international legal system to entangle residence with tourism as the intention for travel under these concepts are different.[57]

On the assessment of the ingredient of movement, we draw these conclusions therefore on the movement of a person to a country or place outside their usual environment:

54 This is a holiday home for purposes of leisure.

55 "Each household has a principal dwelling, usually defined with reference to time spent there, whose location defines the country of residence and place of usual residence of this household and of all its members. All other dwellings are considered secondary dwellings." International Recommendations, p. 12, para 2.26. Retrieved from: https://unstats.un.org/unsd/publication/Seriesm/SeriesM_83rev1e.pdf [Accessed on 3rd Feb 2020]

56 Op. cit, International Recommendations for Tourism Statistics (IRTS), para 2.27.

57 The concept of residence enables us to distinguish the forms of tourism i.e. either domestic or international. See para International Recommendations of Tourism Statistics (IRTS), para. 2.16.

I. The movement must be directed to a different geographic location;

II. The movement must be inbound or outbound to be an international travel; and

III. The final tourist destination must not be a usual environment. A usual environment includes: "the place of usual residence of the household to which he or she belongs, his or her own place of work or study and any other place that he or she visits regularly and frequently, even when this place is located far away from his or her place of usual residence or in another locality, except for vacation homes"[58]

For personal or business or professional purposes

Every trip has a main or central purpose; this remains the case even where there are purposes incidental to the central reason for taking the trip.[59] The purpose of travel assists in evaluating the intention for the trip since it has been profoundly established that not all movements outside the country are tourist inclined.

Personal purposes usually cover holidays, leisure and recreation[60]. Visiting friends and relatives are also classified as personal purposes but the visits must not be so frequent so as to make it a usual environment. Example: visiting Auntie Titi who lives in Maryland, United States of America, 6 times in a year would not to constitute tourism. Other personal purposes include education and training[61]; health and medical care[62]; religion/pilgrimage[63]; shopping[64]; transit and other[65] which includes volunteer work.

58 IRTS, para. 2.25.
59 IRTS, para. 3.16.
60 IRTS, para 3.15.
61 See Appendix A
62 See Appendix A
63 See Appendix A
64 See Appendix A
65 See Appendix A

With what the municipal systems perceive as tourism[66], it seems a stretch to accept education and training as constituting a personal tourism purpose. Education in particular, may run for more than a year, except for short term courses. The guidelines of the IRTS in determining a place of usual environment take into account the duration of the trip[67]. That being so, supposing the length of stay in the country of study is five (5) years with no frequency in movements in and out of the country from their usual residence, do we still deem this activity to be tourism? I think not. The drafters in outlining these purposes were meticulous enough to have delineated certain types of educational study as not constituting tourism. For example, under the IRTS guidelines, students studying for more than a year are not considered visitors.[68]

Strikingly, the definition of tourism under the Glossary of Terms of UNWTO is plagued by the problem of an indefinite duration. It does not set a boundary on the duration or period of stay in the Host country. We therefore have recourse to the Glossary Terms of the IRTS in search of a solution.

As previously indicated, by tourism, the IRTS means the activities of a visitor, and by visitor, the IRTS means a trip to an unusual environment for less than a year[69]. Ordinarily, by this definition, there is a cap placed on the period which a tourist may spend in the Host state. So, for the purposes of resolving the deadlock created by the definition of tourism in the UNWTO Glossary of Terms, it will be prudent to acknowledge and apply the duration cap under the IRTS Glossary of Terms.

66 In Ghana for instance, tourism concerns creative arts, culture and hospitality. To that effect, a typical Ghanaian tourism scene comprises cultural resources such as traditional festivals and historical resources like our castles and forts. See 'Tourism in Ghana'. Retrieved from: https://www.icao.int/Meetings/SUSDEV-AT/Documents/Presentation_GHANA%20TOURISM%20POTENTIALS.pdf [Accessed on 15th Feb 2020]

67 IRTS, para. 2.25.

68 IRTS, para. 2.66.

69 IRTS, Glossary Terms. The less than a year benchmark is reiterated in the Glossary of Statistical Terms of the Organization of Economic Cooperation and Development (OECD). Tourism Satellite Account: Recommended Methodological Framework, Eurostat, OECD, WTO, UNSD, 2001, paras 1.1 and 2.1.

It is still unresolved why education is a personal tourism purpose. The argument is, it is profoundly known that it is on the footing of distinguishing between purely tourist acts from educational purposes that Foreign Consulates (Embassies) in countries issue tourist visas for short recreational visits.[70] Furthermore, there is a general consensus amongst consular officers that the term of stay should not exceed 90 days[71] or in some cases 180 days[72]; for after 6 months, the purposes dovetails into a temporary stay, and this is not tourism. It can be inferred from the immigration rules of most nation States that one cannot undertake a tourism activity for more than 6 months.[73] There appears to be much difficulty in situating educational exploits as acts of tourism by municipal law metrics. Whether the course of study runs for 3 weeks or more, local consulates would not see this to be tourism.

A business or professional purpose[74] counts as tourism by UNWTO's standard. To them, tourism is not skewed towards leisure and recreational activity but extends to business motivated travels. Again, this categorization deviates from conventional notion of tourism which is an act of leisure outside working hours. The business purpose is said to comprise 'activities of self-employed and employees as long as they do not correspond to an implicit or explicit employer-

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70 Prospective Ghanaians wishing to travel to the UK for tourism purposes are advised by the UK Immigration to apply for a Standard Visitor Visa. Whereas for short-term studies, you are to apply for short-term study visa. Government of the UK website.
Retrieved from: https://www.gov.uk/standard-visitor-visa [Accessed on 15th Feb 2020]

71 "A Uniform Schengen Visa stands for a permit of one of the Schengen Area Member Countries to transit or reside in the desired territory for a certain period of time up to the maximum of 90 days every six month period starting from the date of entry". Retrieved: https://www.schengenvisainfo.com/schengen-visa-types/ [Accessed on 15th Feb 2020]

72 In the United Kingdom, the maximum duration of stay for tourist visits is 180 days. Popularly referred to the 180-day rule. Retrieved from: https://www.gov.uk/standard-visitor-visa [Accessed on 15th Feb 2020]

73 For instance, the immigration rules of United States do not permit Canadian visitors to the US for more than 6 months. Hodgson Russ LLP, 'The 180-day rule for Canadian visitors-law or legend?'.
Retrieved from: https://www.lexology.com/library/detail.aspx?g=bb7206f5-69f7-472f-94a2-cfb18755e3ea [Accessed on 15th Feb 2020]

74 See Appendix A

employee relationship with a resident producer in the country or place visited'.[75] The recommended principle is that a visit to another country on professional reasons should be sanctioned by the country of origin of the worker and not the country that has agreed to host the visitor. A worker on secondment[76] in a different jurisdiction for the purposes of this guideline, would not be a tourist seeing as there is an explicit 'employer-employee relationship with the resident producer'. Business purpose extends to "meetings, conferences, congress, trade fairs and exhibitions"[77]. The IRTS in its reliance on business purposes made the requisite delineations such that business here is not an all embarrassing term. In the opinion of the writer, business here is tied to acts that are peripheral to actual business ongoing in the Home country[78]. The IRTS ought to be lauded for this attention to detail.

Notwithstanding these flattery remarks, as much as globalization and technological growth have influenced the tourism industry significantly, it is only fair, just and reasonable that the rudimentary framework of tourism is maintained. What becomes the essence of tourism if the central theme of "touring", "leisure" and "short stay" is missing from the definition of tourism? We ought to be mindful of the early foundations of the industry which should inform our present and help us anticipate the future.

It is submitted that the definition of tourism proposed by both the IRTS and UNWTO in terms of personal purposes of tourism is excessively broad and overreaching. In the opinion of the writer, the most appropriate and convenient definition which conforms to general practice of countries would

75 IRTS, para. 3.17 (2).

76 "A period of time when an employee is sent to work somewhere else, to increase the number of workers, to replace other workers, or to exchange experience or skills" Retrieved from: https://dictionary.cambridge.org/dictionary/english/secondment [Accessed on 15th Feb 2020]

77 IRTS, para. 3.20.

78 It is usually the place of residence. The IRTS recommends that travellers are classified on the basis of their country of residence and not nationality. This does not bear the same meaning with National Government in the Code.

maintain the 1st element of tourism of the Glossary of Terms of the UNWTO—movement—whilst limiting the purpose to recreation or leisure. The proposed definition would then have a fixed duration of not more than 6 months so as to conform to the acceptable municipal standards.

Fundamental Human Rights Claims of Foreign Tourists

Human rights are universal and inalienable[79]. A non-citizen[80] in a foreign country is entitled to the respect, promotion and fulfilment of their fundamental human rights inscribed in the Universal Declaration of Human Rights (UDHR)[81]. Like the luggage they carry, every tourist carries with them their human rights without distinction.

Article 3(1) of the Statutes of the World Tourism Organization[82] expressly provides that one of the fundamental aims of the UNWTO is to promote and develop the "observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". Members of the UNWTO are thus charged with the duty to ensure the respect of the fundamental human rights of alien tourists.[83]

In addition to enjoyment of the rights set out in the UDHR, foreign travellers who are non-nationals of the destination country are expected to benefit from the rights enshrined

79 UNFPA, 'Human Rights Principles' (2005)

80 Article 1 of the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live (1985) as a non-citizen is defined as any "individual who is not a national of a state in which he or she is present"—Study Guide: The Rights of Non-Citizens. University of Minnesota Human Rights Center (2003)

81 Some scholars have posited that the UDHR, or at least, some of its provisions have attained the force of customary international law [a source of law under article 38(1)(b) of the ICJ Statute as evidence of general practice accepted by law]. See Hurst Hannum, 'the Status of the Universal Declaration of Human Rights in International and National Law'. GA. J. INT'L & COMP. L. Volume 287- 392 at p. 289.

82 United Nations World Tourism Organization, Statutes of the World Tourism Organization, adopted by the Extraordinary General Assembly of IUOTO, Mexico City, Mex., Sept. 17-28, 1970 (June 2009).

83 Article 10(2) of the Global Code of Ethics for Tourism demands of stakeholders in tourism develop to have due respect for the general principles of international law.

in the Declaration of Non-Nationals[84]. By this legal instrument, aliens are entitled to the same treatment as nationals of the countries they are currently present in, and are to be accorded protection of basic rights such as:

I. the right to life and security of the person[85];

II. freedom from arbitrary arrest or detention[86];

III. protection against arbitrary or unlawful interference with privacy, family, home or correspondence[87];

IV. equality before the courts, including the free assistance of an interpreter[88];

V. the right to choose a spouse, to marry, and to found a family[89];

VI. freedom of thought, opinion, conscience and religion[90];

VII. the right to retain language, culture and tradition[91]; and

VIII. the right to transfer money abroad[92].

The import of these bundle of rights is that, a tourist, like any other national of the Host state, is entitled to benefit from these rights from their Host country without exception. They are not specially carved out for the international traveller. They are ordinary rights at law for the non-national enforceable by the international traveller against the State in national and international courts.

These fundamental human rights claims are the hunting

84 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, G.A. res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985).
85 Id. article 5(1)(a)
86 Id. article7 5(1)(a)
87 Id. article 5(1)(b)
88 Id. article 5(1)(c)
89 Id. article 5(1)(d)
90 Id. article 5(1)(e)
91 Id. article 5(1)(f)
92 Id. article 5(1)(g)

grounds of International Human Rights Law. It would be absurd therefore to subsume them as part of International Tourism law since international Human Rights give rise to erga omnes[93] obligations which is uncharacteristic of International Tourism Law. However, the writer holds the view that it would be impracticable to speak about the rights of tourists without giving a general forecast of their natural entitlements at law.

Tourists' Rights

Other than the general human rights of a tourist, there are specific rights that accrue to tourists by virtue of a contract between the government and the tourist.[94] The terms of this contract are usually implied from the issuance of a visa or, where no visa is required, the terms of the contract are gleaned from multilateral or bilateral treaties and agreements between Host states and the country of residence or nationality of the tourist. By a mutual contract with travel agents[95] tourists who patronize the services of travel agencies are, as of right, supposed to claim certain rights from them.

The rights in question do not stand on their own. They are required to make the right to tourism real and effective. The Global Code of Ethics, the authority for the right to tourism, fortifies the right to tourism with the Obligations of Stakeholders in Tourism Development[96] and Liberty of Tourist Movements[97].

93 These are obligations towards all under international law. Erga omnes partes obligations exists because of world interest in the breach of that obligation. Basic human rights such as right against torture, slavery etc.. give rise to erga omnes obligations. The concept was illustrated in the Barcelona Traction case [(Belgium v Spain) (Second Phase) ICJ Rep 1970 3, and it is further codified in article 48(1)(b) of the UN ILC Draft Articles.

94 The idea of specific tourist rights is propounded by Amir Maghami & Mitra Dorudgar, 'Tourism and Foreign Rights in International law' at p. 25 (op. *cit).*

95 "Travel Agent is a person whose job it is to arrange travel for end clients (individuals, groups, corporations) on behalf of suppliers (hotels, airlines, car rentals, cruise lines, railways, travel insurance, package tours). His task is to simplify the travel planning process for their customers in addition to providing consultation services and entire travel packages" Retrieved from: https://www.xotels.com/en/glossary/travel-agent [Accessed on 15th Feb 2020]

96 See Article 6 of the Code.

97 See Article 8 of the Code.

Obligations of Stakeholders in Tourism Development

The stakeholders in tourism development[98] refer to persons that have an interest in the tourism industry and are directly affected by outcomes of the tourism industry. These public and private stakeholders have a joint responsibility in the implementation of these principles and monitor their effective application.[99] There are a number of stakeholders, but the principal players in the tourism industry are: Tourism professionals[100], Host countries[101] and National governments[102]. The Code contains distinct functions that must be carried out by these principal stakeholders.

Obligations of Tourism Professionals

Tourism Professionals are enjoined by article 6(1) of the Code to perform a number of obligations in favour of the tourists that they serve.

98 "The term "stakeholders in tourism development" includes, according to UNWTO, the following players:

- national governments;
- local governments with specific competence in tourism matters;
- tourism establishments and tourism enterprises, including their associations;
- institutions engaged in financing tourism projects;
- tourism employees, tourism professionals and tourism consultants;
- trade unions of tourism employees;
- tourism education and training centers;
- travellers, including business travellers, and visitors to tourism destinations, sites and attractions;
- local populations and host communities at tourism destinations through their representatives;
- other juridical and natural persons having stakes in tourism development including non-governmental organizations specializing in tourism and directly involved in tourism projects and the supply of tourism services."

WTO Survey on the Implementation of the Global Code of Ethics for Tourism (2005), paragraph 32.
Retrieved from: https://www.safecoastaltourism.org/article/stakeholders-tourism-development-according-unwto [Accessed on 8th Feb 2020]

99 The Code, article 10(1).

100 From the Global Code of Ethics for Tourism, it can be inferred that tourism professionals are workers in the tourism industry who provide tourism packages. They include travel agencies, proprietors of organized group tours and other service providers in the tourism and hospitality industry.

101 This is the country of destination for the act of tourism.

102 This is the country where the tourist is a citizen and has a close connection with. It is not the same as the Home country which means the country of residence under the IRTS. However, it means the same thing as Generating state. The principle of effective nationality must be established. See ICJ's opinion in the Nottebohm case (Liechtenstein v. Guatemala) [1955] ICJ 1

The law is that tourism professionals have an obligation to:

a. provide tourists with objective and honest information on their places of destination and on the conditions of travel, hospitality and stays:

There is a responsibility placed on tourism professionals to make available to tourists, the requisite information that may affect their travel plans. As persons moving to an unusual environment[103] and with the hopes of returning to their country of residence, it is desirable to make known pertinent details of the place of visit to enable tourists make an informed decision. With the outbreak of the coronavirus epidemic[104] in the year 2020 for instance, a tourism professional offering tours to areas noted to have persons diagnosed of the virus must consciously share vital information relating to this.

The obligation to provide information is intimately linked to the right to access information[105]. The right to access information is a fundamental human right that flows from the freedom of opinion and expression[106] contained in article 19 of the UDHR[107]. The right relates specifically to access to information from public bodies, but in 2002, the African Commission on Human and Peoples' Rights adopted a Declaration of Principles on Freedom of Expression

103 The usual environment of an individual, IRTS, para 2.21-2.18

104 China coronavirus outbreak: All the latest updates. (Aljazeera, 2020) https://www.aljazeera.com/news/2020/02/clone.of.cloneofchina-coronavirus-outbreak-latest-.html [Accessed on 15th Feb 2020]

105 Article 19 of the UDHR states: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

106 In 1998 the UN Special Rapporteur on Freedom of Opinion and Expression stated clearly that the right to access information held by the State is included in the right to freedom of expression: "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems. ..." Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14. https://www.article19.org/resources/international-standards-right-information/ [Accessed on 8th Feb 2020]

107 Article 19 of the UDHR states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

in Africa[108] which guaranteed the right to access information held by private bodies[109] too. The obligation to grant access to information therefore naturally behoves tourism professionals within the meaning of this Declaration.

The burden in article 6(1) in respect of the duty to provide information further requires of the tourism professional to ensure that the information is honest. The obligation may be interpreted to mean the information provided should not be misleading[110] or fraudulent or made in bad faith. Partial disclosures are not considered as honest information[111]; therefore, the disclosure must be all encompassing.

b. ensure that the contractual clauses proposed to their customers are readily understandable as to the nature, price and quality of the services they commit themselves to providing and the financial compensation payable by them in the event of a unilateral breach of contract on their part[112];

Tourism professionals are to put their contracts in comprehensible language to allow their consumers to appreciate the overall quality of service they are receiving. In simple and plain words, the contract ought to convey the terms under which the tourism professionals are prepared to contract. Tourism professionals, by this article, are to restrain from concealing special information in the contract that have a great impact on the service being rendered. For example,

108 "The Declaration of Principles of Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights. The document serves as a reference point for assessing African countries' records at the Commission. It has also been a strong reference point for jurisprudence in Africa." Source: UNESCO. Retrieved from: https://en.unesco.org/news/unesco-supports-updating-african-declaration-freedom-expression [Accessed on 15th Feb 2020]

109 Declaration of Principles on Freedom of Expression in Africa, article 4(2).

110 Information is misleading when it would result in a consumer making a decision relating to goods or services that he or she would not have made with the decision. Retrieved from: https://www.kkv.fi/en/facts-and-advice/marketing-and-customer-relationships/inappropriate-marketing-and-unfair-practices-in-customer-relationships/misleading-information/ [Accessed on 15th Feb 2020]

111 Curtis v. Chemical Cleaning and Dyeing Co [1951] 1 KB 805 affirms that where a party misrepresents the significance of a term, it ceases to be contractually binding.

112 This is second part to article 6(1) of the Global Code of Ethics for Tourism.

some organized tour groups may refund only 50% of the travel money if a trip is forfeited. Information of this nature should be explicit in the contract.

Arrangement has also been made in the case of a unilateral breach of the contract by a tourism professional. The monetary weight of liability payable as financial compensation in the event of unilateral abrogation of the contract should be stated in the agreement as well.

An evaluation of article 6(1) of the Code reveals a key ingredient present in all the stated obligations: information. It is argued therefore that tourists on the premise of this obligation have a corresponding right to information peculiar to their act of tourism.

By article 6(2) to article 6(4) of the Code, tourism professionals are to perform the following obligations:

1. Ensure the existence of suitable systems of insurance and assistance;[113]
2. Accept the reporting obligations prescribed by national regulations;[114]
3. Pay fair compensation in the event of failure to observe their contractual obligations;[115]
4. Contribute to the cultural and spiritual fulfilment of tourists. Included in this obligation is allowing tourists to practise their religions during their travels.[116]

113 The Code, article 6(2)
114 Ibid.
115 Ibid.
116 The Code, article 6(3)

Obligations of the National Government

The Government of the tourist is still connected to their citizen when they are abroad. By a rule of international law, the National governments extend an arm of protection to keep their nationals safe outside their borders.

Article 6(4) of the Code[117] in respect of the obligation owed by the National government provides that:

The Government have the duty especially in a crisis to inform their nationals of the difficult circumstances, or even the dangers they may encounter during their travels abroad[118].

Beyond tourism professionals, the Code establishes that information is to be issued by the National government. The Code qualifies this obligation by stating that the information must be broadcast to nationals to inform them of 'difficult circumstances or dangers they might encounter when they travel abroad'.[119] The obligation to so do becomes even more necessary when crisis strikes.[120]

It must be noted that unlike the general right to access information, which is exercisable on request, the special tourist right to information is to be fulfilled without an intentional act on the part of the tourist to seek the information. The information is to come freely from the National state as a corollary to the right to tourism and this is commendable.

As much as the National governments hold the responsibility in disseminating information, such information should not be prejudicial to the interests of the Host country. The framers of the Code anticipate that the National country of the tourist may roll out information which could be disparaging to the tourism sector of the Host country. Therefore, the requirement is that the information by law should be 'without prejudice in an unjustified or exaggerated manner to the tourism industry of the Host countries and the interests of their own operators'.[121]

117 Article 6(4) of the Global Code of Ethics for Tourism.
118 https://www.unwto.org/global-code-of-ethics-for-tourism
119 The Code, article 6(5).
120 Ibid.
121 Ibid.

The information sent out to nationals in the form of travel advisories should be discussed beforehand with the authorities of the Host countries and the professionals concerned[122]. The rationale of this guideline is to allow the governments of either state agree on what sort of information is healthy and relevant for public consumption.[123]

In all this, it is recognised that the obligation to disseminate information relating to crisis situations lies on the country of nationality of the tourist and not the Host country where the crisis is ongoing.

By critical evaluation of this law, the Host country, in which the crisis has occurred or is about to occur, certainly has more accurate and detailed information on this crisis and should be better placed to disseminate information to visiting foreign travellers. An instance of a Host country disseminating important information about a lingering or rumored crisis was demonstrated by the United Arab Emirates. News material was circulated in latter part of January 2020, reporting that Dubai was under an imminent threat of missile strikes from Iran.[124] It was the government of the United Arab Emirates (UAE) who issued a rejoinder to that statement and allayed the fears of tourists by denying any spec of truth in that reportage.[125] The government was seized with the proper information. Yet, throughout the Code, no burden is placed on the Host country to release information pertaining to safety during impending or on-going crisis situations. This, the writer submits, is another weakness of the Global Code of Ethics for Tourism.

122 Ibid.

123 Article 6(5) of the Code states specifically that "Recommendations formulated should be strictly proportionate to the gravity of the situations encountered and confined to the geographical areas where the insecurity has arisen; such advisories should be qualified or cancelled as soon as a return to normality permits".

124 'Amid Soleimani crisis, Iran to level Dubai and Israel. But Why?' (TRTWorld, 8 Jan 2020) https://www.trtworld.com/magazine/amid-soleimani-crisis-iran-threatens-to-level-dubai-and-israel-but-why-32793 [Accessed on 15th Feb 2020]

125 'Dubai absolutely safe to visit, no threat from Iran: Govt' (Khaleejtimes, 9 Jan 2020). https://www.khaleejtimes.com/uae/dubai/dubai-absolutely-safe-to-visit-no-threat-from-iran-govt- [Accessed on 15th Feb 2020]

The right to access information in its pristine form provides for access to information held by public bodies for persons within the jurisdiction of that State from that State. It was on these grounds that the Committee of Ministers of the Council of Europe adopted Recommendation No. R(81)19 on Access to Information held by Public Authorities[126], which states:

"Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities..."[127]

The Code ought to be revised in this respect to reflect an obligation on Host governments to provide key information to visitors especially during times of impending or on-going crisis.

Collective Obligations of Tourism Professionals, Host Government and National Governments

Obligations are set out in the Code which admit of a joint, collaborative effort of two or more of the stakeholders in tourism development in the fulfilment of its objective. Working hand in hand with other stakeholders is instrumental in complementing the strengths of either camp.

The first of such obligation devolves on tourism professionals and public authorities of the Host country to cooperate with each other in showing concern for the 'security and safety, accident prevention, health protection and food safety of those who seek their services'.[128]

126 Adopted by the Committee of Ministers on 25 November 1981 at the 340th meeting of the Ministers' Deputies. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f7a6e [Accessed on 15th Feb 2020]

127 Recommendation No. R (81) 19, article I. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f7a6e [Accessed on 15th Feb 2020]

128 The Code, article 6(2).

Then, there is a three-man cooperative agenda played by the public authorities of the generating States and the Host countries, in cooperation with the professionals concerned and their associations, to 'ensure that the necessary mechanisms are in place for the repatriation of tourists in the event of the bankruptcy of the enterprise that organized their travel'.[129]

Obligations Of Other Stakeholders

Well apart from the commonly known stakeholders, the Code mandates the media[130], another stakeholder, to play a role in the broadcast of information. The right to information of tourists is entrenched even more in Article 6(6) of the Code which is to the effect that media should "issue honest and balanced information on events and situations that could influence the flow of tourists".[131]

The Code emphatically states that the media should not in any way promote sex tourism.[132] This conspicuous provision awakens a conflict between countries like Netherlands and Sweden where sex tourism is a fundamental drive to their tourism industry.

It is said that sex tourism is big business in Netherlands[133]. Foreign policy in Netherlands makes it legal to sell sex in Amsterdam[134] and Red-light District alone attracts over 20 million visitors[135] each year, and this makes sex tourism in Netherlands economically lucrative. To expand the reach of

129 The Code, article 6(4).

130 This includes the "press, and particularly the specialized travel press and the other media"

131 Article 6(6) further provides that the media "should also provide accurate and reliable information to the consumers of tourism services; the new communication and electronic commerce technologies should also be developed and used for this purpose".

132 The Code, Article 6(6).

133 https://www.expatica.com/nl/amsterdam/basics-amsterdam/dear-foreigners-please-dont-visit-amsterdam-until-youve-read-these-5-

134 Geneva Abdul, "It's Legal to Sell Sex in Amsterdam But Don't Expect the Same Rights as Other Workers". Foreign Policy Website. https://foreignpolicy.com/2019/02/19/its-legal-to-sell-sex-in-amsterdam-but-dont-expect-the-same-rights-as-other-self-employed-workers-netherlands-legal-prostitution-sex-workers/ [Accessed on 8th Feb 2020]

135 Mark Smith. "SEX SELLS I'm a sex worker who makes hundreds a day – now rich and patronising feminists want to 'save me'... by taking away my job". The Sun (25 Jun 2019). https://www.thesun.co.uk/news/9062338/amsterdam-red-light-district-exxpose/

their business, it should permissible for advertisements to be broadcast on sex tourism in Netherlands. Therefore, this guideline fettering media advertisements on sex tourism may not fly in a country like Netherlands.

Liberty of Tourists Movements

The Code in Article 8[136] contains, amongst other rights, the right to movement of a tourist.[137] These rights are to be fulfilled by the Host states who have an implied obligation to promote these rights. Article 8 therefore represents a compendium of rights at the disposal of the tourist to make the right to tourism practical.

Article 8(1) of the Code stipulates that tourists in compliance with international law and national legislation, have the liberty to move within their countries and from one State to another.[138] The right of movement is the cardinal to tourism, for without it, tourism cannot exist.

In respect of the liberty to move, the Code recommends that "administrative procedures relating to border crossings whether they lie within the competence of States or result from international agreements, such as visas or health and customs formalities, should be adapted, so far as possible, so as to facilitate to the maximum freedom of travel and widespread access to international tourism"[139] States, by this recommendation, are encouraged to augment their national laws in such a way as would maximize international tourism. However, this cannot be construed as a right to a visa or to enter a country at all cost since the issuance of a visa or grant of entry lies at the discretion of the administrative authorities.

136 Article 8 of the Global Code of Ethics for Tourism.

137 According to General Comment No. 27 of the Human Rights Committee, Liberty of movement is an indispensable condition for the free development of a person. CCPR General Comment No.27: Article 13 (Freedom of Movement). CCPR/C/21/Rev.1/Add.9

138 The right also implicates access to places of transit and stay. This right is backed by Article 13 of the Universal Declaration of Human Rights (UDHR) and Article 12 of the International Covenant on Civil and Political Rights (ICCPR)

139 The Code, Article 8(4). https://www.unwto.org/global-code-of-ethics-for-tourism [Accessed on 15th Feb 2020]

Nevertheless, under the Code, agreements between groups of countries to harmonize and simplify these procedures are to be encouraged to ensure the 'maximum travel and widespread access to international tourism'.[140] The complete realization of the right to movement of a tourist ordinarily encompasses access to cultural sites[141] without being subject to excessive formalities.[142]

In summary, the rights scheduled in article 7(2) to 7(5) that the Host state must protect, respect and fulfil are:

1. access to available forms of communication, internal or external[143];
2. prompt and easy access to local administrative, legal and health services[144];
3. freedom to contact the consular representatives of their countries of origin in compliance with the diplomatic conventions in force[145];
4. entitlement to same rights as the citizens of the country visited concerning the confidentiality of the personal data and information concerning them, especially when these are stored electronically[146];
5. access to allowances of convertible currencies needed for their travels[147];

140 Ibid.
141 Access to cultural sites would involve participation in culture—the right of which article 27 of the UDHR guarantees.
142 The Code, article 8(2).
143 Ibid.
144 Ibid.
145 Ibid.
146 The Code, article 8(3).
147 The Code, article 8(5).

Obligation of Tourists Towards Host States

Obligations under international tourism law is a two-way street: obligations of Host states to tourists and, on the other hand, obligations of tourists to Host states. Majority of municipal law systems have in place, rules and regulations designed to ensure responsible conduct of international tourists within their jurisdiction. The World Committee on Tourism Ethics[148](WCTE) has further institutionalized obligations of the international traveller based on the Global Code of Ethics for Tourism under the scheme "Tips for a Responsible Traveller"[149]. Travellers in this guide are implored to "observe national laws and regulations".[150] International law hence obliges tourists to obey and comply with local laws during their stay.

Municipal law varies across sub-regional backgrounds and continental landscapes. Obligations of a foreign tourist in one Host state may sharply differ from the another. In the succeeding paragraphs, two of the laws of the countries of some of the most visited cities in the world[151] would be investigated. The essence of this is to give a breakdown of what prospective tourists are to take note of when planning to visit these countries.

148 "the World Committee on Tourism Ethics is the impartial body responsible for interpreting, applying and evaluating the provisions of the UNWTO Global Code of Ethics for Tourism". UNWTO Website.
Retrieved from: https://www.unwto.org/world-committee-tourism-ethics [15th Feb 2020]

149 "Prepared on the occasion of the International Year of Sustainable Tourism for Development, the "Tips for a Responsible Traveller" (2017) brochure highlights those principles of the Code directly related to tourists, in order to help guide travellers in making their behaviour ever more responsible". 'The Responsible Tourist'. UNWTO Website.
Retrieved from: https://www.unwto.org/responsible-tourist [Accessed on 9th Feb 2020]

150 http://www.tourism4development2017.org/wp-content/uploads/2017/01/tips_web.pdf [Accessed on 9th Feb 2020]

151 Alexandra Talty, "Bangkok Is The Most Visited City in the World.... Again". Forbes Website. Forbes in 2019 listed the top ten cities for international visitors in 2017: Bangkok, Paris, London, Dubai, Singapore, Kuala Lumpur, Istanbul, New York, Tokyo, Antalya.
https://www.forbes.com/sites/alexandratalty/2019/09/04/bangkok-is-the-most-visited-city-in-the-world-again/#32b8b36b5f1b [Accessed on 9th Feb 2020]

Dubai, United Arab Emirates

Dubai is an ideal vacation hotspot; however, the country draws on Muslim heritage and has strict traditional rules that are universally applicable to all tourists.[152] Some of the applicable tourism laws include the following: i. tourists are not to show public display of affection.[153] This is considered offensive; unmarried Couples are not to sleep in the same accommodations because of Sharia Law.[154]; tourists are not to engage in acts of homosexuality[155]; tourists are not to take photos of other people without their consent;[156] tourists are to refrain from drinking or eating in public places during Ramadan fasting;[157] and tourists are not to wear sleeveless tops and short dresses at Dubai Mall.[158]

Paris, France

In France, it is illegal to conceal one's face with balaclavas, full veils or any other garment or mask.[159] One is also forbidden from smoking in public places or public transportation.[160] Also, an individual cannot take alcoholic beverages into places where sporting activities take place.[161] The laws make it illegal to travel in public intoxicated whether by car or by foot.[162] Tourists desiring to use drones in France must be

152 Beth Allcock, "Dubai Laws: Doing this ordinary tourist pastime could see you in jail- what is thus? Express, UK, 2019.

153 'Dubai Tourist Information and Travel Tips'. 2019. https://www.guide2dubai.com/visiting/tourist-information/dubai-travel-tips

154 Ibid.

155 Consensual same-sex sexual relations are criminalized in the UAE. Penalties may include fines and imprisonment. Under interpretations of sharia, the punishment could include the death penalty. US Department of State-Bureau of Consular Affairs.

156 Visitors could suffer deportation or be fined up to USD$ 136, 147.

157 A Russian woman was put on trial for drinking juice in public during the month of Ramadan in 2008. https://www.pravdareport.com/society/106429-dubai/ [Accessed on 9th Feb 2020]

158 "Dubai Mall Dress Code". https://www.alceis.com/fr/ [Accessed on 9th Feb 2020]

159 France. 'Local laws and customs' https://www.gov.uk/foreign-travel-advice/france/local-laws-and-customs Failure to comply with the ban is punishable by a maximum fine of €150.

160 France Tourism, 'Local Laws' http://www.francetourism.com/More/Before-You-Go/Local-Laws/Local-Laws-/8348 [Accessed on 9th Feb 2020]

161 Ibid. January 10, 1991, this law was passed.

162 Ibid.

circumspect about this. It is against the law to operate drones over public spaces in urban areas, and official places such airports, military bases, prisons, nuclear plants, and large gatherings such as outdoor concerts and parades.[163]

The gist of the obligations required to be performed by tourists in the aforementioned Host states exposes the conflicts between national and international law in the administration of tourism and its accompanying rights. In France, the prohibition against concealing one's body could be an affront to the religion of a tourist which regards the wearing of a veil as sacred. The restriction on the types of clothes to wear in Dubai, amongst others, also puts a strain on the right to personal liberty.

In the face of the conflicts between international law and municipal law, we are met by the harsh resistance of State sovereignty[164] which would forcefully argue that the presence of these tourists in their territories would require them to comply with their local laws. Be that as it may, without a reflection of international minimum standards in national laws, these laws directly offend international law. As vigilant and concerned watchers of the international community therefore, we cannot trivialize this conflict which wields the potential of suppressing international collaborative efforts garnered towards the creation of a unified system of rules for the tourism industry.

163 US Department of State-Bureau of Consular Affairs. 'Local Laws and Special Circumstances. Violators can be arrested and subject to fines of up to 75,000 euros and/or one year imprisonment.
https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/France.html

164 State sovereignty is the concept that states are in complete and exclusive control of all the people and property within their territory.
Retrieved from: http://www.globalization101.org/the-issue-of-sovereignty/ [5th April 2020]

Conclusion

The rules, principles and guidelines of international tourism law are extensive and save for some impractical rules, can effectively serve the needs of the growing international tourism population. However, the non-binding nature of international tourism law may set us back in seeking a remedy for a breach of the law in a court of law. Whilst these rights have been beautifully outlined in the Global Code of Tourism Ethics, the chances of successfully pursuing a claim for alleged violations of these rights before a domestic court does not look promising for the injured tourist. As at now, there exists no international court or tribunal positioned to receive claims of this nature unless they are couched as breaches to fundamental human rights under the International Bill of Rights (terminology for the aggregate of the UDHR, the ICCPR and the ICESCR). This would, of course, be a cause of action founded on international human rights law. It is not the intent of this author to downplay the potency of the broader spectrum of human rights law. Rather, it is the sole objective of the author to amplify international tourism law and advocate for promotion of its special category of tourists' rights guaranteed under international law. The initiative taken by the UNWTO and other UN organizations on harmonizing the rules on tourism is no doubt a creditable one. We need to take further steps forward. International Law, without neglect to the scale of State sovereignty, must fearlessly pursue an agenda to set strict international minimum standards and thereon strive to make tourists' rights accessible to all international travellers.

APPENDIX A

Personal Purposes for Travel under the IRTS[165]

Purpose	Details
Holidays, leisure and recreation[166]	"This category includes, for example, sightseeing, visiting natural or man-made sites, attending sporting or cultural events, practicing a sport (skiing, riding, golfing, playing tennis, diving, surfing, hiking, trekking, mountain climbing, etc.) as a non-professional activity; using beaches, swimming pools and any recreation and entertainment facilities, cruising, gambling, attending summer camps for youngsters, resting, honey-mooning, fine dining, visiting establishments specialized in well-being (for example, wellness hotels), fitness except in the context of a medical treatment, staying in a vacation home owned or leased by the household, etc."
Visiting friends and relatives[167]	"This category includes, for example, activities such as visiting relatives or friends; attending weddings, funerals or any other family event; short-term caring for the sick or old, etc."

165 These are the tourism purposes gleaned from the International Recommendation for Tourism Statistics (IRTS).
Retrieved at: https://unstats.un.org/unsd/publication/Seriesm/SeriesM_83rev1e.pdf [Accessed on 15th Feb 2020]

166 IRTS, para 3.17.1.11

167 Id, para 3.17.1.1.2

Education and Training[168]	"This category includes, for example, taking short-term courses paid either by employers (excluding "on-the-job" training classified in Business and professional) or others, which should be identified separately, where relevant following particular programmes of study (formal or informal) or acquiring specific skills through formal courses, including paid study, language, professional or other special courses, university sabbatical leaves, etc."
Health and medical care[169]	"This category includes, for example, receiving services from hospitals, clinics, convalescent homes and, more generally, health and social institutions, visiting thalassotherapy and health and spa resorts and other specialized places to receive medical treatments when they are based on medical advice, including cosmetic surgeries using medical facilities and services. This category includes only short-term treatments because long-term treatments requiring stays of one year or more are not part of tourism."
Religion/pilgrimage[170]	"This category includes, for example, attending religious meetings and events, pilgrimages."

168 Id, para 3.17.1.1.3
169 Id, para 3.17.1.1.4
170 Id, para 3.17.1.1.5

Shopping[171]	"This category includes, for example, purchasing consumer goods for own personal use or as gifts except for resale or for use in a future productive process, (in which case the purpose would be business and professional)."
Transit[172]	"This category consists of stopping at a place without any specific purpose other than being en route to another destination."
Other[173]	"This category includes, for example, volunteer work (not included elsewhere), investigative work and migration possibilities; undertaking any other temporary non-remunerated activities not included elsewhere, etc."

171 Id, para 3.17.1.1.6
172 Id, para 3.17.1.1.7
173 Id, para 3.17.1.1.8

FEMINISM AND GENDER RELATIONS: THE GHANAIAN PERSPECTIVE

Abena A. Awuku-Larbi *

Abstract

Modern feminism is largely made up of the ideologies of the dominant class in the feminist movement – the Western Woman's narrative. The discourse on feminism to address unequal gender relations is often interpreted in terms of the needs, priorities and interests of the Western Woman. However, the Ghanaian conception of feminism as an account of gender relations is substantially different from the Western structure with which our society has been intimately associated with since colonialism. The Ghanaian feminist perspective, stands in stark contrast to the Western form; while western ideas blame capitalism and the patriarchy for gender imbalance, we are faced with the challenge of legal pluralism complicating the laws that govern gender relations. This paper explains gender, gender relations and feminism; analyzes the nature of gender inequality in Ghana and suggests considerations for approaching gender relations from a legal perspective distinctly influenced by the Ghanaian sociocultural system.

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Introduction

"Sisterhood"[1]

white sister told me
all women are one
united in de face
of chau'vism.
(pa'don my engilis)

I smiled

pa ... paa
pa .. tri .. archy is the cross
women carry, she charged
we must unite
to fight it
with all our might.

I laughed ...

racked by spasm
my head jerked back
and crazily wobbled
from side to side.
pampered sister
titillates herself
to frenzy
with quixotic tales
of male 'xploitation.

1 Nkiru Uwechia, Sisterhood. *JENdA: A Journal of Culture and African Women Studies* [Online]

I...

"dumb" black woman
laughed mirthlessly on
flicking away tears
of pain from eyes.

I looked up
from my chore
on the kitchen floor
where, new found sister
had ordered me to be
on knees

to scrub the floor clean
for the pittance she paid:
on knees
to scrub the floor clean
for sisterarchy.

The feminist ideology is a claim for the rights of all – men and women – to the respect in their persons of the great principles of justice and equality and liberty.[2] Feminism generally aims at studying gender biases and understanding the nature of gender inequality. It is characterized by specific antecedents and objectives depending on the historical moment, culture and country. The existing body of knowledge on feminism suggests a conclusion that contemporary women suffer an inequality, manifested in a male hegemony, a product of a capitalist society, which works to fuel male domination and

2 Virginia Woolf, Three Guineas (The Hogarth Press, 1938)

female subjugation in every sphere of society. What this narrative does is to exaggerate the plight of the Western Woman, to project those plights on Ghanaian women and diminish legitimate gender concerns in this part of the world. The flaw is not that the narrative is erroneous but that it is not complete. The narrative fails to represent the experiences of Ghanaian women by overlooking the modern influences of the indigenous sociocultural systems that have guided the evolution of gender relations in the Ghanaian society.

The label "feminism" is largely defined by the histories of the European woman and the American woman when it is in actuality used to refer to the range of behavior indicating an account of the woman's capacity for individualized choice and action. The question of the woman's agency comes up because there have been periods where women's identities took shape in social situations and settings that were unsympathetic to their interests. It should be noted that all women do not have the same interests; the interests of the Englishwoman are different from the interests of the American woman which are also different from the interests of the Ghanaian woman. Although there is an underlying ethos, no two accounts are the same and different weights are given to each experience of injustice. To adopt the Western account of feminism and gender inequality without an evaluation of our indigenous social circumstances is akin to placing square pegs in round holes. Unfortunately, Ghanaians have not ceased to be recipients of influences from without. The forces molding Ghana are foreign and not native. We owe our progress to the ghosts of colonization and to the socio-political whims of the Western world, to the hands of religion and the manipulations of the Eastern bloc. Our social engineering is by ideologies we cannot relate to and we are trained to defend philosophies that are recycled hand-overs from our colonial masters. Just like undigested food causes constipation, we feed on euro-centric research which, being insensitive to local needs and

ideals, becomes the rock of offence that hinders development. We are a country that has not yet become a nation.

Law, in every society, evolved to secure conformity to acceptable range of social behavior. For many years law has been the social instrument of coercion used to further the objectives of a people at any given point in history. Law as an instrument of coercion in intent, becomes a means of cohesion. According to Nkrumah, it becomes a means of cohesion by underlining common values, which themselves generate common interests, and hence common attitudes and common reactions. It is this community, this identity in the range of principles and values, in the range of interests, attitudes, and so of reactions, which lies at the bottom of social order. It is also this community which makes social sanction necessary, which inspires the physical institutions of society....and decides the purposes for which they are called into being.[3] The Ghanaian legal profession is in a unique position to right the scales of gender relations by influencing the understanding of gender inequality based on the Ghanaian experience of social organization. Judges and lawyers have a calling to "assist in the administration of justice; in the practical process of promoting and maintaining an ideal relation among men [and women] by adjusting their relations and ordering their conduct through an orderly and systematic application of the force of a politically organized society."[4] The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become.[5] If our intention is to right the gender scales, then it is necessary that we confront inherited legal systems and ideologies, explore the existing gendered customs among the various ethnic groups vis-à-vis

3 Kwame Nkrumah, Conscientism, (First Modern Reader Paperback Edition 1970) 61
4 Roscoe Pound, The Lawyer As A Social Engineer, 3 J. Pub. L. 292 (1954)
5 Oliver Wendell Homes Jr., The Common Law (1881)

modern state law, and adjust – even harmonize - these norms to adapt to current global trends thereby changing the face of gender relations in Ghana.

This paper stems from a motivation to raise consciousness about the importance of a distinctly Ghanaian feminist theory, to distinguish the Ghanaian concept of womanhood from the westernized ideals and to chart a path to gender justice that is real to the man and woman on the streets. The paper is divided into four parts. Part I explains gender, gender relations and feminism. Part II deals with the nature of gender inequality in Ghana. Part III suggests considerations for addressing gender relations from a legal perspective influenced by the Ghanaian sociocultural system. Concluding remarks are made at the end of the exercise.

Part I

Gender, Gender Relations and Feminism

At the root of every society [its physical institutions, value systems, politics and policy views] is a statement of identity. A statement of identity is the fact of who or what a thing is and their relation to the environment they exist in. From this statement of identity, one can make a deduction on that society's deeply-rooted beliefs about the nature of its members and the type of society which must be created for them. Beliefs are representations of the ways one expects things to work based on the recurrence of a particular sequence of events or similarity to previously recognized patterns. Beliefs are formed from experiences, causal inferences and interpretations of the environment.

Beliefs are sustained and become naturalized through learning and imitating social behavior. Social behavior is learned through socializing institutions and influenced and maintained by laws, customs and conventions. Beliefs simplify the social world; they reduce the amount of processing that people do when they are confronted with new situations. A person's cultural beliefs become the lens through which they filter new social situations, understand gender relations and their place in the society. Beliefs are static, stable and familiar – conditions a person and by extension a society needs to grow and develop.

Gender is a belief, a heterosexual framework that is manufactured for people, projected on people and naturalized by people. Gender is an estimation made based on the biological relationship between the sexes. The sex of a person refers to the biological features – genetic components and physiology - that identify them as male or female. Gender is what is constructed when the relationship between biological sexes is culturally stylized that is, how women and men should behave and how they should be related to each other. Therefore, gender should be conceived of as cultural

in the same sense as biological sex is natural. It follows that I do not support the notion that a society should allow the natural differences between people to determine their lives through gender roles. Gender roles refer to the set of behaviors a society considers appropriate for people based on their biological sex. Gender roles as are known all over the world are dichotomized and that division arises from the association of males and masculinity with the public sphere (where decisions regarding the exchange and consumption of resources within institutions and the society at large are made) and females and femininity with the private sphere (where decisions concerning reproduction, childrearing and housekeeping are made).

There is a view that inequality is natural and intrinsic and it is what accounts for the perceived differences in man-woman relations. The argument is that the anatomy of a woman makes her passive, weak, nurturing and conservative as opposed to the active, strong, conquering and passionate nature of a man which makes him suited to positions of power and leadership; that there are biological barriers that distinguish men and women and by virtue of these distinctions, men have greater capacity than women in public affairs. I disagree with this perspective and instead suggest that any considerations on the perceived differences between men and women should be looked at in the context of social influences and interpretations of events.

In medieval Europe, religion was considered to be the main preoccupation of life and religion was dominated by Christianity. Laws and governance were in the hands of the church. Actions that were not in conflict with religion tended to win general approval. Religion was the stabilizing force in everyday life which kept the community framework together. Sociopolitical situations were interpreted from a religious point of view which in substance was a traditional hierarchical conception of the world, evident in the philosophy of the

time. The idea that men and women were naturally unequal was backed by religion with its notions of monogamy and female subordination. By the 16th century, women like Jane Anger began to argue their case strongly although their arguments where conducted within the religious framework. Jane Anger was the first woman to use the power of the printing press to write and publish an apologia for women against male supremacy. In the following excerpt from her pamphlet, the reader sees the man-woman relations in a 16th century European society. She made a case for women, capturing their anger at being treated as inferior men:

"The creation of man and woman at the first, hee being formed in principio of drosse and filthy clay, did so remaine until God saw that in him his workmanship was good and therefore by the transformation of the dust which was loathsome unto flesh, it became purified. Then lacking a help for him, God making woman of mans fleshe, that she might bee purer than he doth show how far we women are more excellent then men. Our bodies are fruitefull, wherby the world encreaseth, and our care wonderful, by which man is preserved. From woman sprang man's salvation. A woman was the first that believed & a woman liewise the first that repented of sin....they are comforted by our means: they nourished by the meats we dresse: their bodies freed from diseases by our cleanliness...without our care they lie in their beds as dogs in litter & goe like lowsie Mackarell swimming in the heat of summer..."[6]

In her speech to the troops assembled at Tilbury, Queen Elizabeth 1 of England gives us insight into how that society understood the place of a woman in public: I know I have the body of a weak and feeble woman, but I have the heart and stomach of a king and of a king of England too. In one statement, she claims political power by virtue of the position she occupies and at the same time acknowledges her physical weakness **as a woman**. In structuring the facts and events that make up the gender history of many European societies, one would

6 Jane Anger, Her Protection For Women (Richard Jones & Thomas Orwin, London 1589)

arrive at the conclusion that these societies stressed more on exclusion and less on inclusion, on hierarchy rather than community. Gender roles and relations were hierarchical and inequality was patent. A woman's personhood, her name, the profits from her economic activities, her personal property were all subsumed under the man's.

While the idea that nature determined a person's function and position within the European society was influenced by religion, the case was totally different in the practices of the cultural groups which populated Ghana before mid-twentieth century. The Akan, Mole-Dagbon, Guan, Ewe and Gã-Adangme shared similarities in their social, political, economic and cultural structures designed to deal with social relations between men and women in connection with property, labor, marriage and authority. Gender roles and relations were determined by the family and kinship ties. The basic tenet of customary law is that everyone belongs to a "family," membership of which confers rights and obligations.7 A family or kinship is either patrilineal or matrilineal. Where it is patrilineal, it means all members of that family or kin are lineally descended from one common ancestor, specified as male and traced through males. Where it is matrilineal, the common ancestor is female and kinship is traced through females. The status of women varied depending on which membership they subscribed to.

One thing these societies had in common was that they were primarily agrarian and the sociopolitical order was built around food production and food-trading activities. They made use of communal labor and reproductive strategies needed for forest clearance and settlement. There was the biological/sexual division of labor which meant that men and women were primarily defined by their biological functions. While men had the duty to find unsettled land and assume custodianship, the women played vital roles in local food-

7 Ollenu N. A, Law of Testate and Intestate Succession in Ghana. London: Sweet and Maxwell 1966

trading activities and allowed for population growth through procreation. Far from being subdued or feeling inferior, research shows that women took pride in their reproductive duties more so because of the social value it offered them within their families and kinship.8

In the matrilineal societies, the biological functions of women did not prevent them from taking on political and economic roles. Women could own property and hold political positions based on kinship ties. A husband was bound to maintain his wife, even though she may have independent means and be able to support herself independently of him. For that reason, the husband's liability extended to the provision of necessaries, but he was not liable for his wife's contracts or for debts she incurred outside the scope of the upkeep of the house, her subsistence, and her medical treatment.9

In patrilineal societies, the political and economic functions of women were weak. This exclusion of women considerably dampened their interest in the economic transactions of the patrilineal group. The children constitute part of the man's patrilineal family and inherit accordingly, while the wife does not and must acquire economic security through other means. [10] However, except in areas of the north where Islam had been established as a cultural mode, as in Gonja and Dagomba, free women throughout Ghana have had considerable economic independence and played other important social roles. Patrilineal women tend to have a strong work ethic, being autonomous economic individuals in those situations where they live apart from husbands, or making major contributions to the household through farming or other work where they reside with husbands. Traditionally, wives residing with the husband or his family

8 In Asare Konadu's novel, A Woman In Her Prime, a prime example of the status of a woman in a typical matrilineal community is seen. It deals with the problems of a typical Ghanaian woman who is past her prime and has not had any children. Her childlessness is considered a tragic condition by her society

9 Ollenu N. A, Law of Testate and Intestate Succession in Ghana. London: Sweet and Maxwell 1966 67

10 Robertson Claire, Sharing the Same Bowl. Indianapolis: Indiana University Press 1984 pg 49-51

assume farming responsibilities that help feed the family and perhaps produce surplus for themselves. Alternatively, among the Ga of Accra, women help to support the children of their households through the drying and selling of fish and also more general trading activities.[11] Gender relations in both groups were complementary and tied in with family or communal interactions. Women in Ghana were recognized socially and legally as having rights, protections, privileges, responsibilities and legal liabilities separate from their male counterparts. Women generally had the capacity to act independently and to make their own choices in a corporate social structure based on kinship and family ties as opposed to a hierarchical social structure influenced by religion. Where inequality existed, it was horizontal and latent.

How people understand the origins of gender inequality has a lot to do with knowledge collected from past experiences which they learn from their homes and information about the world which they learn about in school. Both of these sources of information are not only biased but also limited by their background and the environments they have been exposed to. Gender is a cultural interpretation of sex and there are as many interpretations of gender relations as there are cultures.

To suppose that nature accounts for the perceived differences in the physiology and psychology of men and women and that those differences are the root of gender inequality hems men and women within the confines of nature and is disturbingly essentialist. What this fails to take cognizance of is that the way a person behaves is influenced largely by the environment in which they live. Simone de Beauvoir offers a formulation that resonates with mine that although there are important biological differences between men and women, one is not born, but rather becomes a woman [or a man].

11 Takyiwaa Manuh, Wives, Children, and Intestate Succession in Ghana, The Politics of Survival in Sub-Saharan Africa-University of Pennsylvania Press (1997)

The process of becoming has to do with the process of socialization – it is culturally learned and acquired. To assume that biological differences account for the behavioral differences in men and women totally eliminates the role of socialization in shaping an individual. Throughout different historical periods, societies and cultures, gender has been determined in varied ways by the conception of tasks, functions and roles attributed to women and men in society and in public and private life.

The concept of gender alters depending on socio-economic factors, age, education, ethnicity and religion. The logical progression from this statement is that biological sexes are static but social identities are dynamic. Thus, a man can be feminine and a woman can be masculine. Gender is interchangeable - only binarily. There is an opposing school of thought – mainly westernized and radical – that pushes the notion that gender and sex are co-extensive which is taken to mean that the phenomenon of the two biological sexes is a social construct, in the same sense as gender. Sex is a social construct subject to the limits and weaknesses of the reality the society creates for itself. To presume that gender is a binary system and that gender mirrors sex is an assumption fraught with inaccuracies because if gender is the cultural meaning that the sexed body assumes, then a gender cannot be said to follow from a sex in any one way.

Taken to its logical limit, the sex/gender distinction suggests a radical discontinuity between sexed bodies and culturally constructed genders. Assuming for the moment the stability of binary sex, it does not follow that the construction of "men" will accrue exclusively to the bodies of males and "women" will interpret only female bodies. Further even if the sexes appear to be unproblematically binary in their morphology and constitution (which will become a question), there is no reason to assume that genders ought also to remain as two"12.

12 Judith Butler, Gender Trouble (Routledge 1999)

They believe that sex classification is not a matter of biology. They justify this by asserting that medical phenomena and social conditioning shape biology. Thus, sex as we know it should be understood as the effect of the apparatus of cultural construction designed by gender. Although I do not agree with this floodgate-inducing line of reasoning, this essay is not meant to offer an apologia to these ideas. Despite the different perspectives on the gender/sex dichotomy, the common ground we agree on is that gender roles and relations change, [they are mutable and alterable] often quite rapidly, as a result of social, economic and technological trends. Gender constructs become a concern when its different roles, attributes, opportunities, privileges and rights create socioeconomic, political and cultural differences that limit a woman's right to develop at each stage of social administration. This is where the feminist agenda is most relevant in interrogating the factors that influence gender relations and lead to imbalances.

Feminism advocates for a form of social engineering; a balance that requires equal enjoyment by women and men of socially valued goods, opportunities, resources and rewards. The emphasis is on the equality of opportunity and not the equality of station that is, men and women do not become the same biologically but that their opportunity chances are equal. I belabor this point because there is an unfortunately strong, opposing view that by equality, feminists mean equality in station. If equality means the equitable distribution of social resources according to needs and priorities of men and women in a society, then I am firmly in favor of this view. Feminism pushes forward the practice of differential treatment that compensates for the social disadvantages that prevent women from sharing a levelled playing field with men.

It is often said that feminism is a hotchpotch of ideas and it is difficult to fish out a single strain of ideology that aptly describes the whole point of feminism. When the threads of feminism first began to be woven, the word "feminism"

was treated with same hostility that taxi and trotro drivers mete out to okada riders and uber drivers. This treatment led Rebecca West to remark, "I myself have never been able to find out what feminism is; I only know that people call me a feminist whenever I express sentiments that differentiate me from a doormat or a prostitute".[13] The word "feminism" still arouses the same vile feelings albeit in greater intensity now than it attracted in its flowering. In fact, the backlash against feminism led Virginia Woolf to totally reject the label, when what she thought was feminism's central theme "the right to earn a living" had been accomplished:

"What more fitting than to destroy an old word, a vicious, corrupt word that has done much harm in its day and is now obsolete? The word "feminist" is indicated. That word according to the dictionary means "one who champions the rights of women". Since the only right, the right to earn a living has been won, the word no longer has a meaning. And a word without meaning is a dead word, a corrupt word."[14]

Over the years, the foundation of feminism has only grown firmer despite the waves that have washed over its rocky shores. When we sweep off all the theories and perspectives, the single premise to be found is not a gender divisive rhetoric that promotes man-hate but rather a frank admission that there is nothing like man's rights or woman's rights; only the recognition of human rights.[15] As Hillary Clinton[16] said, "If there is one message that echoes forth from this conference, let it be that human rights are women's rights and women's rights are human rights, once and for all." The discourse on discussing women's rights as separate from human rights is not only divisive but it is gynocentric. The only thing gynocentrism achieves is to reify male chauvinism.

13 Jane Macus, The Young Rebecca: Writings of Rebecca West, 1911-17 (1982)
14 Virginia Woolf, Three Guineas (Hogarth Press 1938)
15 Sarah Moore Grimke, Letters on the Equality of the Sexes, and the Condition of Woman. Addressed to Mary Parker. (Boston: Isaac Knapp 1838. Reprinted by Forgotten Books 2012)
16 Hillary Rodham Clinton, Women's Rights Are Human Rights, United Nations Fourth World Conference on Women in Beijing, 1995

Feminism is the radical notion that women are people[17] but not to the extent that it blacks out the masculine experience of gender. Feminism is, of course, part of human rights in general – but to choose to use the vague expression human rights is to deny the specific and particular problem of gender – and it is only in this context that we talk about "women's rights".[18] A feminist is anyone who recognizes the equality and full humanity of a woman. A feminist is anyone who holds the stance that when dealing with gender relations, "we ask no better laws than those you have made for yourselves. We need no other protection than that which your present laws secure to you." [19]

In relation to gender inequality, the feminist theory is an analysis of how the rules, relations and their material consequences produce privileges for men that underlie an interest in their maintenance at the same time that they limit options of women, cause relative deprivations in their lives or render them vulnerable to domination and exploitation.[20] It focuses on specific relations of power, opportunity and resource distribution within a society. Feminism is truly feminism when it goes beyond digging into the position of the "woman's point of view", to develop a system that fully and adequately represents men's and women's interests equally and equitably across all levels of social organization.

17 Marie Shear, New Directions For Women, 1986

18 Chimamanda Adichie, We Should All Be Feminists (Fourth Estate, 2014)

19 The Elizabeth Cady Stanton-Susan B. Anthony Reader, ed. Ellen Carol Dubois (Boston: Northeastern University Press, 1992), p. 51.

20 Iris Marion Young, 'Throwing like a Girl" and Other Essays in Feminist Philosophy and Social Theory (Bloomington: Indiana University Press, 1990)

Part II

Gender Inequality In Ghana

Gender roles, separated into the private/public dichotomy vary from culture to culture and how that society has transformed over time. The strong sense of commitment Ghanaian women have to their ethnic communities tends to let them conceive of gender roles as their natural contribution to communal development based on the understanding that their physiology pushes them toward reproductive activities while men take on all other responsibilities requiring geographical mobility. While this conception might have worked for communities that thrived on subsistence economy, it fails miserably now that gender roles have changed because of religion, colonization and cultural appropriation from the West.

In order to understand the gendered beliefs and ideas there are that make up the current Ghanaian consciousness, reference must be made to the social history and the customary practices that define the experiences of both Ghanaian men and women. Contrary to euro-centric publications on West Africa, the territory now known as Ghana was a vast territory of land and waters connected by the politics of commercial and social networks, peoples relating within complex social and cultural orders and skilled in commerce, agriculture, and gold mining. Before even the British came into relations with our people, we were a developed people, having our own institutions, having our own ideas of government. [21] And even after the horrors of colonization, we are not materially different from the ancient ones who shaped what eventually became Ghana in the mid-twentieth century. Kwesi Brew[22] tells us in his poem "Ancestral Faces":

21 J.E Casely-Hayford (African (Gold Coast) Nationalist 1922)
22 Kwesi Brew (1928–2007) is one of West Africa's most significant twentieth-century poets

They sneaked into the limbo of time

But could not muffle the gay jingling

Brass bells on the frothy necks

Of the sacrificial sheep that limped and nodded after them;

They could not hide the moss on the bald pate

Of their reverent heads;

And the gnarled backs of the wawa tree;

Nor the rust on the ancient state-swords;

Nor the skulls studded with grinning cowries;

They could not silence the drums,

The fiber of their souls and ours—

The drums that whisper to us behind black sinewy hands.

They gazed

And sweeping like white locusts through the forests

Saw the same men, slightly wizened,

Shuffle their sandaled feet to the same rhythms,

They heard the same words of wisdom uttered

Between puffs of pale blue smoke:

They saw us,

And said: They have not changed!

The ethnic groups that existed in Ghana have generally emphasized the communal group as opposed to the individual. This ideology acknowledges that individuals are part of many interdependent human relations (including family and community) in a supernaturally ordained fashion. This spirit can best be described in one phrase “Ubuntu ngunmuntu

ngabantu"; that places emphasis on being self through others. Thus, I am because of who we all are. It is the African and Ghanaian worldview of societal relations. The goal of these relationships is to maintain the harmony and well-being of the social group rather than that of individuals. The modern Ghanaian society as we know it to be, has at its foundation, this corporate base that emphasizes kinship identities and interests.

Colonization began as a trade establishment, first in gold, then enslaved people and then into a cash crop economy. Colonialism did more than simply allowing territorial occupation. What colonialism did was to permit the British to dominate society, trade and economic opportunities and in consequence, traditional political authorities and their social economies weakened. Colonialism ended up creating an economy based on exploiting both human and material resources through the setting up of extractive institutions. Colonialism distorted the Ghanaian worldview and threw social relations into chaos and established a new form of gender relationship – a hierarchical system with patent displays of male hegemony. Colonialism fired up capitalism in Ghana and encouraged male control over resources to the exclusion of women. The instruments of this new state of affairs were the western educational systems, the western form of religion with its notions of hierarchization and the superimposition of the western legal machinery. The system made a mockery of communalism and placed political and economic participation in the hands of the select Europeanized few. The switch from a communalist society to an elitist, hierarchical one left women holding the shorter end of the stick. Colonialism created social structures built around exploitation and most of these structures were headed by men who had no qualms about using women and children as cheap labor. As the trade and commerce scene kept changing, the societies became more absolutist, organized

around a single objective depending on the landscape: first to deal in gold, then to enslave and sell human captives to European slavers and currently the exportation of cash crops and natural resources.

As Gwendolyn Mikell put it, "The dynamics of the colonial regime were such that they proceeded to separate men from women as the regime moved from initial operations of penetration and building an infrastructure to the economic and political integration of the colonial area into the sphere of the metropole. Through the successive processes of forced labor for colonial projects, induced wage-labor migration to pay taxes, male urbanization, mining and resource extraction, and rural cash cropping, the colonial regime created a sexual division of labor and of community that would persist into the World War II period. Colonial change most dramatically affected gender relations in the economic arena and often generated defiant responses. Women's production of traditional items such as cloth were disrupted by colonial control over cotton production and cloth importation, which allowed men to dominate a social arena where gender complementarity had formerly reigned."[23]

The colonial students who became the elite during the nationalist era and later government officials in the independent Ghana, often tried to interpret Ghanaian customary laws regarding property, labor, marriage and authority in ways that reflected western gender roles and capitalistic, class-structured approaches. The western styled education system ingrained in colonial students a perspective that looked down on traditional values and produced a breed of persons distinguished from their communities on the basis of differences in class and power. It produced the self-delusion that their traditional cultures were backwards and must yield to the "fairer values of the European"[24]. These

23 Gwendolyn Mikell, African Feminism The Politics of Survival in Sub-Saharan Africa (University of Pennsylvania Press (1997))

24 Kobina Sekyi, The Blinkards, Heinemann 1974

events led to contradictions and friction in the application of traditional legal rights and colonial legal rights with the latter exaggerating and solidifying the notion of gender hierarchy and male dominance in social life.

After independence, Nkrumah's government envisioned a Ghanaian society which transcended social exploitation in whatever form – basically he wanted to rewrite the history and development of Ghana on a new slate conveniently overlooking the place of ethnic communities and their influence on the Ghanaian. Nkrumah began to create a modern polity with a unified system of addressing socio-political needs totally divorced from colonial mindsets – it did not reach fruition. While the administration did not actively pursue a separate agenda dedicated to addressing the injustices women faced by virtue of the superimposed colonial systems, the Nkrumah government made some noteworthy efforts to improve the situation of women. In relation to work, the first republic saw the abolition of pay discrimination against women, the granting of maternity leave with full pay and the opening up of new avenues of employment for women, sometimes in male dominated professions. In the first parliament of the first republic, ten women were elected to special women's seats.[25]

Although these policies were laudable, they did not address the root of the matter – synchronizing the multiple legal systems in a way that addressed the different needs of the Ghanaian rural woman and the Ghanaian urban woman because oftentimes fairness requires differential treatment. After the overthrow of Nkrumah's government, subsequent governments did not significantly make any improvements on this, each government had its own agenda and none of them adequately addressed the gender problem rather they continued the colonial agenda - what we know today as neocolonialism. Modern "democratic" governments have sidestepped the issue partly out of fear of triggering ethnic

25 Dzodzi Tsikata Affirmative Action and The Prospects For Gender Equality in Ghanaian Politics, Abantu, Women in Broadcasting and the Friedrich-Ebert-Stiftung 2009

conflicts and partly out of political convenience. If anything, most of these policies appeared to benefit bourgeoisie women while not catering for the welfare of rural women because the general understanding was that all that was European was "civilized" and since elite women were deemed to be "civilized" their status was supposedly comparatively better than the "uncivilized" rural women.

A Ghanaian woman does not by origin belong to the history from which the western feminism sprung out of. We belong to a heritage that has weathered several crises from colonialism, nationalist agitation, independence, one-party system, economic instability, famine, military rule, Western and Eastern blocs meddling in our governance and a caricature of a democracy. These unique circumstances make it absolutely vital to the proper appreciation of our perspective of feminism as well as its restructuring effect on our society. Any proper discussion of feminism in our context must take account of our peculiar circumstances as a nation, our history, our ideals, goals and aspirations and our popular consciousness.

The root of gender inequality in Ghana is not the patriarchy. The idea that the root of gender inequality is the patriarchy constitutes a certain crisis that personifies men as the patriarchy and generates a divisive ideology that is harmful across board. The root of gender inequality is a culture that is a step behind human ingenuity. The root of gender inequality in Ghana is the poor harmonization of the many legal systems existing in tandem as well as the measurement of customary law against the standard of the repugnancy clause test.[26] The operation of several legal systems in tandem during the colonial era created the ambiguity that surrounds the status of women – a situation that persists even till today. While women in rural communities with strong ties to their ethnicities consider themselves as subjects of their traditional norms [a situation that arises because modern state influence

26 Customary law could be applied only in so far as it was not repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any ordinance. Section 54 of The Courts Act of Ghana, 1993 Act 459

is almost nonexistent in these areas], urban women find themselves under the authority of the modern state. There is also the category of women caught in between who, having a strong connection to the modern state, are also bound by their obligations to their ethnic communities.

A feminist theory that uses a modern state approach heavily influenced by western ideas will appeal only to a certain class of women, excluding all others. On the other hand, a feminist theory that is based on local customary laws and practices will be uneven in its account of gender relations and inequality because of the many different legal systems. Moreover, indigenous cultural practices as they were known in pre-colonial societies are not the same as what we have today. Today, we have half-baked beliefs about gender relations arising from the unwholesome mix of modern state law and the customs of whichever ethnic group a person belongs to. We are confronting new circumstances with gender beliefs that are either archaic or inadequate to address those circumstances. We cannot continue to draw on these gender beliefs to help organize new ways of doing things.

The analysis of gender relations in marriage and family interactions is pertinent to understanding the nature of gender inequality. In pre-colonial societies, marriage was the vehicle to produce children who would grow to become labor for agricultural activities i.e. either subsistence or market-oriented production. These households were headed by the men and reproductive activities were subtly controlled by family/kinship practices. It should be noted that, within ethnic communities, where wives and their children lived with their husband's families and worked on behalf of their husbands' kin groups, the understanding was "that by customary law it is the duty of the man's wife and children to assist him in the carrying out of the duties of his station in life. The proceeds of that joint effort, and any property which the man acquires with such proceeds, are by customary law

the individual property of the man, not the joint property of all and that the proposition that upon a man's death intestate, his widow married under customary law is by law entitled to one-third share of his self-acquired property, real and personal is untenable. A widow's right is the right to maintenance by the family of her deceased husband."[27]

With the first marriage ordinance passed in 1884[28], the colonial government established a legal regime which enabled the natives of Gold Coast (now Ghana) to contract western-style marriages although not debarring them from contracting customary marriages. As land became increasingly significant for cash cropping, and wives worked on husbands' farms, challenges arose over how to compensate wives and children, given the constraints of many traditional systems on spouses inheriting property or on women owning land. Because of the inheritance rights conferred upon widows and children by Christian monogamy, elite women in West Africa appear to have had some advantages over non-elite women who still operated as members of ethnic and rural communities. Furthermore, the conjugal relations of the new marriage systems tended to solidify the notion of male dominance within marriage as well as before the law, even though it contained "protections" for wives of monogamous unions[29]. Any controversy that arose from the application of English law to marriages was hushed up because then "they had begun to accept certain disconcerting matters as incidental to civilization, and instead of arguing from the unpleasantness of such incidents to the inherent unwholesomeness of that to which they were incidental, they conclude somewhat perversely that whoever cannot explain away such unpleasantness is not civilized."[30]

The idea that men belong to the public sphere and women to the private sphere is totally embarrassed in light of globalization and the new economic roles that women are taking. In pre-colonial societies, the reproductive function of the woman meant that

27 [1959] Quartey v. Martey & Anor GLR 377-383
28 The Marriage Ordinance, 1884 (Cap. 127, Laws of the Gold Coast, 1951 R
29 Gwendolyn Mikell ibid.
30 Kobina Sekyi, The Blinkards

she had the role of producing children who would grow to help in the family work and while she was pregnant she stayed home more often and thus had to take on duties associated with the home and hearth. The situation is different today, the changing economic scene has made women view their employment as the major avenue for providing for their own needs and those of their families. Women have a come a long way from depending on men solely for their upkeep. Women are afforded a range of choices to determine whether or not they would have children. Women are no longer being defined by their biological function ergo her roles in the private sphere have been made redundant – unfortunately, in theory only.

In the sphere of political representation and public participation, achieving men's and women's equality is fraught with roadblocks. Women are limited by their organizing roles in their various political parties. Women make it only as far as political organization and financing hardly occupying positions of leadership. Political parties weave many beautiful words about equality in political participation and yet they continue to groom men to take over administration. There are barriers that bar women from being nominated as running mates to a presidential candidate let alone run for presidency herself. It is convenient to make promises about supporting a woman to run for presidency but in reality, those promises are a façade shielding deep-rooted gender biases about the woman's competence.

Ghana's economy before British influence was one of subsistence which was enabled by a communalist land tenure system preventing the emergence of a land-owning class. With colonization came greater consumption needs and the introduction of a class structure which allowed a select few to run the trade and feed off cheap labor from women and children. Modern Ghana still depends heavily on agriculture and the agriculture sector stands mainly because of its dependence on women's labor. There is a great number of women in the agricultural sector but we hardly know of women who have

successfully been able to translate their involvement into actual management and ownership of agribusinesses. In the urban areas, differentials in economic activities are visible too. Many professions and organizations are bastions of male dominance. We are still at the point where we celebrate women who make it into managerial and leadership positions in the workplace and it is no secret that most of these women have had to act "tough" and "masculine" to make it there.

Traditionally, education was a communal venture, just like other activities in that socio-cultural setting. Gender roles were passed on from parents to their children and the way a child turned out was the responsibility of the community to which it belonged. When the British colonized Ghana, they used western-styled education in a manner that imposed superiority of knowledge, divorced students from their families and created that Europeanized class of indigenous elites who aligned themselves with the colonialist's agenda. Unwittingly post-colonial African schooling practices have continued to play into these politics of hierarchization, as evidenced through contestations of ethnicity, gender class, age, disability and religion as sites of difference and power. The inferior status of women was buttressed by the colonialist whose Victorian values about girls further reinforced the subordination of women. Colonial schools in Africa taught skills that were exclusive of women.[31] Our education systems do not reflect the shared values of the Ghanaian. The modern Ghanaian student finds that while they are able relate well to Western sociopolitical and gendered ideas, they are disconnected from the experience of what it means to be Ghanaian.

Gender-based violence is the abuse of power directed at a group of people who are deemed to be inferior. Gender-based violence includes physical violence [acts that cause physical harm as a result of unlawful physical force], sexual violence [sexual acts performed on an individual without their consent], psychological

31 Sefa Dei G, & Opini B.M, Schooling In The Context of Difference: The Challenge of Post-Colonial Education In Ghana, D. Thiessen and A. Cook-Sather (Eds) International Handbook of Student Experience In Elementary and Secondary School, Rotterdam:Springer 2007

violence [acts which cause psychological harm to an individual] and economic violence [act that cause economic harm or harm to the livelihood of a person, property damage, restricting access to financial resources, education or labor market or not complying with economic responsibilities like payment of alimony, school fees, and necessities of life]. Girls and women are most affected by gendered violence. Gender-based violence finds its roots in gender inequality which, in the Ghanaian context is induced by the ambiguity created by legal pluralism in gender relations.

It is not our aim to romanticize traditional gender practices. Indeed, there is a substantial amount of research that points out the defects inherent in traditional systems. Our claim is to show how colonization distorted gender relations and exaggerated the defects in the traditional practices, disenfranchising women in marriage, political representation, economic activities, education and body integrity. We are advocating for a set of gender relations that marries the vast variations of indigenous custom with modern laws in a manner that is not only recurrent with globalization but is favorable to both the man and the woman. No one tears a patch from a new garment and sews it on an old one. If he does, he will have torn the new garment and the patch from the new will not match the old. And no one pours new wine into old wineskins. If he does, the new wine will burst the skins, the wine will run out and the wineskins will be ruined. No new wine must be poured into new wineskins. And no one after drinking old wine wants the new, for he says, "The old is better"[32] This is the challenge that the legal profession is called to address. We cannot continue to apply old laws and practices to new gender relations. We cannot continue to encourage systems that promote marginalization and gendered class structures. We cannot impose on the Ghanaian laws, practices and ideologies they cannot relate to. It is a travesty of justice.

32 The Parable of the Wineskins Matthew 9:14-17

Part III

Law As An Instrument Of A Ghanaian Feminism.

The central focus of this part is to suggest a paradigm shift in our approach to gender inequality. We need to author an approach to gender inequality that is based on a harmony between traditional notions of family ties and kinship and the law of the modern state. Clearly the legal profession needs to address the questions of how we can harmonize traditional ideas of gender relations with modern ideas of gender relations in a way that facilitates ideal gender relations and how we can incorporate these answers into our jurisprudence.

Law is the expression of every act of coercion; this includes legally enforceable rules and conventionally observed usage. While the predominant understanding of law labels the former as the only law that matters, we find that we cannot speak of "law" without considering statutes and the posited law together with "the whole gamut of instruments which are at once subtle and insidious. The sermon in the pulpit, the pressures of trade unionism, the opprobrium inflicted by the press, the ridicule of friends, the ostracism of colleagues; the sneer, the snub and countless other devices". In this sense, we define law as the consciousness of coercion both explicitly and implicitly recognized by members of a society that keep the wheels of justice in motion. Law is concerned with a vast variety of human relations and its aim is to engineer balance between competing interests, rid society of canker and preserve human dignity. The preservation of human dignity is dependent on the rights and duties enshrined in the Constitution of Ghana, 1992 which has appointed the Judiciary protector and defender of such. The law courts and other law enforcement institutions together with all the relevant individual actors involved in the administration of justice form the necessary nexus between legally enforceable rules [obligations to the modern state] and conventionally observed usage [customary practice].

Legal cases mirror the reality of social relations. Each action brings to light different aspects, relationship dynamics between the parties, issues, practices, conventions and customs. Questions such as "what are individual rights and entitlement?" "What are the ideals and shared values of the Ghanaian society?" "Which human rights come to play here?" are important underlying issues in every case. The courts address these multifaceted issues along with the assistance of the legal practitioners who represent the interests of the parties. The whole judicial and lawyering process therefore is to determine the social standards and ideals that all laws and practices should measure up to. The legal opinions and judgments which find their way into the books become records; a history of the beliefs, identity and ideals of the society at the given time. All other institutions that implement the law do so by reference to the [modern] written laws and their inherent appreciation of what society generally regards as not requiring any opprobrium.

Gender inequality will continue to thrive as long as enabling conditions permit it. One such condition is the ambiguity created by the operation of several legal systems in tandem. These laws different in interests and agenda, are in competition with each other. The law of the modern state, which is supposedly dominant is largely based on colonial practices and can be said to be a continuity of colonial rule. It is the standard by which all other laws and practices are measured, rejected and amended. If there is anything to be said about this system, it is that while it sees neocolonialism as a virtue, the customary practices to which a Ghanaian is intimately bound are seen as mere belief systems which ought to be subject to the infamous repugnancy test. This is a flawed approach and the first thing necessary is to acknowledge that we are recipients of influences from without.

The next step is to begin and sustain the process of engineering and harmonization in the judicial and lawyering process. When

we are faced with any social situation with respect to gender relations, we ought to emphasize the Ghanaian perspective, blending in local understandings with the concept of women's rights as human rights. Modern laws and practices regarding gender relations should be judged from the point of view of the principles and values the Ghanaian holds dear. Every case report, case study, judgment, policy and decision presents an opportunity to assess the utility of the modern state law in relation to the Ghanaian ideals of kinship and collectivism. In this case, the law is like a kaleidoscope. A kaleidoscope is an assembly of mirrors, angles and ordinary objects like beads working in a scientific way to produce breathtaking images. No two images are ever the same. The law as the instrument of social coercion and progress, is the kaleidoscope that is manipulated by lawyers and judges every now and then, to reflect accurately the constantly evolving society. Just as the image would not change if the kaleidoscope is not moved, social relations – gender relations – would not change if the law does not engineer that change. The legal profession, policymakers, legislators, traditional authorities and law enforcement agencies play important roles in facilitating this agenda. The Ghanaian feminism is the presentation of the Ghanaian story of gender relations. We do not tell our story through the eyes of the Western world. We tell our story with our own mouths and write those words by our own hands.

Conclusion

To be able to build a society that is committed to balancing the gender scales and promoting ideal gender relations, our task as members of the legal profession is to set our perspective right. It is our obligation to ensure that the distribution of social resources does not favor one group over the other. We are the bridge that connects the myriad of laws existing in this geographical space and it is in synchronizing the multi-legal systems that we stand the greatest chance of attaining gender equality in our Ghanaian society. The Ghanaian brand of feminism suggests a conclusion that contemporary Ghanaian women suffer an inequality, manifested in the ambiguity created by legal pluralism which distorts the status of a woman in every situation where gender relations arise. Our challenge is not a male hegemony rather, it is the confusion in the application of laws that deal with gender relations.

The legal profession has a duty to remedy these gender concerns in a way that resonates with the reasonable Ghanaian person. The flaw in our approach to gender relations has been to appropriate the Western experience of gender as ours. This state of affairs would change when we begin to consider the influences of the indigenous sociocultural systems that have guided the evolution of gender relations in the Ghanaian society together with the global advancement the modern state laws present.

HOW LATE IS TOO LATE? AN ANALYSIS OF THE EXTENT TO WHICH THE TIME FRAME WITHIN WHICH A SEXUAL ABUSE CRIME IS REPORTED INFLUENCES THE OUTCOME OF JUSTICE IN GHANA.

Nana Adoma Amoah *

Abstract

Research shows that victims of sexual abuse are often slow to report sexual crimes perpetrated against them; a ubiquitous phenomenon. With the jurisdiction of Ghana as its premise, this article seeks to explore the extent to which the delay in reporting sexual abuse crimes has an effect on the subsequent outcome of justice. Statutes of Limitations in different jurisdictions around the world are considered, juxtaposed with its application in Ghana. The reasons that account for the delay in reporting sexual abuse crimes are also considered, as well as the effects that such delay has in influencing the outcome of justice. An analysis of applicable literature and statute led to the conclusion that even in jurisdictions where Statute of Limitations are applicable, it is prudent to report sexual abuse crimes timeously so as to augment the chances of obtaining justice and ensure the effective gathering of applicable evidence.

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Introduction

Nigerian tabloids have recently been riddled with reports on a video in which celebrity photographer Busola Dakolo made allegations about being raped in her teenage years by the head pastor of a well-known church in Nigeria; Commonwealth of Zion Assembly. At the heart of the controversy sparked by this allegation was the predominant concern that Ms. Dakolo waited so long; almost two decades later, to speak up. The rationale proffered by such self-appointed critics was that the delay in speaking up was to her disadvantage, as it was probably 'too late' for anything to be done by way of getting justice. It was argued that the long wait would only make it difficult to prove him to be guilty.

Situations like this in which victims wait to speak up, or decide not to speak up at all, are not peculiar to Nigeria, but occur all over the world, including in Ghana, on a daily basis. Efforts to address the problem of child sexual abuse in Ghana have yielded limited success because child sexual abuse is severely underreported.[1] The research of Plan International Ghana, a non-governmental organization, showed that of the thirty percent (30%) of the victims that report the abuse to a third person, only two percent (2%) goes to the police.

Official police statistics in Ghana from Domestic Violence and Victims Support (DOVVSU) showed a downward trend in child sexual abuse between 2002 and 2005 (from 820 to 670).[2] However, it is difficult to actually determine if there was an actual decrease in child sexual abuse or a decreased willingness among victims to report the abuse. Police reports are not a very accurate reflection of what actually happens, since sexual abuse is generally underreported and most child sexual abuse cases never come to the attention of government authorities, because of factors such as fear, stigma and lack of trust in authorities, for example.[3]

1 Kofi E Boakye, 'Culture and Nondisclosure of Child Sexual Abuse in Ghana: A Theoretical and Empirical Exploration', Law & Social Inquiry, vol 34, no 4, 2009, 951–979. JSTOR, available at www.jstor.org/stable/40539387).

2 ibid.

3 UN Secretary General's study, 2006; UNICEF, 2011.

According to Kofi Boakye's article, the above-discussed research from Plan Ghana also showed that victims of sexual abuse rarely report the abuse to the police.[4] This suggests that the percentages given by the Ghanaian authorities highly underestimate the real situation. The aim of this article is to determine whether or not there exists any legal impediment to the period within which a victim of sexual abuse can speak up or lodge a complaint, and consequently, the extent to which this time frame influences the outcome of justice.

The Enigma Of Sexual Abuse

Sexual abuse, alternatively referred to as molestation or sexual assault, is generally defined as the undesired sexual behavior by one person upon another often perpetrated using force or by taking advantage. The United Nations (UN) defines it as actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.[5] It is a wide umbrella under which can be found a miscellany of acts including rape and unwanted sexual touching. The **Criminal Offences Act, 1960 (Act 29)** which lies at the heart of criminal law in Ghana outlines sexual offences in Chapter Six[6] to include rape, indecent assault and unnatural carnal knowledge.

The Boundaries Of Time

Statute of Limitations indicates the time frame within which a lawsuit may be instituted. Inasmuch as it is often used in relation to civil claims, some legal analysis can be deduced in relation to the time within which a criminal action can be instituted. Statute of Limitations date as far back as ancient Greece and is said to be influenced by two main reasons; firstly, that there should be some finality, so that a person can move

4 Boakye (n 1).

5 United Nations Glossary on Sexual Exploitation and Abuse, Second Edition available at https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%202017%5D%20-%20English0.pdf.

6 As amended by **section 11** of the **Criminal Code Amendment Act 1998 (Act 554).**

on with their life without being haunted by the constant threat of prosecution and secondly, to ensure a fair trial for the alleged offender.

In Ghana, the **Limitation Act 1972 (NRCD 54)** states the position of the law on the limitation of actions. This legislation provides for instances in which certain actions may not be brought after the expiration of a certain duration. For instance, **Section 2 of NRCD 54** provides that an action claiming damages for slander would be barred after two years from the date the cause of action accrued. The Act is however silent on actions concerning sexual offences and as such, it seems a reasonable inference to make that the position of the law in Ghana is that actions regarding sexual offences are not statute-barred.

Juxtaposition With Other Jurisdictions

The situation however differs across the globe. In the **United States of America**, Washington DC and 34 states have statutes of limitations on filing rape or sexual-assault charges, ranging from 3 to 30 years. In New Hampshire, charges must be filed within 6 years of a crime; in Connecticut, within 5 years. In Minnesota, there is a period of limitation of 3 years. Some states tie the Statute of Limitations to reporting deadlines. If a survivor in Illinois comes forward within three years, the state has 10 years to file charges. If she takes longer than that, the case dies. 27 states extend or suspend statutes of limitations if DNA evidence can identify a suspect, but these exemptions vary. The state of Georgia puts no time limit on rape cases in which a DNA match has been made. In Indiana, prosecutors must charge a suspect within one year of a DNA match. In Connecticut, the crime must be initially reported within five years for any future DNA match to be considered.[7] In a nutshell, Statute of Limitations on sexual abuse charges vary on a state to state basis in the United States.

7 Vicens, AJ & Smith, Michael Jordan (November 24, 2014 'Map: How Long Does Your State Give Rape Survivors to Pursue Justice?' available at https://www.motherjones.com/politics/2014/11/rape-statutes-of-limitation-maps-table

Britain on the other hand provides a unique situation in Europe in that it has no Statute of Limitations for serious sexual crimes.[8] This means that a person can be arrested, charged and convicted for a crime committed half a century ago, even though many witnesses may be dead, memories are faded and the only evidence is the word of the alleged victim – or more accurately, the accuser.

In **Germany** the most severe instances of child sex crimes have a limitation of up to 20 years. However, recent revisions to Germany's criminal code[9] mean that the limitation period does not begin before the victim turns 30[10]. In effect, a victim has until the age of 50 to report any instances of abuse experienced during childhood.

France also imposes a 20-year period of limitation on issues of rape against a minor, although the period begins from the time of the incident. Such a policy is controversial and has been decried by several rights groups, since it means the limitation period begins before the victim is old enough to even launch legal proceedings.

Hungary, for example, does not impose any limitation on child abuse cases and **Poland** has looked to follow suit by toughening laws prosecuting sex offenders.

Romania, in 2014, however, appeared to move in the opposite direction by actually shortening the Statute of Limitations down to seven years for young victims.[11]

New Zealand and **Australia** also have no sexual abuse limitations.

8 Nick Titchener (September 14, 2017, 'What is the statute of limitations on sexual assault in the UK?'
available at https://www.lawtonslaw.co.uk/resources/statute-limitations-sexual-assault/

9 Criminal Procedure Code of the Federal Republic of Germany (1950, amended 2014)

10 David Martin, (4 May 2018, 'Child Sex Abuse: How Long Do the Statutes of Limitations Run in The EU' available at https://www.dw.com/en/germany-debates-extending-the-statute-of-limitations-for-sexual-abuse/a-5335373 (last accessed on 14th July, 2019)

11 ibid.

Statute Of Limitations; A Blessing Or A Curse?

On the one hand, some view Statute of Limitations on sexual abuse as a curse. In an article by Jill Filipovic, a lawyer and a writer, on Statute of Limitations on sexual abuse,[12] she opined that "the longer a case sits, the weaker it gets. For that reason, it's unlikely that doing away with statutes of limitations will result in a wave of decades-old prosecutions. Most old cases are simply too weak to win. But some aren't. And those victims deserve justice—not an arbitrary legal limitation. Statutes of limitations differ by state, so a rape victim in California has a different window in which to report her assault than one in Pennsylvania or New York or Mississippi. There are already sixteen states that don't have statutes of limitations on rape or sexual assault; no great chaos has broken out, and the justice system has not broken down. Criminal defendants have a right to fair trials, and certainly judges should take into account the fallibility of human memory. Even eyewitness accounts soon after an event are notoriously unreliable. And perhaps if sex crimes were treated socially, legally and culturally just like any other violent crime, it would make sense to more or less tell victims, "you have a narrow window of time in which to report this, and after that, it's too late."

In 2016, Corey Feldman, an American actor also called for the end of the Statute of Limitations for rape and sex crimes days after claiming he was abused as a child actor.[13]

The conservative Law and Justice party in Poland upon coming into power in 2015, sought to overhaul its Statute of Limitations for child sex offenses, which at the time only imposed a five-year limit to press charges after the victim's 18th birthday. A proposed new bill would scrap the limitation period for child sex cases and also increase the maximum prison sentence to 30 years. "I believe that the Polish state should be ruthless and brutal towards perpetrators of violent crimes,

12 Jill Filipovic, (31 December 2015, 'No More Statutes of Limitations for Rape' available athttps://time.com/4349546/statute-limitations-rape-feldman/

13 Olivia Blair, (27 May 2016, 'Corey Feldman calls for the time limit on sexual abuse reports to be scrapped' available athttps://www.independent.co.uk/news/people/corey-feldman-calls-for-statute-of-limitations-on-sexual-abuse-reports-to-be-scrapped-a7051801.html

extreme cruelty, rape, pedophilia and sexually motivated murders," Justice Minister Zbigniew Ziobro was quoted as saying.[14]

On the other hand, it is viewed as a blessing.

According to research, high-profile historic sexual offence cases, such as the claims against Rolf Harris[15], an Australian entertainer, have brought to light the long-running debate on whether the UK should have the Statute of Limitations for certain criminal offences, including sexual assault.

Some argue that the prosecution of historic offences constitutes a waste of time and money and that the fundamental principle of the Statute of Limitations is to grant protection to the defendant so that they can move on with their life without the constant threat of prosecution and further to make room for a fair trial.[16]

Effects Of Statute Of Limitations On Sexual Abuse

The existence of Statutes of Limitations in some jurisdictions have proven to be the Achilles' heel of the victim's shot at justice.

In the Bill Cosby case[17], many of the accusations date back to the 1970s and 1980s – a relatively long period of time in the eyes of the law. Amidst several allegations, only one woman's allegation against Cosby fell within the time limit - that of Chloe Goins who claimed she was drugged and sexually abused in 2008. Seven women who were sexually assaulted by Bill Cosby had their ability to press for criminal charges precluded by Statute of Limitations. In each case, by the time they decided to come forward, "reasonable" time had elapsed.[18]

14 Filipovic (n 12)

15 https://www.thesun.co.uk/news/4871131/rolf-harris-trial-indecent-assault-jury-poisoned-claim/

16 Martin (n 10)

17 Eric Levenson, (September 26, 2018) 'Bill Cosby Sentenced to 3 to 10 years in prison for Sexual Assault' available at cnn.com

18 https://www.nytimes.com/2016/11/07/arts/television/after-bill-cosby-states-shift-sexual-assault-statutes-of-limitations.html

This notwithstanding, there exist successful cases where though the victim waited many years, they still got justice.

In recent times in the UK, there have been a number of high-profile prosecutions of historical sexual abuse cases. Entertainer Rolf Harris was jailed in 2014 for offences that took place between 1968 and 1986. Broadcaster Stuart Hall was jailed in 2013 for offences between 1967 and 1985. TV weather presenter Fred Talbot was jailed in 2017 for offences that took place in 1975 and 1976.

Labour Peer Lord Janner faced criminal proceedings relating to twenty-two allegations of sexual abuse against nine children during the 1960s, 1970s and 1980s.

In the case of **R v. Hedges**[19] an appeal was allowed the exact date on which the offence was committed by the accused could not be established in view of the prosecution witness's failure to make a prompt complaint.

Analysing The Problem Of Underreporting Of Sexual Abuse Cases In Ghana

As intimated earlier, it has been statistically proven that sexual abuse cases in Ghana are generally underreported. This is due to several factors, some of which will be highlighted subsequently.

According to an article by Bettina Böhm on the perceptions of child abuse in Ghana, data from DOVVSU on the year 2006, state that 1,427 cases of defilement and 138 cases of indecent assault were reported to the police.[20] Media reports and remarks in reports to the UN Committee on the Rights of the Child, however, indicate that the actual figures are likely

19 (1909) 3 Cr App R 262, CCA

20 https://www.researchgate.net/publication/306508544_Perceptions_of_Child_Sexual_Abuse_in_Ghana_Causes_Consequences_and_Implications_for_Intervention [accessed Mar 03 2020].

to be much higher. For example, 26% of all married women between the ages of 20 and 49 years report having been married illegally before the age of 18, while 6.3% of women and 5.3% of men report having engaged in sexual intercourse before the age of 15. In an older national survey of 3,041 participants, 6% reported sexual abuse before the age of 15. Only 10% of those cases were reported to the police and in more than half of all cases, the victims had disclosed to no one. A survey carried out by the Human Rights Documentation Centre with 2,049 girls and women above the age of 13 showed that girls in cities and girls in the countryside are equally affected by the risk of experiencing sexual abuse.

According to the same article, commercial sexual exploitation may be reported to the police, but professionals working in the social sector report face several difficulties in the prosecution of such offences due to high levels of criminal organisation of offenders, a lack of cooperation from the public and police corruption. Even where prosecution takes place, a criminal trial may last 18 months and is associated with great financial barriers (e.g. for medical examinations, experts, transport costs) and high social costs for those affected due to the pressure from the public. In a relatively recent survey of 304 school children, 14% reported having been sexually abused, with 55% of victims being girls and 45% boys. While majority of children interviewed expressed their displeasure at what had happened to them, the younger children specifically did not define the acts as abuse and did not disclose the occurrence to anyone. Reasons for not disclosing included the belief that they could “deal with it” themselves, that they enjoyed the sexual gratification, that they perceived it as normal, that they were afraid of stigmatisation or that they did not want to betray a friend. In addition, in 38% of cases where an adult was informed of the occurrence, the perpetrator suffered no consequence. Furthermore, in 28% of cases, the perpetrator was simply instructed to refrain

from repeating the act. This goes to prove that children and adolescents may not necessarily be aware of what constitutes sexual abuse or may only define it as abuse if there is a strong use of physical violence, which does not reflect the reality of how abuse and grooming operates.

In another survey of 256 students (aged 10-17 years) in Cape Coast, a majority of children and adolescents showed strong basic knowledge about sexual abuse and potential perpetrators, but also stated that they could not confide in their parents or teachers if they were affected.

According to a report released by the Centre on Housing Rights and Evictions released in 2008, in one survey of women living in impoverished neighbourhoods in Accra, kayayei in particular admitted that sexual violence was a large part of their everyday life and that they were afraid to report this. Kayayei, mostly female, work as porters of goods for private persons or businesses, often from the age of ten and after arriving in the capital by themselves from other regions in Ghana with the hope of finding work. Most of them have neither a permanent residence nor the opportunity to enroll in school, although they form informal support networks.

Citing child sexual abuse as a specific instance of sexual abuse in Ghana as a whole, it has been reported that one of the key challenges to addressing the problem of child sexual abuse is the nondisclosure or underreporting by victims and their families, especially to official agencies responsible for combating the phenomenon.[21]

Attempts have been made, particularly in Western societies, to understand factors responsible for underreporting or nondisclosure of child sexual abuse.[22] These attempts notwithstanding, the issue of underreporting or nondisclosure of child sexual abuse remains largely unexplored in the Ghanaian or African context. Thus, while a number of studies have discussed more generically and implicitly the problem

21 (Koss 1993; Pappoe and Ardayfio-Schandorf 1998; Coker-Appiah and Cusack 1999; Russell and Bolen 2000; Ghana News Agency 2006).

22 Smith et al 2000; Ullman 2003; Staller and Nelson-Gardell 2005; Pipe et al 2007

of underreporting of sexual violence against women and children,[23] none explores in specific detail the cultural factors with a bearing on the nondisclosure or underreporting of child sexual abuse in the Ghanaian or African context.

In the case of Ghana, some of the reasons identified as influencing nondisclosure of violence (physical, psychological, sexual, socioeconomic, and traditional) against women and children are the absence of severe physical injury, fear of social reprisal, the economic cost of seeking justice or medical treatment, and negative experiences with formal agencies such as the police.[24] Other factors further highlighted in the Ghanaian context, some of which relate or are likely to relate to culture, include disregarding the need to report, embarrassment, stigmatization, and fear of reprisal from either the perpetrator or the victim's own family.[25]

Considering, for example, that the number of unreported cases of child sexual abuse is generally estimated to be four to five times higher than reported in the United States, and the fact that only one in three women and girls in Ghana disclose their experiences to a third party, it is reasonable to suggest that the figures reported by the DOVVSU about the incidence of child sexual abuse in Ghana grossly underestimates the actual prevalence rate.[26]

According to an article by Doreen Raheena Suleiman on sexual assault in Ghana, marital rape or spousal rape accounts for the most underreported form of sexual assault in Ghana.[27]

23 (Meursing et al. 1995; Armstrong 1998; Coker-Appiah and Cusack 1999; Pappoe and Ardayfio-Schandorf 1998; Jewkes, Penn Kekana, and Rose-Junius 2005; Bowman 2007)

24 Coker-Appiah and Cusack 1999, 96, 110.

25 Pappoe and Ardayfio-Schandorf 1998; Coker-Appiah and Cusack 1999; see also Meursing et al. 1995; Armstrong 1998).

26 Coker-Appiah and Cusack (1999, 111) further note in relation to hospital records, for example, that about 80 percent of cases of violence against women and children who were referred to medical facilities do not come to the attention of the police. This percentage, however, includes all forms of violence (sexual and nonsexual) against women and children. The proportion in relation to child sexual abuse is therefore unknown because of the lack of disaggregated data. It is also worth noting that the prevalence data reported in the studies in Ghana are subject to the common problems associated with these types of studies, including problems of definition of child sexual abuse and inaccurate recall (see Finkelhor 1994). These difficulties notwithstanding, the available evidence strongly suggests that child abuse is a significant problem in Ghana and remains one of the most severely.

27 https://www.genderit.org/feminist-talk/sexual-assault-ghana-how-technology-can-help-build-

The above-mentioned article on culture and nondisclosure of child sexual abuse in Ghana emphasizes the fact that child sexual abuse in general and intrafamilial sexual abuse particularly remains a prohibited topic of discussion.[28] The author of said article further makes reference to the collectivistic culture of Ghanaians and refers to the instance whereby members of a social group experience shame as a result of the undesirable behaviour of a group member, as a "collective shame problem". This eventually damages the entire group's reputation. In relation to sexual abuse, this "collective shame" can result in two consequences: 1) protecting the child's interests in relation to social rather than individual factors (that is, remaining silent about abuse so the child does not face negative social consequences), and/or 2) prioritising the interests of the family over the interests of the child (that is, remaining silent about abuse so there is no shame for the family). This leaves many instances of abuse unreported and instead, families resort to alternative solutions such as financial compensation from the perpetrator.

This article also emphasized the significant correlation between the perception of collective shame and the belief that men cannot control their sexual desires. The causal attribution of sexual violence to an uncontrollable sex drive in men and the concern for social consequences of sexual abuse can lead to victim blaming. (e.g. "why did you provoke him by dressing/acting like that?").

visibility

28 Boakye (n 1).

How Long Is Too Long?

In answering the question 'how long is too long?', it is worth re-emphasising that in Ghana, the Statute of Limitations does not apply to criminal actions. What this means is that a sexual abuse victim is not barred by law from speaking up or reporting a sexual crime perpetrated against him or her, by virtue of the fact that the crime happened a long time ago before it was reported.

It is in fact a common occurrence for people to wait years before coming forward or even in some circumstances, not speaking up at all. As discussed above, several reasons such as fear, shame and self-blame account for this.[29] According to a statistical report compiled by the Department of Justice in the United States, of the sexual violence crimes not reported to police from 2005-2010, the victims adduced the following reasons for not reporting[30]:

- 20% feared retaliation
- 13% believed the police would not do anything to help
- 13% believed it was a personal matter
- 8% reported to a different official
- 8% believed it was not important enough to report
- 7% did not want to get the perpetrator in trouble
- 2% believed the police could not do anything to help
- 30% gave another reason, or did not cite one reason

Ideally, it would be most prudent to report a sexual offence immediately it is perpetrated, so as to, find enough evidence to make a strong case against the accused. This principle was laid down in **Gligah & Atiso v. The Republic**.[31] It is worthy of mention that in Ghana, the law of evidence is governed by the **Evidence Decree, 1975, NRCD 323**. There exists

29 https://journalistsresource.org/studies/government/criminal-justice/sexual-assault-report-why-research/

30 Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Female Victims of Sexual Violence, 1994-2010 (2013)

31 [2010] SCGLR 870.

different means of proof such as documentary evidence, real evidence and circumstantial evidence. According to **section 11** of the Evidence Decree, the prosecution in a criminal trial has a burden of producing evidence to prove a fact which is essential in establishing the guilt of an accused person beyond reasonable doubt. This is buttressed by **section 15(1) of NRCD 323** which states that unless and until it is shifted, the party claiming that a person is guilty of crime or wrongdoing has the burden of persuasion on that issue**. Section 13 of NRCD 323** further iterates that there exists a strict burden of proof beyond reasonable doubt in establishing a case against an accused person. This is highlighted in the case of **Sabbah v. The Republic**[32]. Thus, when a victim does not act timeously in reporting a sexual crime perpetrated against him or her, there may not be any real evidence readily available. Real evidence by definition, takes the form of material objects or physical things produced as exhibits for the court to see or smell or feel or hear.[33] In an instance where such evidence is not readily available, other forms of evidence such as circumstantial evidence may be relied upon to substantiate claim and build a case against the accused. Circumstantial evidence is defined as any fact from the existence of which a judge or jury may infer the existence of a fact in issue.[34] For example, In **Gligah & Atiso v. The Republic**, both testimonial and circumstantial evidence were used to establish proof of rape. One of the prosecution witnesses testified that she found an earring stopper on the floor of the office that it was alleged that the rape had occurred. Assuming that for instance, the story had been different and the complainant waited years to report the case, such evidence may not have been useful in establishing a case and would have made the allegation harder to prove.

32 [2009] SCGLR 728.
33 Maxwell Opoku-Agyemang, Law of Evidence in Ghana (2nd Ed) (Accra Ghana 2015) 22.
34 ibid 23.

The Extent To Which The Long Wait Influences The Outcome Of Justice In Ghana

There are many potential dangers of refusing to act timeously in reporting cases of sexual abuse. There have been occasions where historic sexual assault complaints have been made for ulterior motives, such as instances where the alleged victim had a grudge against an accused. Many such allegations are made by people with a history of maladjustment and who themselves may have been involved as accused persons within the criminal justice system.

A fundamental problem with historic cases is the shadow of doubt they cast on the credibility of the victim's allegation. In **Republic v. Yeboah**[35], Baidoo J intimated that the fact that the victim had waited a week before she made any report was in his view perhaps an indication that she was a willing victim.

There is also the practical issue of such historic cases being more difficult to prosecute if they occurred years ago.

Evidently, memories would not be as sharp and the burden of finding enough corroborating evidence would be greater.[36] In a situation where the victim does not act timeously in reporting a sexual abuse crime, it would be an onerous feat indeed to gather the above-mentioned for use at the trial.

In a bid to further analyse this point, it is worthy to note that scientific evidence is yet another means of evidence that is

35 [1968] GLR 248-256.

36 Dennis Adjei, Criminal Procedure & Practice in Ghana, (Accra Ghana 2018) 189. As eruditely put in his book on criminal procedure and practice in Ghana, Sir Dennis brought to light the fact that in a criminal case, an investigator is tasked with gathering information to make up a case against the accused person. He further noted that some facts which are gathered by an investigator to be used as evidence at the trial of a matter include photographs, fingerprints, identification parade, forensic examination, medical reports, DNA and other reports. According to him, this information gathered is kept by the police for their records, the main aim of taking fingerprints for example, being that it helps the police to trace criminals whose finger impressions are found at the crime scene and subsequently assists the police in investigation in accordance with **section 108** of the **Criminal and Other Offences (Procedure) Act of Ghana, 1960 (Act 30).**

used in Ghana.[37] In the case of **Otsibah v. The Republic[38],** the Court of Appeal ruled that medical evidence supplied links in the chain connecting the deceased with the fatal wounds inflicted which resulted in his death. So, for example, if a rape victim immediately reported rape, it would be much easier for a doctor to medically examine her and get samples of semen or evidence of forceful entry, as opposed to reporting years later and rendering any such potential medical evidence useless.

It is also noted that generally, evidence of a complaint made by a female victim does not amount to corroboration, but the fact that she made the complaint shortly after the incident is evidence of the consistency of her conduct with the evidence at trial.[39] In the case of **Commissioner of Police v. Sem[40]**, where there was a three-week delay in reporting a case of alleged carnal knowledge against the accused, the conviction was quashed on appeal, the medical evidence also not supporting the story told by the female. In Twumasi's words, it is important to make immediate complaint of such incidences at the earliest opportunity because it constitutes evidence of the consistency of the conduct of the victim with evidence at trial, and also, it affords the opportunity for the victim to be medically examined for the purpose of establishing corroboration. The case of **R v. Clifford Dimes[41]** is authority for the principle because in that case, the victim complained to her mother of the accused having carnally known her in less than twenty-four hours after the incident, and this enabled the doctor to find evidence in corroboration upon

37 SA Brobbey, Essentials of the Ghana Law of Evidence, (Accra Ghana 2014) 468. As postulated by Brobbey in his literary work on the essentials of the Ghana law of evidence, scientific evidence is in actual fact circumstantial evidence. This type of evidence enables the identification of the true victim of a crime or the culprit of the commission of a crime. Examples of scientific evidence include medical evidence.

38 [1984 – 89] 2 GLR 394, CA.

39 PK Twumasi, Criminal Law in Ghana, Tema-Ghana, 1996. Twumasi opined that in order that such a person's story may not be regarded as fabricated, a sexual abuse victim is expected to make a complaint of the incident at the nearest opportunity because such a complaint and its particulars would no doubt have a considerable weight to the credibility of the prosecution.

40 [1962] 2 GLR 77, SC.

41 (1911) 7 Cr App R 43

examining the girl's linen and underclothes as well as her physical condition. Also, in the case of **R v. Coulthread**[42], upon a complaint made by the victim, the accused's private parts were examined by a doctor who found that those parts indicated that there had been an interference with them.

It is note-worthy that evidence of complaint made by a victim is admissible in a trial of any sexual offence.[43] So is medical evidence for the purposes of corroboration.[44] This emphasizes how imperative it is to report a sexual abuse crime immediately it is perpetrated.

Additionally, there exists such a thing as an identification parade which normally assists the prosecution to identify the identity of the accused in cases such as robbery, rape, defilement and murder. While it may be argued that it is unlikely for a victim to forget the face of her offender no matter how long it takes, this argument may be flawed because as years pass, our memories get hazier, it may be more difficult to recollect things as clearly and appearances are likely to change over time. Indeed, there are instances where if an identification parade is not properly conducted, an innocent person is likely to be pointed out by the victim as the offender. Sir Dennis aptly expressed this possibility by noting that there are several instances where people who were identified in an identification parade and had been convicted were exonerated by DNA before the actual offenders were subsequently arrested.[45] This risk is likely be heightened in the eventuality of a delayed report. Brandon Garret, a renowned legal research practitioner, in his research work brought to light the fact that per his research based on a sample of 250 cases, a 190 of those cases involved a misidentification of the accused.[46]

42 (1933) 24 Cr App R 44
43 Issa Fulani v The King (1950) 13 WACA, 92
44 State v Ohene-Kesson and Mensah [1961] GLR (pt II) 708-714.
45 Adjei (n 36) 197.
46 Brandon L Garret, *Convicting the Innocent Where Criminal Prosecutions Go Wrong*, Harvard University Press, 2011, 48

Furthermore, the Supreme Court of the United States of America suggests what is referred to as the Reliability Test with respect to the identification of an accused, and one component of the said test is taking into consideration the time between which the crime was committed and the accused was identified. This is telling of the bearing reporting a crime timeously, has on facilitating the wheels of justice with respect to identifying the culprit.[47]

DNA testing is yet another form of scientific evidence that is used especially in cases involving rape, murder and defilement, in order to assist the court in ensuring that the guilty is convicted. In the case of **Eric Asante v. The Republic[48],** the Supreme Court used DNA testing to exonerate a person convicted of defilement, after a paternity test ordered by the court proved that the accused was not the father of the child delivered by the victim whom the victim claimed to have conceived when she was defiled. Evidently, DNA testing is vital in establishing the identity of a perpetrator of a crime, including one of a sexual nature.

There is also the chance of exonerating evidence for an accused person having gone missing after several decades have elapsed. As highlighted in **Republic v. Yeboah**[49] , it is a prudent rule of practice to look for corroboration from some extraneous evidence to confirm the victim's testimony and implicate the accused. This might be difficult to do as the chances of finding readily available circumstantial evidence get slimmer as the years go by.

Generally, besides the fact that doubt is cast on the veracity of a victim's claim, there are a lot of issues that arise in terms of difficulty in gathering evidence to build a solid case against the accused, such as substantial evidence going missing, the memory of the victim in recounting what happened being

47 Manson v Brathwaite 432 US 98 (1977)
48 Criminal Appeal No J3/7/2013, 26th January, 2017 (unreported)
49 *Yeboah* (n 35).

hazy and difficulty in the police carrying out the necessary investigations. In the case of **Mali v. The State**[50] , it was held that if at the end of a case, the court requires further evidence in order to decide on issues raised in the case for the prosecution, the inference is that the prosecution has not made out a case and the accused should be discharged.

Evidence gathering is an important issue that is not to be taken lightly because amongst other things, it helps the prosecution determine whether or not a charge leveled against an accused person is accurate.

50 [1965] GLR 710.

Conclusion

This article argues that the determination of whether the issue of waiting too long to speak up in cases of sexual abuse denies the victim the protection of justice and depends on a myriad of factors such as jurisdiction and the availability of enough corroborating evidence.

For countries like the United States of America and Romania where Statute of Limitations apply, it is vital to report sexual abuse crimes as soon as they happen, despite how difficult or traumatizing it may be, especially if the victim is desirous of seeking justice against the offender. In such countries, what is defined as too long a time to wait to report such a crime is dependent of the number of years couched by the law. Once the stipulated period elapses, the victim is statute-barred from reporting the crime. It is evident that indeed, waiting too long to report a crime in such jurisdictions directly influences the outcome of justice in that, the victim is robbed of the opportunity to seek recourse to the law for after the number of years stipulated.

However, for countries such as the United Kingdom, New Zealand and primarily Ghana, the jurisdiction on which this article is premised, the matter is not as straightforward. While statute does not bar victims from waiting for a long period of time to report sexual abuse crimes or require them to report within a stipulated amount of time, there exist other mitigating factors which could greatly influence the outcome of justice if a sexual abuse crime is reported long after it is committed. These factors include difficulty in gathering corroborating evidence, the possibility of elements of doubt being cast on the victim's report of such an offence, a likelihood of inconsistencies in the victim's report as a result of for example a hazy memory, among others.

It is acknowledged that it is most often times regarded as a herculean task to speak up when sexually abused, especially in this modern-day society. Although in Ghana there is no

Statute of Limitations barring sexual abuse charges, this article posits that it is best to speak up timeously when sexually abused, so as to enhance the chances of obtaining justice. It is emphasised that especially for a country like Ghana where Statutes of Limitations are not applicable to crimes, due to other factors that come to play, it is imperative for crimes, especially those of a sexual nature to be duly and timeously reported.

It is apt to conclude that although it is in no way a sure-fire guarantee that the victim will succeed against the accused if an offence is reported early, it places the victim in a more advantageous position than he/she would have been if they wait eons to speak up.

TAMING AN UNRULY HORSE: EXAMINING THE ATTORNEY GENERAL'S POWER OF NOLLE PROSEQUI IN THE LIGHT OF THE 1992 CONSTITUTION; GREGORY AFOKO V. ATTORNEY GENERAL.

FLAVIN ABOTEMI GAI[1]

Abstract

This paper explores the discretionary powers of the Attorney General in the initiation and conduct of criminal trials with specific attention drawn to the powers of Nolle Prosequi. Following the case of Republic v Gregory, the entry of Nolle Prosequi by the AG without assigning reasons is examined in this paper as an arbitrary exercise of discretionary powers, contrary to Article 296 of the 1992 constitution. This has generated careful analysis of the law, by the author with records of varying arguments of some learned jurists and relevant aspects of statutory law as well as constructive recommendations which if considered, will positively impact the execution of justice and fairness at all times during the conduct of all criminal trials in Ghana.

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Introduction

In a democracy where powers are laid on the institutions of the state and the protection of the fundamental liberties of citizens given utmost importance, French Philosopher, Baron de Montesquieu in his book L'espirit de Lois (The Spirit of the Laws)[2], while reflecting on the importance of pure separation of powers highlighted that an unchecked Executive arm might lead to a tyrannical state. Fundamental to the 1992 Constitution of the Republic of Ghana, where criminal trials are conducted by the Attorney General, a critical look at the discharge of its powers amidst upholding the utmost principle of fair trial has revealed loose ends, stirring an ongoing debate on the need for law reform.

The Attorney General And Delegation Of Prosecutorial Powers

The criminal jurisprudence of many legal systems within the common law tradition, confers the power to prosecute crime on the Attorney General as the fountainhead for the initiation and conduct of criminal trials. In Ghana, **Article 88 of the 1992 Constitution** creates the office of the Attorney General and confers prosecutorial powers on the occupier of that office. For the purposes of this paper, emphasis will be placed on **clauses 3 and 4 of Article 88.**

(3) The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences.

(4) All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or any other person authorised by him in accordance with any law.

By the combined effect of **clauses 3 and 4 of Article 88**, the Attorney General of Ghana, has the sole responsibility to initiate and conduct all criminal trials in the name of the Republic. There are, however, instances where the Attorney General may delegate his prosecutorial powers[3].

2 Baron de Montesquieu (1966)[First published in 1748] L'Espirit des Lois (The Spirit of the Laws), translated by T. Nugent, New York: Hafner Publishing Company

3 Section 1 of Law Officers Act, 1974(N.R.C.D. 279)

Section 1 of Law Officers Act, 1974(N.R.C.D. 279) states that;

(1) Subject to article 88 of the Constitution,

(a) an officer of the Attorney-General's Department, not below the rank of a State Attorney, or an officer holding a post equivalent to that rank, or

(b) a person appointed under section 56 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30), or

(c) any other public officer if so authorised by the Attorney-General, may perform any of the functions vested by an enactment in the Attorney-General, subject to the directions of the Attorney-General.

By virtue of this provision, there are three (3) categories of persons the AG may delegate his prosecutorial powers to. These are, first and foremost, an officer of the Attorney General's Department not below the rank of a State Attorney or an officer holding a post equivalent to that rank.

Secondly, the AG may exercise his powers under section 56 of Criminal and Other Offences (Procedure) Act, 1960 (Act 30) and by Executive Instrument appoint a person to prosecute either generally or for specified class of offences. The section provides that[4];

1. Subject to article 88 of the Constitution, the Attorney-General may, by executive instrument appoint generally, or for a specified class of criminal cause or matter, or for a specified area, public officers to be public prosecutors, and may appoint a legal practitioner in writing to be a public prosecutor in a particular criminal cause or matter.
2. A public prosecutor appointed under subsection (1) may appear and plead before a Court or Tribunal designated by the Attorney-General in the executive instrument or in writing.
3. The Attorney-General may give express directions in writing to the public prosecutor.

4 section 56 of Criminal and Other Offences (Procedure) Act, 1960 (Act 30)

An example of such Executive Instrument is E.I 4/76[5] which empowers Police Officers of the rank of Sergeant and above to prosecute criminal cases in the lower courts i.e District and Circuit Courts on behalf of the Attorney General. Learned jurist, Justice Sir Dennis Dominic Adjei in his book Criminal Procedure and Practice In Ghana mentions other institutions such as the Social Security and National Insurance Trust (SSNIT) and the Environmental Protection Agency (E.P.A) as public institutions with prosecutorial powers conferred on them by the Attorney General to prosecute particular types of offences.

Thirdly, the AG may appoint any public officer to perform prosecutorial functions vested in the AG by an enactment.

Attorney General's Power Of Nolle Prosequi

Under Ghanaian law, prosecuting authorities have some discretion on how to conduct trials. For instance, the prosecuting authority is at liberty to determine who they will call in as a witness or how many witnesses they will need in proving the charges as levelled against an accused person. One of such discretions given to the prosecution during trial is known as Nolle Prosequi.

Generally, the Latin maxim Nolle Prosequi means "to be unwilling to pursue". It also means that there would be no prosecution. And it is filed to terminate pending criminal proceedings against an accused person. When Nolle Prosequi is filed in a case or stated by the Attorney General during court proceedings, the accused person is discharged by the court. However, it does not bar his subsequent prosecution for the same offence on the same facts[6].

It is a discretionary authority given to the prosecution in a criminal trial to discontinue at any stage of the trial before judgment. Thus, in a trial by indictment, it can be entered

5 Executive Instrument 4/1976

6 Henrietta J.A.N Mensa-Bonsu, The Annotated Criminal Procedure Code of Ghana (Act 30) @34

before the accused is committed to stand trial. This means that the prosecuting authority can enter a nolle prosequi right after the plea of the accused is taken, during examination in chief, during cross-examination, after the written addresses have been filed or even after (in the case of a trial by indictment) the case has been summed up for the jury to make a determination.

Under Ghanaian law, the power of Nolle Prosequi is codified under section 54 of the Criminal and Other Offences (Procedural) Act, 1960, Act 30. It grants the prosecuting authority a wide discretion in the use of this legal arsenal. So long as judgment has not been rendered by the court, the Attorney-General can enter a nolle prosequi to indicate to the court that the State seeks to discontinue the case[7].

Section 54 of Act 30 provides thus;

1. In a criminal case, and at any stage of a criminal case before verdict or judgment, and in the case of preliminary proceedings before the District Court, whether the accused has or has not been committed for trial, the Attorney-General may enter a nolle prosequi, by stating in Court or by informing the Court in writing that the Republic does not intend to continue the proceedings.
2. Where the Attorney-General enters a nolle prosequi under subsection (1),
    a. the accused shall be discharged immediately in respect of the charge for which the nolle prosequi is entered, or
    b. the accused shall be released where the accused has been committed to prison, or
    c. the recognisances of the accused shall be discharged where the accused is on bail.

7 A.N.E Amissah, Criminal Procedure In Ghana @ 22

3. The discharge of the accused shall not operate as a bar to subsequent proceedings against the accused in respect of the same case.
4. Where the accused is not before the Court when the nolle prosequi is entered, the Registrar or clerk of the Court shall ensure that notice in writing of the entry of the nolle prosequi is given to the keeper of the prison in which the accused is detained and where the accused has been committed for trial, to the District Court by which the accused was committed.
5. The District Court shall cause a similar notice in writing to be given to a witness bound over to prosecute and to the sureties, and also to the accused and the sureties of the accused where the accused has been admitted to bail.

The discontinuance notwithstanding, the entry of nolle prosequi, shall not serve as a bar or prohibition to subsequent proceedings against the accused person in respect of the same set of facts. Thus, if a person has been charged with the offence of murder and during the trial, the Attorney General enters a nolle prosequi, that does not mean that the Attorney General cannot subsequently re-charge the same accused person on that same offence of murder. Such a step will not lead to double jeopardy as the accused person cannot plead the defence of autrefois acquit to say "I have been already acquitted and as such I cannot be tried anymore".

According to A.N.E Amissah, the power to enter Nolle Prosequi is political in nature and that no law prescribes the conditions under which it should be exercised[8]. Generally, in courtroom practice, however, the instances that have necessitated the entry of Nolle Prosequi have included where;

a. the charges cannot be proved because the evidence is too weak to carry the burden of proof,
b. the evidence is fatally flawed in light of the claims that are brought,

8 A.N.E Amissah, Criminal Procedure In Ghana @ 22

c. the prosecutor becomes doubtful that the accused is guilty,

d. the defendant's innocence is proved,

e. the defendant has died.

The Attorney General only needs to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. According to learned jurist A.N.E Amissah in his book **Criminal Procedure In Ghana,** "in the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts". The argument has therefore been made that the power of Nolle Prosequi is not subject to judicial review. This argument will be examined in great detail at a later stage of this paper.

The Attorney General's power of Nolle Prosequi just like other powers and duties of the office may be delegated to an officer prosecuting a matter to enter Nolle prosequi on behalf of the Attorney General. It is provided by **section 55 of Act 30** that;

1. The Attorney-General may order in writing that the powers expressly vested in the Attorney-General by section 54 be vested for the time being in a person appointed to sign indictments or to represent the Republic at trials on indictment, and that those powers may be exercised by that person accordingly.
2. The Attorney-General may in writing revoke an order made under subsection (1).

He may stop any prosecution on indictment by entering a nolle prosequi. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence.

Can Any Other Person Enter A Nolle Prosequi?

It has been argued already that the prosecutorial powers of the Attorney General may be delegated to some other officers and this is the settled law. However, can the power of Nolle Prosequi be entered by a prosecutor other than the Attorney General? It seems the answer to this question is in section 55 of Act 30.

Section 55 of Act 30 provides that

1. The Attorney-General may order in writing that the powers expressly vested in the Attorney-General by section 54 be vested for the time being in a person appointed to sign indictments or to represent the Republic at trials on indictment, and that those powers may be exercised by that person accordingly.
2. The Attorney-General may in writing revoke an order made under subsection (1).

Therefore, by the above provision, it seems to suggest that a person appointed to sign indictments or represent the Republic at trials on indictment (conduct trials originating from the High Court like murder, manslaughter, rape, etc.) can enter Nolle Prosequi on behalf of the Attorney General. The person referred to above should be an officer of the Attorney General's Department of the rank of a State Attorney or above or holding a position equivalent to the rank of a State Attorney[9]. The debate, however, has been whether such Nolle Prosequi could be entered without written notice by the Attorney General empowering that officer to do so.

This contention was the subject of the decisions in **Republic v. Adu Kwabena**[10] and **Republic v. Abrokwa**[11]. Both were High Court decisions and High Courts in Ghana being of co-ordinate jurisdiction, there was no binding precedent for a long time thereby prolonging this debate until a definite pronouncement on the matter was made by the Court of Appeal in 2010 in the case of **Republic v. Adu Gyamfi Tutu & 2 ors**[12].

9 Section 1 of Law Officers Act, 1974(N.R.C.D. 279)
10 [1971] 2 GLR 323
11 [1989-90] 1 GLR 385
12 Criminal Appeal No. H2/20/2005, Unreported 26th March, 2010

In Republic vs. Adu Kwabena[13], a murder trial, the prosecuting state attorney, after having called the thirteenth witness who was treated as a hostile witness with the leave of the court, applied for an adjournment to seek further instructions. On the adjourned date, the court discovered that a notice of nolle prosequi signed by the prosecuting state attorney on behalf of the Attorney General had been entered in the case. The court thereupon questioned the validity of the notice by requesting the production of the order in writing empowering him to do so as specified by section 55 (1) of the Criminal Procedure Code, 1960 (Act 30). The State Attorney did not produce any written authorization but stated that he had been authorized by the Attorney General to enter a nolle prosequi and that by virtue of section 1(2) of the Law Officers Act, 1964 (Act 225), the court was precluded from requesting that he produces any evidence that he had been so authorized. He contended that as Act 225 was a subsequent enactment to Act 30, the written requirement specified in section 55 (1) of Act 30 had by implication been amended by the subsequent enactment of Act 225. Anterkyi J (as he then was) held that the power to enter a nolle prosequi in a case was vested solely in the Attorney General, and although under section 55 (1) of Act 30 he could authorize a state attorney to enter a nolle prosequi, for such authorization to be valid, it must be in writing. Since the prosecuting State Attorney was unable to produce any written authorization, the purported entry of the nolle prosequi was therefore null and void. According to learned jurist S.A. Brobbey, this holding of the court in the Adu Kwabena case supra has been the subject of criticism by prosecutors at the Attorney General's Department[14].

However, in the subsequent case of Republic vs Abrokwa, the accused who was arraigned before the Circuit Court, Koforidua, was discharged by the court upon the entry of a nolle prosequi by the Republic. However, later on the same day, the same court purported to rescind its earlier decision on the grounds that a copy of the nolle prosequi had not

13 ibid

14 S.A. Brobbey, Practice and Procedure in the Trial Courts and Tribunals in Ghana @87

been filed at the Court. In an appeal by the Republic against the Circuit Court's order rescinding its earlier decision discharging the accused, Abakah J (as he then was) held that under section 37 (1) of the Evidence Decree, 1975 (N.R.C.D. 323), official duty was presumed to have been regularly performed and therefore the entry of a nolle prosequi by the Republic under the Criminal Procedure Code, 1960 (Act 30), section 54 was presumed to be regular. The power of the Attorney General to enter a nolle prosequi at any stage of a trial before judgment or verdict could not be questioned upon any basis other than political. And whether the Attorney General had exercised that power after having regard to the circumstances of the case or not, or whether that power was exercised properly or not was not a matter for judicial inquiry or review. The court further held that a trial court had to act in accordance with the provisions of 1(2) of the Law Officers Act, 1974 (NRCD 279) which was in pari materia to section 1(2) of Law Officers Act, 1964 (Act 225) and refrain from requiring evidence that an officer of the Attorney-General's Department had been directed to enter a nolle prosequi.

In Republic vs Adu Gyamfi Tutu, the facts were that, the three respondents were arraigned before the Ashanti Regional Tribunal on various counts; the first respondent to one count of forgery of document, one count of uttering forged document and one count of possessing forged document; the two others to one count of abetment of forgery. At the trial, counsel for the appellant referred the trial tribunal to a nolle prosequi the appellant had filed. Counsel on the other side again raised an objection, contending that the nolle prosequi was not properly before the tribunal in so far as it had not been either signed by the Attorney-General himself or authorized by the Attorney-General in writing. The tribunal delivered a written ruling, not only sustaining the objection taken to the entry of the nolle prosequi by the appellant but dismissing the entire case against the respondents and accordingly acquitting and discharging them. On appeal, the Court of Appeal speaking through Korbieh J.A. conferred judicial blessing on the position in the Abrokwa

case supra by holding that the intendment of the legislator in NRCD 279 was to enable the Attorney General work through his officers and do so efficiently and expeditiously. This can be clearly seen from the long title of NRCD 279 as well as all the other provisions thereof, thus, the trial tribunal was wrong in sustaining the objection raised by the respondents and further that the nolle prosequi was valid and therefore should have brought the proceedings to an immediate end.

The effect of the Adu Gyamfi Tutu case in respect of the jurisprudence in Ghana relating to Nolle Prosequi entered by a person other than the Attorney General is that an officer of the Attorney General's Department of a rank not below that of a State Attorney may enter a Nolle Prosequi on behalf of the Attorney General without the necessity of filing a written notice at the registry of the court, empowering such an officer to so act.

Whether Or Not Nolle Prosequi Is Subject To Judicial Review

The argument has been made that the common law power of Nolle Prosequi given to the Attorney General under Section 54 of Act 30 is not subject to judicial review. The proponents of this argument find support from learned jurist A.N.E. Amissah in his book Criminal Procedure in Ghana. Amissah contends that Nolle Prosequi is a political discretion which is subject not to judicial review but to political consequences. This position was quoted and affirmed by Abakah J (as he then was) in Republic vs Abrokwa[15] where he asserted that the power of the Attorney-General to enter a nolle prosequi at any stage of a trial before judgment or verdict could not be questioned upon any basis other than political. It was not a matter for judicial inquiry or review.

I am however, of the considered opinion that in the light of the 1992 Constitution of Ghana within the broader scope of constitutionalism in a democratic environment which

15 supra

guarantees civil liberties, it will be erroneous to posit that the power of Nolle prosequi is not subject to judicial review. I am fortified in my belief by Articles 1(2), 2, 11, 23, 33, 130 and 296 of the 1992 Constitution.

The combined effect of these provisions is that the Constitution shall be the supreme law of Ghana and any other law or act or omission of a person that contravenes or is inconsistent with a provision of the constitution shall to the extent of that inconsistency be void and a suit may be brought to the Supreme Court for the enforcement of the constitution[16]. In the alternative, where it is a violation of any of the fundamental rights and freedoms guaranteed under the 1992 Constitution, a suit may be brought before the High Court for the enforcement of the accrued rights[17]. In respect of Administrative bodies and Administrative Officials, there is an implied constitutional duty to exercise fairness and candidness in the exercise of discretionary power[18]. These are internal mechanisms built into the constitution to ensure that the exercise of Legislative functions and Executive functions including that of the Attorney General and those deriving prosecutorial powers from that office are within the limits and restraints of the constitution. It is upon the foundation of these provisions that I hold the considered view that, it sins against the 1992 Constitution for one to make the argument that Nolle Prosequi is not subject to judicial review. My position finds support from Pwamang JSC in Gregory Afoko v. Attorney where his Lordship expressed the opinion that the power of entry of nolle prosequi by the Attorney-General is subject to the requirements of Article 296 (c) and 11(7) of the Constitution.

16 Articles 1(2), 2 and 130 of the 1992 Constitution of Ghana
17 Articles 33 and 140(2) of the 1992 Constitution of Ghana
18 Articles 11(7), 23 and 296(a) of the 1992 Constitution of Ghana

Why Nolle Prosequi Ought To Be Tamed

Despite the fact that Nolle Prosequi is subject to judicial review under the 1992 Constitution, learned jurist Sir Dennis D. Adjei holds the view that the power of Nolle Prosequi is subject to abuse by Prosecutors[19]. It is on this background that I will proceed to examine the recent decision of the Supreme Court in Gregory Afoko v. Attorney General[20] and make an argument for the necessity of the Attorney General to assign reasons for the decision to enter a nolle prosequi in the course of a trial under a democratic society such as ours just as the Special Prosecutor is required to assign reasons for the entry of nolle prosequi[21].

In Republic vs Gregory Afoko, the facts were that the plaintiff herein, an accused person was standing trial on a charge of murder in the High Court, Accra. The trial of the plaintiff was almost at an end as the prosecution and the accused person had closed their respective cases and what remained was addresses by counsel, summing up by the trial judge and rendering of a verdict by the jury. The Attorney-General filed a nolle prosequi in the case, only for her to immediately re-arraign the accused person together with one Asabke Alangdi before the District Court, Accra for fresh committal proceedings. The accused person aggrieved by the entry of Nolle Prosequi instituted an action in the Supreme Court on grounds that the entry of the Nolle prosequi by the Attorney-General without assigning reasons was an arbitrary exercise of discretionary power and contrary to Article 296 of the Constitution. The plaintiff contended that the exercise of the right of nolle prosequi by the defendant in his trial is inconsistent with or is in contravention of Articles 23, 11, and 296 of the Constitution. The defendant also disputed the claim by the plaintiff and asserted that the exercise of the right of nolle prosequi, under section 54 of the Criminal and Other Offences (Procedural) Act, Act 30 of 1960, does not

19 Dennis Dominic Adjei, Criminal Procedure and Practice In Ghana (2018) G-PAK Ltd @ 38
20 Gregory Afoko v. Attorney General, Writ No. J1/8/2019, 19th June 2019

21 Section 80(2A) of the Office of Special Prosecutor Act 2017 (Act 959)

breach the Constitution and urged the court to dismiss the writ issued by the plaintiff. The main issue for determination was "whether or not the exercise of the power of nolle prosequi by the Attorney-General is subject to the requirements of articles 296 (c) and 11(7) of the Constitution"?

The Supreme Court expressed itself through Marful-Sau JSC thus, the plaintiff only seemed aggrieved that the defendant exercised the right of nolle prosequi virtually at the end of his trial, but the defendant in so doing, acted within the law. The Criminal & Other Offences (Procedure) Act, Act 30, by its section 54, gave the defendant the right to file nolle prosequi in a criminal trial at any time before the verdict or judgment. In the plaintiff's case, the nolle prosequi was entered, by his own account, before judgment. The defendant therefore did no wrong against the law, when she entered the nolle prosequi. The fact the that plaintiff's trial was almost at the tail end, could not legally bar or restrain the defendant from exercising her right to enter nolle prosequi. The court further stated that although they sympathized with the plaintiff that his trial was not completed but terminated as it were, for a new trial to begin, that in law did not amount to unfairness, arbitrariness, bias or capriciousness. In effect, the plaintiff failed to show how the defendant breached Article 296(a) and (b), of the Constitution.

With the greatest of respect to their Lordships, I humbly wish to express my disagreement with the position the court took. Article 19 of the constitution provides mechanisms to ensure that an accused person is given a fair trial. The Supreme Court in recent times has rendered landmark decisions in an effort to safeguard the rights of an accused person and to ensure that an accused person is given fair trial. In **Re Effiduase Stool Affairs (No 2), Republic v. Oduro Nimapua, President of the National House of Chiefs; Ex Parte Ameyaw II (No. 2)**[22], the Supreme Court referred to the right to a fair trial as one of the basic principles of any civilized system of justice.

22 [1998-99] SCGLR 630 at 670

The Court expressed itself through Acquah JSC (as he then was) as follows: "For one of the basic principles of any civilized system of justice is that a person is entitled to a fair trial free from prejudice. No system of justice can be effective unless a fair trial to both sides is ensured...this common law right to a fair trial is now elevated to a fundamental right in the 1992 Constitution of Ghana."

Furthermore, in **Republic v. Eugene Baffoe-Bonnie & Ors**, the Supreme Court speaking through **Adinyira JSC** said that "in addition to the right to fair trial, are other guarantees such as equal access to justice and equality of arms, which require that the parties to the proceedings in question are treated without any discrimination and or distinction based on the nature or mode of the trial in both civil and criminal proceedings. Consequently, we are of the view that access to administration of justice and **the enforcement of the constitutional right to fair hearing shall be enforced in a manner that ensures that no individual is deprived, in procedural terms, of his/her right to seek justice"**.

The right to a fair trial is inviolable and should not be derogated from for whatever reason. The procedure adopted by the prosecution in the initiation and conduct of a trial should definitely not be abused to the disadvantage of an accused person. As such, though the power of nolle prosequi conferred on the Attorney General is constitutional as has been demonstrated earlier, the exercise of that procedural power must ensure that the utmost principle of fair trial is promoted at all times. Per the holding in the **Gregory Afoko case** supra, it appears that the timing for the entry of the power of nolle prosequi by the Attorney General although within the limits of the present state of the law, affirmed the belief of Sir Dennis Adjei that the power of nolle prosequi is subject to abuse. The learned jurist in demonstrating how unfair the exercise of nolle prosequi can be, has asserted that "it will be utmost unfair where the Attorney General enters

a nolle prosequi in a matter fixed for judgment where the Attorney General was of the strong conviction that the accused would be acquitted and may use the acquittal as a defence in a subsequent trial on the same facts or for any other criminal offence for which the accused could have been convicted in the previous trial[23]". As if to say that the learned jurist was speaking like a Jewish Prophet, in the Gregory Afoko case supra, the Attorney General entered a nolle prosequi at a time where the trial of the accused person was almost at an end, as both prosecution and defence had closed their respective cases and the matter was adjourned for addresses by counsel, summing up by the trial judge and rendering of a verdict by the jury.

In expressing his opinion on the entry of nolle prosequi by the Attorney General in the Afoko trial at the High Court, Prof Stephen Kwaku Asare (Kwaku Azar), said "I do not understand why his apprehension should lead to a nolle prosequi in the trial of Afoko, the first suspect, when that trial is almost complete. But why should a prosecutor be allowed to withdraw a case that it was sure of and about to send to the jury only because it has now apprehended a second suspect[24]?" He further opined that the power of nolle prosequi like all other discretionary tools, was a useful one but was subject to prosecutorial abuse.

It is safe then to say that by that stage of the Afoko trial, it had become quite clear to the prosecution that they had not discharged the evidentiary burden that laid on it to prove its case beyond all reasonable doubt to obtain the conviction it sought. In the circumstance, what did the Attorney General do? She filed a nolle prosequi and immediately re-arraigned the accused on the same charges.

Furthermore, the duration of the trial of an accused person

23 Dennis Dominic Adjei, Criminal Procedure and Practice In Ghana (2018) G-PAK @ 38

24 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Kwaku-Azar-top-lawyers-outraged-over-Afoko-nolle-prosequi-after-4-year-trial-719196

could also be an indicator of the fairness or otherwise of the trial. It is for this reason that the framers of the Constitution provided that;

A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court25.

So, to have stood trial for four years and just when the trial was ending, the Attorney General entered a nolle prosequi only to re-arraign the accused person as happened in the Afoko case is one that should not go without criticism from stakeholders within the legal fraternity. In fact, in that case **Pwamang JSC expressed himself thus; "in the instant case, the exercise of the discretion has substantial effects on the criminal justice rights of the plaintiff who is being subjected to another arduous trial after four years of a first one. It is equally of interest to the relations of the victim of the offence and has consequences for public confidence in the fairness and independence of our criminal justice system in general"**.

It must not be lost on us that a fundamental principle of our criminal jurisprudence is the presumption of innocence of an accused person until he has pleaded or been proven guilty. **Article 19 (2) (c)** provides thus;

A person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.

In the **Baffoe-Bonney case** supra, Adinyira JSC said respect for human rights is an attribute or an element of good governance, and all efforts must be made to ensure its observance. Unfortunately, in the **Afoko case**, respect for the rights of the accused person to fair trial seemed to have been thrown to the dogs by reason of the nolle prosequi filed by the Attorney General.

25 Article 19(1) of the 1992 Constitution

It is to combat any such future abuse of this power that this author is calling for law reform that makes it mandatory for the Attorney General to assign reasons whenever he/she exercises the discretionary power of nolle prosequi. The author believes that the power of nolle prosequi is quasi-judicial in nature and as such the exercise of this discretion should comply with the requirements of Article 296 (c). It provides that;

Where in this Constitution or in any other law discretionary power is vested in any person or authority, where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power.

In the case of **Ransford France (No. 3) v. Electoral Commission & Attorney-General**[26] Dr. S. K. Date-Bah said that "the obligation to make regulations should be limited to discretion which is quasi-judicial situations. By that we mean where adjudication is involved".

In the lead judgment in the **Gregory Afoko case** supra, the Supreme Court through Marful-Sau JSC said that the exercise of the power of nolle prosequi is an executive act and not a quasi-judicial act which needs to satisfy the requirements of Article 296 (c) of the Constitution. With the greatest of respect to his Lordship, though nolle prosequi is part of the ministerial functions of the Attorney General, it is of a different species of discretion which is not purely executive discretion but carries with it elements of adjudication in so long as the exercise of the power determines the criminal justice rights of the individual and so should conform to the requirements of Article 296(c). In the same case, **Pwamang JSC** in similar tenor as this author, said that "the exercise of

26 Ransford France (No. 3) v. Electoral Commission & Attorney-General {2012} 1 SCGLR 705

the discretion has substantial effects on the criminal justice rights of the plaintiff who is being subjected to another arduous trial after four years of a first one. It is equally of interest to the relations of the victim of the offence and has consequences for public confidence in the fairness and independence of our criminal justice system in general. His Lordship further opined that the purpose of Article 296(c) is to infuse transparency in the exercise of discretionary powers and thereby check abuse of discretion by those upon whom it is conferred. In the case of nolle prosequi, with which we are concerned in this case, **published regulations would assure the public that the Attorney-General can be held legally accountable and furthermore, published regulations would provide a framework within which, if the exercise of the discretion of nolle prosequi is challenged, a court can judge the fairness and reasonableness of the nolle prosequi on a case by case basis.**

Recommendation

It is the belief of this writer that published regulations in accordance with Articles 296(c) and 11(7) will set a standard by which we can judge the fairness or otherwise of an entry of nolle prosequi. Such regulation should require that the Attorney General assigns reasons necessitating the entry of a nolle prosequi. This argument is founded on the belief that the accused person who is directly affected by the nolle prosequi ought to know beforehand the factors that necessitated the entry of a nolle prosequi. In **Republic v. Baffoe-Bonney & Ors supra**, the Supreme Court on the issue of non-disclosure of information by the prosecution, expressed itself thus; "**non-disclosure is a potent source of injustice** as it is often difficult to say whether an undisclosed item of evidence might have shifted the balance or opened up a new line of defence. In determining the nature of the disclosure, the Court said the prosecution must bear in mind **the principle that the Constitution is premised on openness, transparency and accountability and the spirit of equality before the law**.

On that score, I humbly recommend that the entry of nolle prosequi at any stage after the close of the prosecution's case but before judgment, should be made with the leave of the court. This is to allow the courts to play a watchdog role in safeguarding the rights of accused persons. In so doing, the Attorney-General just like in the case of the Special Prosecutor, ought to assign reasons upon which the court must exercise its discretion in allowing or refusing the entry of a nolle prosequi.

Conclusion

Central to the principle of fair trial is the principle of equality of arms. A trial cannot be fair, just and balanced if the prosecution is allowed to keep relevant materials to its chest and thereby hope to spring a surprise on the defence for purposes of securing a conviction. This would place the accused at a disadvantage in relation to the prosecution. Such a disadvantage in my view does not accord with the tenor and spirit of equality before the law as enshrined in the Constitution.

UNCHARTED WATERS: AN EXPLORATION OF AN EXISTING GHANAIAN CRYPTOCURRENCY REGULATORY FRAMEWORK

Gideon T. Gabor *

Abstract

The historical evolution of money has taken many forms such as precious metals, cowries, banknotes and coins, with the latest stage of this evolving continuum being digital currency. This evolution has been characterised by the gradual movement to a more cashlite aware society. The transition is being facilitated by constant improvement in financial technologies and services. Ghana is no exception to this development. The emergence of mobile money payment, use of credit and debit cards as well as mobile banking is fast-tracking Ghana's progress towards a more cashlite economy. The introduction of the digital currency Bitcoin in 2009, birthed the cryptocurrency era. Bitcoin is touted as offering anonymous, fast and irreversible peer to peer transactions, across borders with little or no transactional cost. Internationally, cryptocurrency is largely unregulated. This article draws on the legal approaches to regulating cryptocurrency to explore an existing legal framework regulating cryptocurrency in Ghana.

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Introduction

Cryptocurrency is a global phenomenon, demonstrated to offer real and potential benefits such as providing financial services to the unbanked and underbanked, through fast and cheap cross border transactions.[1] This has the potential of disruptively innovating[2] the existing financial industry including the remittance industry. Notwithstanding, cryptocurrency is also uniquely suited to facilitate unlawful activities.[3] The illicit use of cryptocurrency has been identified as negligible when juxtaposed with the illicit use of well-established payment methods such as paper money.[4] In Ghana, public interest in relation to cryptocurrency has been on the rise.[5] This interest was further evidenced when some Ghanaian business leaders urged upon the Bank of Ghana (BoG) to diversify its investments by investing in the cryptocurrency, Bitcoin.[6] However, some banks in Ghana have expressed strong resistance to the adoption of cryptocurrency in Ghana.[7] The banks cited the narrative of an absent regulatory framework, regulating cryptocurrency in Ghana as the basis for their scepticism.[8] The BoG wary of the unlicensed nature of cryptocurrency under Ghana's payment systems regulatory

1 Flamur Bunjaku and others, 'Cryptocurrencies–Advantages and Disadvantages' (2017) 2(1) Journal of Economics 31, 37-38.

2 Christensen attributed with the coining of this term, describes the term as a process by which an innovation transforms an existing market or sector, initially taking root in simple applications at the bottom of a market, and then relentlessly moves upward and completely redefining the industry as it creates entirely new markets with different value networks: Clayton Christensen, The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail (Cambridge 1997); Jonathan Lim, 'A Facilitative Model for Crypto-Currency Regulation in Singapore' (2014) Centre for Banking and Finance Law, 1.

3 Marian demonstrates how the combination of anonymity, and the decentralisation of financial dealings make cryptocurrency uniquely suited for criminal activity: Omri Marian, A Conceptual Framework for the Regulation of Cryptocurrency. (2017) 82(53) The University of Chicago Law Review 53, 56 -57.

4 David Carlisle, 'Virtual Currencies and Financial Crime Challenges and Opportunities' (2017) Royal United Services Institute for Defence and Security Studies, 5.

5 Google searches on cryptocurrency such as Bitcoin heightened in the year 2019 in Ghana. Ghana placed second in Africa after South Africa in terms of the search in Africa; Google Trends <https://trends.google.com/trends/explore?q=bitcoin> accessed 23 January, 2020.

6 Joseph Appiah-Dolphyne, 'Invest 1% of Ghana's reserves in Bitcoin Ndoum to BOG' (Joyonline, 2 January 2018) <https://www.myjoyonline.com/business/2018/January-2nd/invest-1-of-ghanas-reserves-in-bitcoin-ndoum-to-bog.php> accessed 25 January, 2020.

7 Pius Eduku, 'Banks resist crypto currency use in Ghana' (Citifmonline, 16 March 2018) <http://citifmonline.com/2018/03/16/banks-resist-crypto-currency-use-ghana/> accessed 24 January 2020.

8 ibid.

framework, issued a notice 'strongly encouraging' the general public to only transact business with licensed institutions.[9] It is thus inevitable that disputes with all the concomitant legal suits may soon arise in relation to cryptocurrency in Ghana.[10] This article, drawing on the narrative of an absent regulatory framework regulating cryptocurrency in Ghana, engages with the literature – primary and secondary – on cryptocurrency to analyses cryptocurrency under a Ghanaian legal scope.

Aside this first chapter which is the introduction, this article further proceeds in four chapters. The second chapter examines digital currencies, specifically cryptocurrency and its unique advantage in aiding illicit activities. The third chapter considers the cryptocurrency regulatory discourse, analysing in detail, the literature in relation to the regulation of cryptocurrency. Chapter four builds on the analysis in chapter three to further explore the existence of cryptocurrency regulation in Ghana. The fifth and final chapter concludes the article.

Digital Currencies

The advent of the internet has spawned new financial technologies and services that are transforming the global financial sector.[11] This is heralding an era of cashlite aware societies characterised by the increase in use of e-money.[12] E-money, as used in this context, is a digital representation of fiat currency used to electronically transfer value denominated in fiat currency.[13] The electronic nature of e-money transfers

9 Bank of Ghana, 'Digital and Virtual Currencies Operations in Ghana' NOTICE NO. BG/GOV/SEC/2018/02 [hereinafter referred to as the Notice].

10 An alleged cryptocurrency Ponzi scheme alleged to be accepting deposits and engaging in investment schemes are being investigated by the EOCO. The legal status of cryptocurrency made be considered if criminal procedures are initiated: Suleiman Mustapha, 'EOCO grills crypto-currency directors over GH¢ 135m customers' cash' (Graphic Online, 29 November 2018) <https://www.graphic.com.gh/news/general-news/ghana-news-eoco-grills-crypto-currency-directors-over-gh-135m-customers-cash.html> accessed 13 February 2020.

11 Asli Demirgüç-Kunt and others, The Global Findex Database Measuring Financial Inclusion and the Fintech Revolution (World Bank Publications 2017).

12 Capgemini and BNP Paribas, 'World Payment Report 2017' < https://www.worldpaymentsreport.com> accessed 13 February 2020.

13 Financial Action Task Force, 'Virtual Currencies: Key Definitions and Potential AML/CFT Risk (2014) Financial Action Task Force Report, 4 [hereinafter referred to as FATF Definition].

means, money can be transferred effortlessly across borders. The increase in use of e-money is rapidly transforming the transfer of money, from the physical exchange of banknotes and coins to the debit and credit of accounts of transacting parties. At the core, the transfer of e-money is simply a transfer of a digital asset[14] similar to the transfer of a text or music file; thus it can be duplicated and spent multiple times.[15] A trusted third party institution such as a bank or credit card entity process e-money transactions at a cost, potentially eliminating the double spending problem.[16] The trusted third party institution is usually represented by a centralised bank which controls the issuance and withdrawal of e-money; and validates and verifies e-money transactions.[17] E-money transactions are thus subjected to the rules and bureaucracies of such trusted third party institutions.[18]

Advent of Cryptocurrency

In November 2008, a seminal white paper, authored under the pen name of Satoshi Nakamoto, described a peer to peer electronic cash system known as Bitcoin.[19] In January 2009, the first Bitcoin was issued. Bitcoin's issuance and transaction is protected by cryptography[20] thus introducing the world's first cryptocurrency. The success of Bitcoin spurred the proliferation of a plethora of alternative cryptocurrency (altcoins) including Litecoin, Ethereum and Ripple, which implement similar yet

14 Sherry defines a digital asset as anything stored in a digital file: Kristina Sherry, 'What Happens to Our Facebook Accounts When We Die? Probate Versus Policy and the Fate of Social-Media Assets Postmortem' (2012) 40(1) Pepperdine Law Review 185, 194.

15 This term is described as the double spending problem: Aleksander Berentsen and Fabian Schär, 'A Short Introduction to the World of Cryptocurrencies' (2018) 100(1) Federal Reserve Bank of St. Louis Review, 2.

16 ibid.

17 FATF Definition (n 13) 7.

18 The bureaucracies include restricting transactions during business hours, holidays; limiting transactions and issuing barriers to entry; Satoshi recognises the inherent weakness of such trusted third party institutions and posits the idea of an electronic cash system eliminating such institutions: Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' (2008) <https://bitcoin.org/bitcoin.pdf> access 24 January 2019.

19 ibid.

20 Cryptography is use of mathematics to create codes and ciphers that can be used to conceal information: Secretary of the Department of Homeland Security, Risks and Threats of Cryptocurrencies (Homeland Security Studies and Analysis Institute 2014) xii [hereinafter referred to as Homeland Security]; Edward Murphy, 'Bitcoin: Questions, Answers, and Analysis of Legal Issues' (2015) Congressional Research Service, 1.

modified features of Bitcoin.[21] The current number of distinct cryptocurrencies in circulation is pegged at 5,140, with a significantly combined market capitalisation of about $281 billion.[22]

Cryptocurrency, like e-money, is electronic in nature, thus connects transacting parties across borders. Cryptocurrency distinguishing features includes the nature of cryptocurrency and the way it solves the double spending problem. Cryptocurrency unlike e-money is not a substitute of fiat currency but a form of currency on its own. In mimicking fiat currency units, a cryptocurrency is represented by a distinct unit of account such as BTC for Bitcoin and Ether for Ethereum. It is important to point at this early stage that a unit of most cryptocurrency such as Bitcoin is intrinsically worth nothing. Most cryptocurrency derive their value from the belief and confidence that they might be exchanged for goods or services; or converted to an amount of fiat currency. The belief in a subjective value has resulted in the volatility of the value of most cryptocurrency.[23]

Beyond volatility, cryptocurrency as a digital asset, is potential susceptible to the double spending problem. It solves the double spending problem by relying on a public ledger system and the group consensus of networked participants on the ledger to verify and validate transactions. This public ledger system, known as the Blockchain,[24] is a ledger recording ownership and transfers

21 Primavera De Filippi, 'Bitcoin: A Regulatory Nightmare to a Libertarian Dream' (2014) 3(2) Internet Policy Review 43, 46.

22 The market capitalisation of a particular cryptocurrency is the value of the total available number units of a particular cryptocurrency in circulation; CoinMarketCap <https://coinmarketcap.com> accessed 21 February 2020.

23 On 17th December, 2017 the value of the cryptocurrency, Bitcoin, reached an all-time high of about $19,783 for one BTC. This seems to have a ripple effect on most cryptocurrency which traded at all-time highs during that period: David Morris, 'Bitcoin Hits a New Record High, But Stops Short of $20,000' (Fortune, 17 December 2017) <http://fortune.com/2017/12/17/bitcoin-record-high-short-of-20000/> accessed 21 January 2020.

24 The Blockchain has been described as 'one of the most fundamental inventions in the history of computer science and the invention at the heart of the fourth industrial revolution': Kobina Hughes, 'Blockchain, The Greater Good, and Human and Civil Rights' (2017) 48(5) Metaphilosophy, 1.

of units of cryptocurrency, with each record timestamped and referencing the earlier transaction. The Blockchain relies on cryptography to encrypt the ledger. This ledger system is characterised as public, as it distributes a copy of the ledger to the computers of all the networked participants connected to that particular Blockchain. The network participants can then track and trace every transaction on the Blockchain and ensure through group consensus that a user is not 'double spending' the same unit of cryptocurrency. A verified and validated transaction is then recorded on the Blockchain. A recorded transaction cannot be reversed. Transactions are also transparent and easily accessible to every person connected to the Blockchain. Attempts at altering a transaction on the Blockchain would conflict with the copies of the Blockchain of other users, consequently ensuring the ledger is secure from hacks and unverified changes. The decentralised nature of cryptocurrency has thus eliminated the need for the centralised trusted third party institution with its fees, rules and failures.[25] Cryptocurrency is thus marked by peer to peer transactions and lower transaction costs, thus users are at liberty to send any units of cryptocurrency anywhere in the world irrespective of public policy and international economic sanctions.[26] As Bill Gates stated, 'Bitcoin is exciting because it shows how cheap transfer of fund from one place to another can be'.[27]

Furthermore, the Blockchain as already stated is transparent, and at the same time, maintains a level of privacy of owners of units of cryptocurrency. This is done by representing the real identities of users with a pseudonym represented by a string of alphanumerical characters. Hence no personal identifiable information of the user is stored on the

25 Lim (n 2) 2.

26 Reuters, 'Venezuela cryptocurrency to draw investment from Turkey, Qatar-official' (Reuters, 16 February 2018) <https://www.reuters.com/article/us-crypto-currency-venezuela/venezuela-cryptocurrency-to-draw-investment-from-turkey-qatar-official-dUSKCN1G025S?utm_campaign=trueAnthem%3A+Trending+Content&utm_content=5a87c16104d301339b95133f&utm_medium=trueAnthem&utm_source=facebook> accessed 24 January 2020.

27 Charlotte Krol, 'Bill Gates: Bitcoin is 'exciting' because it is cheap' (Telegraph, 3 October 2014) <http://www.telegraph.co.uk/technology/11138905/Bill-Gates-Bitcoin-is-excitingbecause-it-is-cheap.html> accessed 21 February 2020.

Blockchain. Cryptocurrency transactions are anonymous and users are thus cloaked in pseudonymity. It is this perceived anonymity of cryptocurrency transactions that is so often exploited by cybercriminals and terrorist organisations that use cryptocurrency as a medium of payment for illicit goods and services, to facilitate money laundering and promote terrorist activities.[28]

Illicit Use of Cryptocurrency

Europol notes that, 'For almost all types of organised crime, criminals are deploying and adapting to technology with ever greater skill and to ever greater effect, with organised crime moving increasingly to the dark web'.[29] Cryptocurrency anonymous, rapid, borderless, cheap and irreversible transfers have thus been beneficial to bad actors such as cybercriminals, terrorist organisations and dealers in illicit narcotics. Carlisle identifies the narrative that, cryptocurrency enables the flourishing of new types of crime such as dark web activity and increased ransomware attacks.[30]

The most well-known criminal use of cryptocurrency is as a payment method for illicit goods and services such as drugs, child pornography, counterfeited documents, as well as, weapons and ammunition offered on hidden online market sites hosted on the dark web.[31] Marian also demonstrates how cryptocurrency is a potential super tax haven for the evasion of taxes.[32] Terrorist organisations such as the Islamic State are also getting up to pace with the exploitation of cryptocurrency for terrorist activities.[33] As Lagarde further notes, 'The fact that the anonymity, the lack of transparency and the way in which

28 Homeland Security (n 20); Angela Irwin and George Milad, 'The Use of Crypto-Currencies in Funding Violent Jihad' (2016) 19(4) Journal of Money Laundering Control 407: These articles demonstrate the use of cryptocurrency such as Bitcoin in the financing and funding of terrorist organisations and terrorist acts.

29 Europol, 'Internet Organised Crime Threat Assessment' European Cybercrime Centre, 24.

30 Carlisle (n 4) 27.

31 Online market sites such as Alphabay, Silk Road and Hansa. Access to such sites requires the use of an anonymiser. An anonymiser is a specialised software that provides access to blocked and hidden sites by altering and masking the IP address of an information technology (IT) device with a series of other IP addresses connected to the network. The Onion Router (TOR) is an example of an anonymiser: Homeland Security (n 20).

32 Omri Marian, 'Are Cryptocurrencies Super Tax Havens?' (2013) 112 Michigan Law Review.

33 Irwin and Milad (n 28) 407.

cryptocurrency conceals and protects money laundering and financing of terrorism and all sorts of dark trades is just not acceptable'.[34]

Criminal activities with the use of cryptocurrency is not alien in Ghana. There is a high incidence of cybercrime such as credit card fraud in Ghana.[35] The modus operandi of such cybercriminals is to obtain the credit card details of a person purchased on hidden online market sites on the dark web with cryptocurrency as the medium of exchange. The credit card details are used to procure services and goods such as vehicles, branded clothing and electronic gadgets, among others, which are transported to Ghana and sold.

Bitcoin, and significantly more sinister altcoins designed to offer far greater anonymity such as Darkcoin, Monero, Dash and Zcash, is gaining popularity as the currency of choice for cybercriminals.[36] Bitcoin however, remains the virtual currency of choice for dark web activity.[37] At this juncture, it is imperative to be wary of the inference that cryptocurrency offers absolute pseudonymity to users. As Bunjaku argues, cryptocurrency transactions are completely anonymous and at the same time fully transparent.[38] This statement, however, is not completely accurate. Reid and Harrigan have warned that Bitcoin's touted anonymity is seriously flawed.[39] They noted that, 'many organizations and services such as on-line stores that accept Bitcoin and exchanges have access to identifying information regarding their users, e.g., email addresses, shipping addresses, credit card and bank account details, internet protocol addresses, among others. If any of this information was publicly

34 Christine Lagarde, 'An Even-handed Approach to Crypto-Assets' (IMFBlog, 16 April 2018) <https://blogs.imf.org/2018/04/16/an-even-handed-approach-to-crypto-assets/> accessed 11 February 2020.

35 Ebenezer Sabutey, 'Ghana to get off PayPal's blacklist in 2019' (Joyonline, 10 May 2018) <https://www.myjoyonline.com/business/2018/May-10th/ghana-to-get-off-paypals-blacklist-in-2019.php> accessed 24 January 2020.

36 Europol (n 29) 11.

37 Steven Brown, 'Cryptocurrency and criminality: The Bitcoin Opportunity' (2016) 89(4) The Police Journal: Theory, Practice and Principles 327, 336.

38 Bunjaku and others (n 1).

39 Andres Guadamuz and Chris Marsden, 'Blockchains and Bitcoin: Regulatory Responses to Cryptocurrencies' (2015) 20(12) First Monday, 12.

available, or accessible by law enforcement agencies, then the identities of users involved in related transactions may also be at risk'.[40] Meiklejohn has also demonstrated how the real identities of Bitcoin users can be de-anonymised with the aid of clustering techniques.[41]

Regulating the Faces of Cryptocurrency

Cryptocurrency is intangible in nature, existing only in digital form. Lessig argues that regulation in the instance of technologies that are leveraged on the internet should consider who the user is, where the user is and the acts of the user on the internet.[42] Hence this chapter considers the physical network participants that facilitate the use, holding and trading of cryptocurrency. This chapter identifies four main network participants namely; Miners, Users, Exchanges and Wallets.

Miners

Generally, cryptocurrency is created through the process of mining. Mining in the world of cryptocurrency refers to a dual process, that is, the generating of new cryptocurrency by solving complex codes and ciphers that add a block to the Blockchain, and the verification and validating of new transactions. The first process deals with the solving of complex codes and ciphers. Miners who solve such complex codes and ciphers add a block to the Blockchain which block brings into existence a specified number of newly created cryptocurrency units. The second is the verification and validation process. This process functions in a similar manner to a bank ensuring a customer has sufficient funds before

40 Fergal Reid and Martin Harrigan, 'An Analysis of Anonymity in the Bitcoin System' in Yaniv Altshuler and others (eds), Security and Privacy in Social Networks (Springer 2013) 197.

41 Sarah Micklejohn and others, 'A Fistful of Bitcoins: Characterizing Payments Among Men with No Names' (Proceedings of the 2013 Conference on Internet Measurement Conference, 2013).

42 Lawrence Lessig, Code: And Other Laws of Cyberspace, Version 2.0 (Basic books 2006) 23.

honouring a demand by the customer. Hence miners solve the double spending problem in cryptocurrency by verifying and validating cryptocurrency transactions. A verified and validated transaction is recorded into a block of records on the Blockchain. Miners are then rewarded with a transactional fee for performing this task. The newly created cryptocurrency units and transactional fees serve as an incentive for miners to participate in the mining process.

Mining is a voluntary engagement initiated by the downloading of a specialised mining program on a computer. The program installed on the computer, with the aid of constant and relatively fast internet connection, mines on a computer.[43] The complex codes and ciphers increases in difficulty as more blocks are added to the Blockchain. Thus, mining on a basic personal computer has become impossible and inefficient for some cryptocurrency. Hence miners invest in latest technology and also combine their computing power to mine in rigs and pools.[44] Ghana Dot Com, an IT solutions company based in Ghana, is attributed as the very first Bitcoin mining facility in Africa.[45]

User

A user refers to a person who obtains cryptocurrency as a medium of exchange, as a speculative asset[46] or a hybrid of the two.[47] Cryptocurrency rely on cryptographical keys, that is a public key which corresponds to a private key, to encrypt the real identity and transactions of users. The public key is comparable to an email address, whilst the private key is similar to a password used to access an email account. The public key, which is represented

43 Paul Gil, 'A Beginner's Guide to Cryptocoin Mining' (Lifewire, 22 May 2018) <https://www.lifewire.com/cryptocoin-mining-for-beginners-2483064> accessed 24 January 2020.

44 A mining rig is a specialised computer system used for mining of cryptocurrency. A mining pools also refers to the collaboration of miners who combine computing power to mine a block, and split the reward among the participants: Homeland Security (n 20) xiii.

45 'Bitcoin Mining in Ghana' <https://ice3x.co.za/bitcoin-mining-ghana/> accessed 24 January 2020.

46 In 2016, it was estimated that 54% of users of Coinbase, a popular digital currency exchange, obtained cryptocurrency strictly as an investment due to the volatile spike in prices: Garrick Hileman and Michel Rauchs, 'Global Cryptocurrency Benchmarking Study' (Cambridge Centre for Alternative Finance 2017), 26.

47 Douglas King, 'Banking Bitcoin-Related Businesses: A Primer for Managing BSA/AML Risks' (2016) Retail Payments Risk Forum Working Paper, 3.

by a combination of alphanumeric characters, identifies users and protects the personal identifiable information of a user. This therefore does not give out explicit information about the real owner of a unit of cryptocurrency. This feature makes users of cryptocurrency pseudonymous. The public key can also be represented by a Quick Response code (QR code).

Exchanges

Exchanges are entities that provide a marketplace for the trading and price discovery of cryptocurrency in circulation. Some exchanges also store users' cryptocurrency. Users can buy and sell cryptocurrency for fiat currency and, or other cryptocurrency at exchanges. Bitcoin is the most supported cryptocurrency on all exchanges.[48] Users can also obtain cryptocurrency from a cryptocurrency automated teller machines (ATMs). Cryptocurrency ATMs are specialised internet machines resembling ATMs developed to facilitate the trading and conversion of cryptocurrency to fiat currency. Most exchanges, that is an estimated 73% of exchanges, act as custodians of users' private keys thus have access to users' funds.[49] Access to the private key means control of the units of cryptocurrency in a wallet. This situation coupled with the surge in market prices of cryptocurrency has made exchanges popular targets for cybercriminals.[50] Cybercriminals thus exploit security flaws in the computer systems of exchanges to obtain the private keys of users in order to appropriate units of cryptocurrency.

A quick google search of indigenous Ghanaian based exchange service providers will provide a list of exchange providers. Users can also trade with other users to obtain cryptocurrency on 'localbitcoins'.[51]

48 Hileman and Rauchs (n 46) 34.

49 Hileman and Rauchs (n 46) 37.

50 The first quarter of 2018 has been marked by the theft of about $700 million worth of cryptocurrency in Japan and Italy alone: 'This Crypto Exchange Is Offering a $250,000 Bounty for Hacker Tip-Offs' (Fortune, 12 March 2018) <http://fortune.com/2018/03/12/binance-cryptocurrency-hacker-tip-offs/> accessed 24 January 2020.

51 Localbitcoins <https://localbitcoins.com/country/GH> accessed 24 January 2020.

Wallets

A wallet is a software program that securely stores, and facilitates the sending and receipt of cryptocurrency through the management of private and public cryptographical keys.[52] Wallets provide an interface for users to track all previous transactions, determine their balance and ascertain the estimated transactional fees for transferring units of cryptocurrency. Majority of wallet service providers do not control the private keys of the users.[53] Users have ultimate control of their accounts. Thus, users bare all the risks when it comes to ensuring the security of their private keys. Wallet service programs and apps can be downloaded on to mobile devices or computers. There seems to be no indigenous Ghanaian wallet service provider, although there is no evidence to suggest the nonexistence of one. A user can create multiple accounts with several or the same wallet service provider without any delays or provision of any national identity information. Thus, estimating the exact number of Ghanaian users would prove quite impossible. The existence of other network participants such as indigenous Ghanaian miners and exchanges and the availability of wallet service providers online sufficiently demonstrates the existence of users in Ghana.

To Regulate or Not to Regulate?

The call for the regulation of cryptocurrency raises the question whether or not regulation is actually warranted. Some scholars have described cryptocurrency such as Bitcoin, as a bubble, a passing fad and a scam destined for the bins of history.[54] This

52 Hileman and Rauchs (n 46) 49.

53 73% of wallets do not control the private keys of users: ibid, 55.

54 Former Greek Finance Minister Varoufakis stated, 'There is a Bitcoin aristocracy, the Bitcoin early adopters, who accumulated very cheaply Bitcoins from the beginning. They have every reason to talk this thing up and lure people into like a Tulip-like mania or a pyramid, making extravagant claims [...] to (open and use a new Bitcoin ATM). This was all just hype': Evan Smart, 'Bitcoin Debate between Andreas Antonopoulos vs. The Greek Finance Minister' (Crytocoin News, 18 February 2015) <https://www.cryptocoinsnews.com/bitcoin-debate-andreasantonopoulos-vs-greek-finance-minister/> accessed 24 January 2020; Former US Federal Reserve Chairman Alan Greenspan, Nout Wellink, a former President of the Dutch Central Bank, and Nobel Laureate economist Robert Shiller, maintain that virtual currency is a passing fad or bubble, akin to Tulip mania in 17th Century Netherlands. Nouriel Roubini, professor of economics at New York University, described Bitcoin was 'the mother of all bubbles' favoured by 'charlatans and swindlers': Angela Monaghan, 'Bitcoin biggest bubble in history, says economist who predicted 2008 crash' (The Guardian, 2 February 2018) <https://www.theguardian.com/technology/2018/feb/02/bitcoin-biggest-bubble-in-history-says-economist-who-predicted-2008-crash> accessed 24 January 2020.

has raised comparisons of cryptocurrency with the tulip mania and the dotcom bubble.[55] Notwithstanding, cryptocurrency is demonstrated to potentially transform the financial sector by providing cheap financial services to the underbanked and unbanked, and transforming the remittance industry by reducing transactional costs across borders.[56] In the evolving continuum of cryptocurrency, states are also beginning to think more seriously about national forms of cryptocurrency which can result in the reduction of the high costs of printing and distributing banknotes, and the risks of counterfeits.[57] Lagarde notes that, cryptocurrency rapid borderless, cheap and irreversible transfers can significantly transform financial activities in a meaningful and enduring way.[58] Cryptocurrency is thus argued to offer tremendous opportunities for innovation and development, but it is also uniquely suited to facilitate illicit behaviour.[59] Flowing from this, Marian notes that regulation aids cryptocurrency in achieving its positive potential whilst preventing cryptocurrency from becoming a vehicle for criminal activity.[60]

Drawing on the need to regulate, the Bank for International Settlements has identified five approaches to regulating cryptocurrency.[61] First, regulators could decide to use moral suasions towards users and investors in order to highlight the relevant risks and to influence the market. The second approach borders on the regulation of specific entities such as those that enable interaction between digital currencies and traditional payment instruments. The third, posits that states can interpret existing regulations to apply to cryptocurrency and their network participants. The fourth approach supports the drafting of broader regulation similar to the

55 Lagarde (n 34); Lizzy McNeill and Sachin Croker, 'The truth about Tulip Mania' (BBC, 13 May 2018) < http://www.bbc.com/news/business-44067178 > accessed 24 January 2019; Jorn Madslien, 'Dotcom bubble burst: 10 years on' (BBC, 9 March 2010) <http://news.bbc.co.uk/2/hi/business/8558257.stm> accessed 24 January 2020.

56 Homeland Security (n 20) 163-165.

57 Misha Yang, 'Cryptocurrency in China: Light-Touch Regulation in Demand' (2016), 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2792477> accessed 2 February 2020.

58 Lagarde (n 34).

59 Marian (n 3) 56.

60 ibid, 59.

61 Committee on Payments and Market Infrastructures, 'Digital Currencies' (2015) Bank for International Settlements, 12.

regulations that applies to traditional payment methods, and last, the banning of the use cryptocurrency. Troeller builds on the approach of broadening the interpretation of existing laws to encompass cryptocurrency.[62] He notes that with this approach, 'it is still within a judge's discretion to include or not include cryptocurrency in the statutory scheme'.63 This could result in conflicting interpretation of the certainty of the legal status of cryptocurrency.

Lim suggests that self-regulatory frameworks, where industry participants operate on agreed norms alongside guidance from regulators, may be more effective than heavy-handed regulatory approaches for regulating cryptocurrency.[64] This suggestion of self-regulation is defined by Guadamuz and Marsden as the process where, 'governments provide support for mechanisms whereby users of virtual currencies can agree upon and enforce their own "community standards" and rules of conduct'.[65] Carlisle toes to this line of argument by noting that when countries find that regulating network participants prove difficult, state agencies may encourage self-governing anti-money laundering approaches rather than formal regulation of network participants. This could include encouraging the cryptocurrency industry to develop voluntarily whilst incorporating meaningful standards that encourage responsible anti-money laundering practices.[66]

Regulating Cryptocurrency in Ghana

The Governor of the BoG in a speech acknowledged that, 'The future of money and finance will be marked by innovation, new technologies and increased competition across borders'.[67]

62 Lauren Troeller, 'Bitcoin and Money Laundering (2016) 36 Review of Banking and Financial Law 159.

63 ibid, 166.

64 Lim (n 2) 22.

65 Guadamuz and Marsden (n 39) 22.

66 Carlisle (n 4) 32.

67 Ernest Addison, Official Launch of Payswitch Company Limited (Payswitch conference, Accra 16 May 2018 <http://bog.gov.gh/privatecontent/Speeches/SPEECH%20DELIVERED%20BY%20DR.%20ERNEST%20ADDISON,%20GOVERNOR,%20AT%20LAUNCH%20OF%20PAYSWITCH%20COMPANY%20LTD.pdf> accessed 19 January 2020.

The governor also cited the 2018 World Bank's Global Findex Report which marked Ghana's progress in financial inclusiveness as an improvement from 40.5 percent in 2014 to 58 percent in 2018, driven mainly by digital financial services.[68] This upward movement suggests an increase in the use of financial technologies, in spite of the digital divide in Ghana.[69] The demonstrated nexus between unlawful activity and cryptocurrency also necessitates the need for regulation to pre-emptively protect the Ghanaian financial system from the potential mainstream use of cryptocurrency for unlawful activity. This chapter considers the possible existence of an existing regulatory framework regulating cryptocurrency in Ghana.

Regulation as a Payment System

On the 22nd of January, 2018, the BoG issued a notice on the operations of digital and virtual currencies in Ghana.[70] The Notice stated that the BoG has indicated its intention to regulate digital currencies with the drafting of the Payment Systems and Services Bill. [71] This ambiguous indication did not specify which form of digital currencies the BoG seeks to regulate.[72] The Director of Communications of the Bank of Ghana is quoted stating that the Payment Systems and Services Bill is expected to provide a regulatory framework for digital currencies.[73] The Payment Systems and Services Act has now been passed into law and amends and consolidates the laws relating to payment systems, payment services and

68 ibid.

69 It is estimated that about 35% of the population representing about has access and is using the internet in Ghana: Kweku Zurek, 'Over 10 million Ghanaians use the internet – Report' (Graphic online, 19 February 2018) < https://www.graphic.com.gh/news/general-news/over-10-million-ghanaians-using-the-internet-report.html> accessed 24 January 2020.

70 The Notice (n 9).

71 Anita Arthur, 'BoG unfazed by digital currency inroads in Ghana' (Citifmonline, 3 February 2018) <http://citifmonline.com/2018/02/03/bog-unfazed-digital-currency-inroads-ghana/> accessed 24 January 2020.

72 Digital currency can mean a digital representation of either virtual currency (non-fiat) or e-money (fiat) and thus is often used interchangeably with the term 'virtual currency': FATF Definition (n 13) 4.

73 Arthur (n 71).

regulates institutions which carry on payment service and electronic money business and to provide for related matters.[74]

In the PSS Act electronic money is defined as, 'monetary value which is stored electronically or magnetically, and represented by a claim on the issuer which is issued on receipt of funds, redeemable against cash and may be accepted by a person'.[75] Electronic money is thus money and legal tender which may be the accepted legal tender of Ghana or the accepted legal tender of another country. Cryptocurrency such as Bitcoin and Ethereum is not recognised as legal tender in Ghana nor elsewhere. The definition of electronic money in the PSS Act is strikingly similar to the definition of electronic money in the Electronic Money Directive of the European Union.[76] The directive defines electronic money also as, 'electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions and which is accepted by a natural or legal person other than the electronic money issuer'. The European Court of Justice in distinguishing between cryptocurrency and electronic money held that, Virtual currencies such as bitcoin, does not have a single issuer and instead is created directly in a network by a special algorithm.[77] The court further opined that Virtual currencies differ from electronic money, as defined in Directive 2009/110/EC ...in so far as, unlike that money, for virtual currencies the funds are not expressed in traditional accounting units, such as in euro, but in virtual accounting units, such as the 'bitcoin'.[78] In analysing the decision of the court, it can be noted that cryptocurrency, as already stated, is issued through the process of mining and not on the receipt of funds. Also, cryptocurrency is not 'stored monetary value' as it is a unique medium of exchange and not accepted legal tender.[79]

74 Long title of the Payment Systems and Services Act, 2003 (Act 987) [hereinafter know as PSS Act].

75 PSS Act, s 102.

76 Electronic Money Directive of the European Union, Directive 2009/110/EC.

77 Skatteverket v David Hedqvist Case C-264/14, 6 (July 2015), para 11.

78 ibid, para 12.

79 Samuel Alesu-Dordzi, 'Digital and Virtual currencies in Ghana: Did the Bank of Ghana miss the road?' (2018) Ghana Law Hub <https://ghanalawhub.com/digital-and-virtual-currencies-in-ghana-did-the-bank-of-ghana-miss-the-road/> accessed 2 February 2020.

The decisions of such foreign courts only have persuasive effects in the Ghanaian courts. As Sowah JA (as he then was) in the case Pokua v. State Insurance Corporation held,

> It is of course correct that our courts are not bound to follow decisions of foreign courts and are free to chart their own course; and so be it; but where the foreign piece of legislation is in pari materia with a similar enactment in our laws and where the words used are similar, it does seem prudent to have regard to the experience of those who have chartered the same course before and to observe in what manner we are in agreement with them or otherwise; and it is in this spirit that our courts should examine foreign decisions bearing ... I do not consider that English words must necessarily alter their meaning simply because the countries using the language might have different social and economic circumstances.[80]

Regulation under Anti-Money Laundering Law

Money laundering is the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced.[81] The origin of the term lies in the use of laundries and other cash businesses by organised crime to integrate proceeds of their crimes into the legitimate economy.[82] It is estimated that $800billion - $2 trillion is laundered globally.[83] Sadly, law enforcers and regulatory authorities seize only about 1 percent of money laundered internationally.[84]

Generally, the process of money laundering occurs in three stages, the placement, layering and integration stage.[85] Ellinger describes the stages as,

> The first stage is the placement stage, where the proceeds of the crime are placed into the financial system. Moving

80 Pokua v. State Insurance [1973] 1 Ghana Law Report 335, 386.
81 Bryan Garner (ed in chief), Black's Law Dictionary (9th edn, 2009).
82 Eliahu Ellinger and others, Ellinger's Modern Banking Law (5th edn, OUP 2011).
83 United Nations Office on Drugs and Crime, 'Money-Laundering and Globalization' <https://www.unodc.org/unodc/en/money-laundering/globalization.html> accessed 24 January 2020.
84 Homeland Security (n 20) 98.
85 Ellinger and others (n 82) 92.

> on to the second stage, that is the layering stage, where proceeds are then moved usually through a series of transactions perhaps involving different entities, assets and jurisdictions in order to sever any audit trail hence tracing their origins harder. In the final stage, integration stage, the criminal resumes control of the proceeds free from any link to their criminal source.[86]

It is reported that £3 – £4 billion pounds sterling of proceeds of unlawful activity has been laundered through cryptocurrency in Europe alone.[87] The laundering of cryptocurrency is initiated by first placing the proceeds of illicit sources in the cryptocurrency system through the purchase of cryptocurrency from an exchange or cryptocurrency ATM. As launderers convert illegally acquired cash to Bitcoin, their identity become pseudonymous and thereby frustrating authorities' ability to track their activity. The tainted units of cryptocurrency are transferred to multiple wallets and layered through series of transactions such as the trading in other altcoins or the purchase of goods and services. The launderer then receives goods or services, or money from an exchange or cryptocurrency ATM free from the taint of crime. Some exchanges however impose identification requirements on some transactions frustrating the obfuscating of the link of illegal proceeds to the real identities of the launderer.[88]

Ghana's Anti Money Laundering Regulatory Framework

Ghana's anti-money laundering legislation is couched in the Anti-Money Laundering Act, 2008 (Act 749) and the Anti-Money Laundering (Amendment) Act, 2014 (Act 874).[89] Ghana's AML Act provides a two-prong regulatory approach to combat the menace of money laundering. The first approach

86 ibid.

87 Shiroma Silva, 'Criminals hide 'billions' in crypto-cash - Europol' (BBC, 12 February 2018) <http://www.bbc.com/news/technology-43025787> accessed 24 January 2020.

88 'Exchanges such as Coinbase and Kraken, cloud-based wallet providers, and some ATM operators generally require various levels of identity verification based on transaction velocity and size': King (n 47) 9.

89 Hereinafter referred to as the AML Act.

is the criminalisation of the act of money laundering and related offences, and the second is the prevention of the money laundering by placing obligations and requirements on accountable institutions to detect and report suspicious transactions that may form or are proceeds of unlawful activity.

Criminalising Money Laundering

In Ghana, the act of money laundering is a crime punishable by a fine of not more than five thousand penalty units[90] or to a term of imprisonment, not less than twelve months and not more than ten years or to both. The AML Act criminalises the activity of money laundering by stating;

> A person commits an offence of money laundering if the person knows or ought to have known that property is or forms part of the proceeds of unlawful activity[91] and the person; converts, conceals, disguises or transfers the property; conceals or disguises the unlawful origin, disposition, movement or ownership of rights with respect to the property; or acquires, uses or takes possession of the property.[92]

The AML Act further defines property as, 'assets of any kind situated in this country or elsewhere, regardless of its value, whether corporeal or incorporeal, movable or immovable, tangible or intangible, among others'. [93]

The AML Act does not define incorporeal or intangible assets. The Ghanaian courts have also not been confronted with the task of interpreting incorporeal and intangible assets pursuant to the AML Act to include cryptocurrency. My attention is thus drawn to Black's Law Dictionary which defines intangible assets as 'any nonphysical asset or resource than can be

90 A penalty unit is worth GHS12 (Ghana Cedi).

91 Unlawful activity is defined as conduct which constitutes a serious offence, financing of terrorism, financing of the proliferation of weapons of mass destruction or other transnational organised crime or contravention of a law regarding any of these matters which occurs in this country or elsewhere: AML Act, s 1(2) as amended.

92 AML Act, s 1 as amended.

93 AML Act, s 51 (emphasis mine).

amortized or converted to cash...' and the word incorporeal as, 'having a conceptual existence but no physical existence.'[94] In light of the definitions provided, the ambit of property per the AML Act is wide in scope to include cryptocurrency. Thus, a person can be convicted of the crime of money laundering of property in the form of cryptocurrency which is or forms part of proceeds of unlawful activity. It must be noted that Cryptocurrency as a currency under the AML act strays from the definitional ambit.[95]

Obligations and Requirements of Accountable Institutions

The second approach is the placing of obligations and requirements on accountable institutions[96] to detect and report suspicious transactions which may be the proceeds of unlawful activity. The AML Act imposes an obligation on such accountable institutions to keep records of transactions and the identities of persons who performed the transactions with the accountable institution.[97] Such accountable institutions are also mandated to file suspicious transaction reports within twenty-four hours of knowledge of suspicious attempts or completed transactions, which the institution suspects the transaction is proceeds sourced illegally.[98] What suffices as a suspicious transaction is not defined in the Act. In the case of R v. Da Silva, the court held that, 'The essential element in the word "suspect" ...is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease will not suffice'.[99]

This second approach presents a problem as the network participants that facilitate the use, holding and trading of cryptocurrency are not licensed nor obligated to detect and

94 Garner (n 81).
95 AML Act, sec 51.
96 AML Act, first schedule as amended by s 21, the first schedule provides for accountable institutions which includes banks.
97 AML Act, s 23 as amended by s 8.
98 AML Act s 30 as amended by s 11.
99 [2006] EWCA Crim 1654.

report proceeds of unlawful activity in Ghana. However, cryptocurrency interacts with the traditional financial system when a user buys or sells cryptocurrency with the national currency or e-money. This can be done through the physical exchange of money, a bank deposit or transfer of e-money at an exchange or with another user. The payment of cryptocurrency with a bank deposit or transfer of e-money creates a nexus between exchanges and financial institutions regulated under the Payment Systems and Services Act.

Confiscation and Seizure of Proceeds of Unlawful activity

The Economic and Organised Crime Office (EOCO), is a specialised state agency that is empowered to seize, confiscate and recover property that a court of competent jurisdiction has adjudged as forming part or is proceeds of crime.[100] The confiscation of cryptocurrency that is or forms part of proceeds of crime presents EOCO with a series of questions; what is the subject of such a seizure order? Where is the subject of seizure? And, how can EOCO enforce a seizure order in relation to cryptocurrency? Cryptocurrency such as Bitcoin is a subjective valuable record on a Blockchain.[101] The property right is represented by a record on the Blockchain.[102] The subject of a seizure order is property in the form of an intangible or incorporeal valuable record. Cryptocurrency, as already noted, is stored in a wallet or exchange. Ownership rights in cryptocurrency is knowledge of the private key of a wallet.[103] In order to enforce a seizure order of cryptocurrency the state agency exercising the order must have knowledge of the private key of a wallet. As demonstrated custodial

100 Economic and Organised Crime Office 2010 (Act 804), s 2(b); s 24; Proceeds of crimes is defined as any property derived from or obtained through the commission of a serious offence: s 74 [hereinafter refer to as EOCO Act].

101 Witold Srokosz and Tomasz Kopyscianski, 'Legal and Economic Analysis of the Cryptocurrencies Impact On the Financial System Stability' (2015) Journal of Teaching and Education 619, 620.

102 ibid.

103 Brenig and others argue that ownership is established by knowing the private key to a wallet: Christian Brenig and others, 'Economic Analysis of Cryptocurrency Backed Money Laundering' (Twenty-Third European Conference on Information Systems (ECIS), Münster, 2015), 7.

exchanges that store users' cryptocurrency, have access to the private key of users. Thus, a seizure order would be effective if issued against a custodial exchange or wallet. An authorised officer of the EOCO may also by notice in writing request for information from an exchange to assist in an investigation of a user.[104] An authorised officer of the EOCO, in accordance with due process, is also empowered to search[105] for tainted property[106] by entering any land or premises and conduct a search in respect of tainted property to enforce a seizure order.[107] Such a search on any land or premises includes property including but not limited to the computers on the land or premise.[108] Cryptocurrency transactions is anonymous thus knowledge of the cryptocurrency assets of a person will be herculean to find if not revealed to the public. Also, most custodial exchanges or wallets are located outside the Ghanaian territorial space and this will result in challenges in obtaining information of tainted property.

Conclusion: The Way Forward

Ghana's finance minister during the budgetary statement for the year 2018 posited the financial policy of the government aimed at positioning Ghana as a regional financial services hub.[109] Among the policies to strengthen the financial sector in Ghana is the conduct of a comprehensive study on cryptocurrency and Blockchain technology to enable the country position itself against any adverse effect on the economy and to provide an appropriate regulatory environment.[110] This suggests that there is the momentum for the regulation of cryptocurrency in Ghana.

At this juncture, this article has demonstrated that cryptocurrency is not e-money thus not regulated under the

104 EOCO Act, s 19.

105 EOCO Act, s 25(4)(b), A search may be under a search warrant or emergency warrant.

106 EOCO Act, s 74: tainted property is defined as property used in or in connection with the commission of a serious offence or derived, obtained or realized as a result of the commission of a serious offence.

107 EOCO Act, S 25 1(b).

108 EOCO Act, S 25 2(c).

109 Ken Ofori-Atta, 'The Budget Statement and Economic Policy of the Government of Ghana for the year 2018', para 838.

110 ibid, para 846.

Payment Systems and Services Act. Also, the article has shone light in the gaps, of the AML Act in relation the laundering of cryptocurrency in Ghana. Moving forward, Carlisle argues that anti-money laundering regimes would be most effective at the point where cryptocurrency come into contact with 'real' money and the formal financial system.[111] He further notes that, placing exchanges under anti-money laundering regulation enables exchanges to act as a gatekeeper to the fiat money world and to identify illicit actors who may be transferring funds between legal tender and cryptocurrency.[112] Varriale supporting this argument also recommends that legislation should focus on the gateways, or the points at which people take real currency and transform it into virtual currency.[113] Flowing from these assertions, regulation would be most effective when targeted at exchanges. This article considers the regulation of the exchanges in the cryptocurrency ecosystem. There is however, the risk of drafting nugatory regulatory frameworks for cryptocurrency which can be bypassed by trading online with other international exchanges. The fear of heavy-handed regulation stifling the technological innovation of cryptocurrency is also ever present.

Thus, I propose an even-handed approach to regulating cryptocurrency in Ghana. Restating Guadamuz and Marsden, 'governments should provide support for mechanisms whereby users of virtual currencies can agree upon and enforce their own "community standards" and rules of conduct'.[114] Drawing from the restatement, an optimal solution to regulation is for the BoG to persuade exchanges to self-regulate and serve as gatekeepers to monitor and detect property that is or forms part of proceeds of unlawful activity. This even-handed approach solicits the BoG to compel exchanges to adopt a rule of conduct or soft norms to guide their activities. The BoG can exercise its leverage over exchanges whose services are facilitated by the banks and regulated payment systems in Ghana to ensure compliance. Furthermore,

111 Carlisle (n 4) 13.
112 ibid.
113 Gemma Varriale, 'Bitcoin: How to Regulate a Virtual Currency' (2013) 32(6) International Financial Law Review ,2.
114 Guadamuz and Marsden (n 39).

the BoG can organise stakeholder meetings for the network participants in the Ghanaian cryptocurrency ecosystem to draft standards to regulate their activities in Ghana. Self-regulatory measures should include anti-money laundering procedures to ensure cryptocurrency is not being laundered through the exchanges in Ghana.

ARE THERE NO NEGOTIATORS IN GHANA? DOES THE EXCLUSION OF NEGOTIATION IN THE ADR ACT MEAN LACK OF INTEREST IN DEVELOPING THE THEORY AND PRACTICE OF NEGOTIATION AS A DISPUTE RESOLUTION MECHANISM?

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Abstract

This paper seeks to analyse the extent to which the exclusion of Negotiation in the (ADR Act, Act, 798) affects the practice of negotiation in Ghana. Beginning with the history of ADR in Ghana, the paper discusses the historical antecedents to the passage of Act 798. Even though negotiation is the primary method of dispute resolution, there is no legal framework for the enforcement of negotiation agreements unless they are obtained within the context of a litigious dispute or unless they are enforced by the initiation of a court action. This paper also discusses the concept of negotiation, and some of the advantages and the disadvantages associated with negotiation. The paper further indicates the practice of ADR, in other jurisdictions, and the extent to which negotiation is provided for.

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Introduction

Discourage litigation. Persuade your neighbours to compromise whenever you can.

Point out to them how the nominal winner is often a real

loser – in fees, expenses, and waste of time.

–Abraham Lincoln

Before the introduction of formal systems of dispute resolution, the communities in the Gold Coast had their own local dispute resolution systems[1]. These local systems were the main processes of resolving disputes between disputants. Among these were negotiation, mediation and customary arbitration.

The colonial authorities dismantled the existing dispute resolution systems and, in their place, established the courts where the adversarial system of dispute resolution – litigation, dominated. This became the main form of resolving disputes. Consequently, the local dispute resolution processes became and have remained alternative rather than the main mechanism for resolving disputes in modern day Ghana. Litigation has played its role in resolving various conflicts, as well as found to be better than arms and self-help. However, it inherently suffers from inflexible rules, mystifying courtroom language, delays, lack of privacy and acrimony among others. The inherent challenges of litigation gave rise to the calls for alternative systems of dispute resolution.

Contemporary ADR mechanisms refer to a range of procedures that serve as alternatives to litigation for the amicable resolution of disputes. In reality, the existence of ADR in Ghana dates as far back as the pre-colonial era. ADR in current times is only a restructuring and redefinition of the local dispute resolution processes. Principles which if adhered to, bring about a more amicable and speedy resolution of conflict or disputes at lesser cost both financially and emotionally. Negotiation is one of the main ADR mechanisms. Negotiation is relatively speedy and less costly.

1 Frederick Bawa 'Alternative Dispute Resolution: The way to restorative justice'(25 July,2018) https://mobile.ghanaweb.com/GhanaHomepage/features/Alternative-Disput-Resolution-The-Way-t0-restorative-justice-67190/ accessed 20 February 2020

The Alternative Dispute Resolution Act, 2010 (Act 798) – Background

ADR started in USA only about fifty years ago as a legal movement to address the problems associated with litigation. Negotiation, mediation and customary arbitration continued to be employed by the natives even during the colonial era to address disputes. Present day ADR methods have largely been influenced by the communal spirit of the local dispute resolution processes.

The Arbitration Act of 1961, (ACT 38) was passed in 1961 to regulate arbitration in Ghana. During this period there were no legislation for the enforcement of ADR processes other than arbitration. Customary Arbitration existed under the law[2] but it was not expressly recognised under any statute. It is the current ADR Act that has given statutory backing to it and has provided for the enforcement of awards under this type of dispute resolution.

Legislations were, however, passed in subsequent years to provide for negotiation, mediation and some other ADR processes for the settlement of disputes in sectors or subject matter specified by the particular enactment. Among these are:

- Section 32 of Free Zone Act[3]
- Section 8 of Matrimonial Causes Act[4]

2 Case law recognised the validity of customary arbitration. In Budu II v. Caesar [1959] GLR 410, Ollenu J, as he then was, laid down the characteristics of a valid customary arbitration.

3 Free Zone Act, 1995 (ACT 504) Section 32

'(1) Where a dispute arises between a licensee in a free zone and the Government in respect of any activities in the free zone, all efforts shall be made through mutual discussion to reach an amicable settlement.'

4 Matrimonial Causes Act, 1971 (ACT 367)Section 8

'(1) On the hearing of a petition for divorce, the petitioner or his counsel shall inform the court of all efforts made by or on behalf of the petitioner, both before and after the commencement of the proceedings, to effect reconciliation.

(2) If at any stage of the proceedings for divorce it appears to the court that there is a reasonable possibility of reconciliation, the court may adjourn the proceedings for a reasonable time to enable attempts to be made to effect a reconciliation, and may direct that the parties to the marriage, together with representatives of their families or any conciliator appointed by the court and mutually agreeable to the parties, attempt to effect a reconciliation.'

- Section 48 of Copyright Act[5]
- Section 29 of Ghana Investment Promotion Centre Act[6]
- Section 22 of PNDCL 152[7]
- Section 153 and 154 of Labour Act[8]
- Section 7 of CHRAJ Act[9]
- Section 2 of Legal Aid Scheme Act[10]
- Section 72 and 73 of Courts Act 1993[11]
- Order 58 rule 6 and 64 of C.I 47[12]

The economic recovery especially in the 1990s manifested the frustrations inherent to litigation. Delays in the court system were common but delays in resolution of commercial disputes were becoming of great concern because they could seriously damage the economic life of Ghana. The state of commercial litigation under LN 140A was a matter of concern.

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5 Copyright Act, 2005 (ACT 690)Section 48
'(1) Where any dispute arises between any parties under this Act or in relation to any copyright or claim under this Act, the parties involved in the dispute may seek to negotiate a settlement of the dispute.
(2) Where negotiation under subsection (1) fails, a report may be made by either or both parties to the Copyright Administrator who shall mediate for a settlement.
(3) A party dissatisfied with a decision to submit to mediation made under subsection (2) may seek redress from a court of competent Jurisdiction.'

6 Ghana Investment Promotion Centre Act,1994 (ACT 478)Section 29
'(1) Where a dispute arises between an investor and Government in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.
(2) Any dispute between an investor and Government in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions may be submitted at the option of the aggrieved party to arbitration as follows—
(a) in accordance with the rules of procedure for arbitration of the United Nations Commission of International Trade Law; or
(b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties; or
(c) in accordance with any other national or international machinery for the settlement of investment dispute agreed to by the parties.
(3) Where in respect of any dispute, there is disagreement between the investor and the Government as to the method of dispute settlement to be adopted, the choice of the investor shall prevail.'

7 Land Title Registration Law, 1986 (PNDCL 152)
8 Labour Act, 2003 (ACT 651)
9 Commission On Human Rights And Administrative Justice Act, 1993 (ACT 456)
10 Legal Aid Scheme Act, 1997 (ACT 542)
11 Courts Act 1993 (ACT 459)
12 High Court(Civil Procedure) Rules ,2004 (C.I 47)

In Adu v. Kyeremeh[13] , Adade JSC lamented:

'It is a serious indictment on the administration of justice in this country that a case of such simple dimensions should take as long as 26 years to see itself through the courts. It started in November 1960; it is now, in April 1987, being given hopefully its final farewell. 24 out of these 26 years were spent in the Court of Appeal alone. When in 1981, in Abba v. Nframa, Supreme Court, 30 November 1981, unreported, I came upon a similar situation, I whined. That case took twelve years. This one is worse.'

Former President Rawlings also expressed a similar grievance to Parliament in 1999, depicting the frustrations of the investors. He said, "this is the investor's shipment, plant and equipment. And just before these arrived in Ghana, litigation begins regarding the land. The court places an injunction on the land whiles the substantive case suffers interminable delays".

Government could no longer ignore the incessant complains about the delays and frustrations inherent in litigation generally and particularly its effects on commercial transactions. There was the need for legislation to govern the enforcement of alternative dispute specifically those that provide for speedy and effective resolution of disputes.

The Government commissioned a project under the private sector development project that sought to identify areas of the Ghana Legal System that had the tendency to constrain commercial transaction. One of the areas of study under the project was administrative law procedure, arbitration and other ADR mechanisms. The study recommended that ADR was the key to the improvement of the dispute resolution system in Ghana.

In 1998 the Attorney General set up a taskforce on ADR with members from various sectors of the country. The function of the taskforce among others was the formulation of the

13 [1987-88] 1 GLR 137-142

Bill on ADR. The Bill went through several examinations often under the auspices of the Attorney General's department in collaboration with GHACMA for almost ten years until the birth of the ADR ACT in 2010.

The Alternative Dispute Resolution Act, 2010 (Act 798)-Structure

The current ADR Act[14] was enacted on 31st May, 2010. It is this Act that is currently being discussed in this paper.

The purpose of the Act according to the memorandum which accompanied the then bill is to bring the law governing arbitration into harmony with international convention, rules and practices in arbitration, provide by legislation for the legal and institutional framework that will facilitate and encourage the settlement of disputes through ADR procedures and provide by legislation for the subject of customary arbitration which we have been practising for years.

The object of most ADR legislations is to achieve conflict resolution through a negotiated approach which is acceptable to both parties. Further, ADR legislations must seek to address parties' conflict in a timely, particularized, efficient, cost- effective and amicable non-adversary manner.

The Act[15] is written in five parts: Part 1 deals with arbitration in 62 sections and covers the following issues:

- The arbitration agreement
- Qualification and appointment of arbitrators
- Impartiality and challenge of arbitrator
- Revocation of arbitrator's authority
- Vacancy in the tribunal
- Fees and Immunity of the arbitrator from legal liability
- Jurisdiction of Arbitral Tribunal
- The Arbitral process
- Powers of the high court in relation to the award.

14 Alternative Dispute Resolution Act, 2010 (ACT 798)
15 supra

Part 2 covers Mediation from section 63 to 88. In this part, there are provisions as to how mediation may be initiated and finalised. They include:

- Powers of the mediator
- Requirement of confidentiality
- Effect of mediated settlement

Part 3 deals with Customary Arbitration. This is covered from section 89 to 113. This part deals with issues of:

- Commencement of customary arbitration
- Qualification of customary arbitrator
- Rules which govern customary arbitration

Part 4 deals with the establishment of the ADR centre for Ghana. It provides the administrative support for the growth and development of ADR in Ghana. This Part covers Sections 114-124.

Matters dealt with in Part 4 include:

- Appointment of an executive board
- Executive secretary
- Functions of the centre

Part 5 spans from section 125 to 137 and deals with financial, administrative and miscellaneous matters including:

- Establishment of a fund
- Management of fund
- Financial reporting requirements
- Staff appointments
- Interpretation
- Repeals and Savings; and
- Transitional provisions.

The Act also incorporates five Schedules:

Schedule one reproduces the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention'). Schedule two, which is entitled 'Alternative Dispute Resolution Centre Rules', sets out the Arbitration Rules pursuant to section 5(3) and 8(2) of the Act. Schedule three contains the Expedited Arbitration Proceedings Rules of the ADR Centre; The Mediation Rules for this Centre then appear in Schedule four; and Schedule five contains samples of arbitration clauses or agreements.

Negotiation – The Concept And Its Efficiency

Negotiation is at the heart of the ADR process. Negotiations have always been and will remain the bedrock of human interactions and almost all ADR processes. The increasing popularity of alternative dispute resolution mechanisms suggests that international and local dispute resolution instruments will place more emphasis on negotiation as the first point of call in alternative dispute resolution. The ADR act has been celebrated by many scholars for its uniqueness in the inclusion of customary arbitration and its ability to provide a working definition of what constitutes ADR. Despite the ground-breaking introductions made by the Act, one does not fail to notice the Alternate Dispute Resolution Act, 2010 (Act 798) makes no provision for negotiations in the Act.

Negotiation is always a necessary step in the settlement of a dispute. There is no one definition for negotiation. Negotiation simply means talking out your issues. Disputing parties iron out their differences by discussing the issues at hand. Porters Dodson defines negotiation as "a process whereby the parties and their legal advisors seek to resolve the dispute by reaching an agreement either through written correspondence or a meeting between all concerned"[16]. Fisher and Ury in their book Getting to Yes define negotiation as "a back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed"[17].

16 Porter Dodson LLP, 'Alternative dispute resolution' (*Porter Dodson Solicitors & Advisors*, 2020) https://www.porterdodson.co.uk/alternative-dispute-resolution-solicitors/ accessed 14 February 2020

17 Roger Fisher and William Ury, Getting To Yes: Negotiating Agreement Without Giving In, (2nd

Negotiation has been characterised as 'the preeminent mode of dispute resolution'[18]. In defining negotiation, Porters Dodson describes negotiation as "perhaps the most common and straightforward form of ADR[19]." Negotiation has further been described as "the most commonly used ADR process; appropriate for use in almost every situation in which parties need to clarify or resolve issues. It is fundamental and key to all processes"[20]. Negotiations may be applied within the context of other ADR processes. Negotiation does not involve any third party – the parties themselves or their duly authorised representatives communicate directly with each other to clarify the issues andsettle the disputes on their own, and arrive at well-suited solutions. The parties themselves have maximum control over the process and the outcome[21]. Negotiation allows the parties to find a solution that best serves their interests.

A negotiator may adopt one of many distinct styles of negotiation, or a combination of two or more. Jean-Marie Hiltrop citing Thomas and Kilmann[22] (1974) identified five distinct approaches to negotiation.

I. Collaborating
II. Compromising
III. Accommodating
IV. Controlling
V. Avoiding

Different writers identify different approaches to negotiation. In recent times negotiations are classified as follows[23];

edition, Penguin Books, 1991)

18 S.G. Goldberg, E.A. Frank and N.H. Rogers, 'Dispute Resolution: Negotiation, Mediation, and Other Processes', (2nd edition, Boston: Little, Brown and Company, 1992) at p. 3

19 Porter Dodson LLP, 'Alternative dispute resolution' (Porter Dodson Solicitors & Advisors, 2020) supra

20 Jean-Marie Hiltrop, The Essence of Negotiation, (Prentice Hall, 1995)

21 Brown and Marriot, 'ADR Principles and Practice' (3rd edition, Sweet and Maxwell, 2011)

22 Kenneth Thomas and Ralph Kilmann, Conflict Mode Instrument, (XICOM, 1974)

23 This classification is by Fisher and Ury

I. Hard negotiator

II. Soft negotiator

III. Competitive/ positional based approach

IV. Co-operative / problem solving approach

V. Positional bargaining

VI. Principled bargaining/ interest-based approach

The style a negotiator adopts may be dependent on the facts present. Each style works best in a particular situation[24]. Negotiations are more desirable as a means of resolving disputes for a number of reasons.

The Department of Justice, Canada, in outlining the advantages of negotiation had this to say:

'In procedural terms, negotiation is probably the most flexible form of dispute resolution as it involves only those parties with an interest in the matter and their representatives, if any. The parties are free to shape the negotiations in accordance with their own needs, for example, setting the agenda, selecting the forum (public or private) and identifying the participants. By ensuring that all those who have an interest in the dispute have been consulted regarding their willingness to participate and that adequate safeguards exist to prevent inequities in the bargaining process (i.e., an imbalance in power between the parties), the chances of reaching an agreement satisfactory to all are enhanced'[25].

It has been said that, 'like any method of dispute resolution, negotiation cannot guarantee that a party will be successful. However, many commentators feel that negotiations have a greater possibility of a successful outcome when the parties adopt an interest-based approach as opposed to a positional-based approach. By focusing on their mutual needs and

24 Thomas 1977

25 Government of Canada, Department of Justice, Canada. Dispute Resolution Reference Guide, https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/03.htmlaccessed on 22 February, 2020

interests and the use of mechanisms such as objective standards, there is a greater chance of reaching an agreement that meets the needs of the parties. This is sometimes referred to as a "win-win" approach'[26].

Unlike litigation, negotiation is a voluntary process. A party cannot automatically be subject to the process with the issuance of a writ. No one is required to participate in negotiations against their will.

In negotiation the parties do not make use of a third-party neutral. This is important when none of the parties wants to involve outside parties in the process. The matter to be discussed or the dispute to be resolved may be highly sensitive in nature and the parties may prefer some degree of privacy. This is most useful in personal disputes and in commercial settings. Negotiations may preserve and, in some cases, even enhance the relationship between the parties once an agreement has been reached between them.

In commercial settings, negotiations serve as a better mode for resolving disputes because it leaves little room for bad blood between the parties. Negotiations help maintain the relationships between the parties. While negotiations may be held privately or in public, and the parties are at liberty to decide whether or not to make their negotiations confidential, generally, negotiations are more private than litigation and do not make trade secrets accessible to the public.

Further, unlike the outcomes of certain adjudicative processes, the outcome of a negotiation is non-binding. The parties who were involved in the negotiation may exercise their discretion to uphold the outcome of the negotiation or not. However, where the agreement has been reduced into writing, the parties may enforce it as they will a contract.

When the right approach to negotiation is employed, negotiation will provide the parties with the opportunity to design an agreement which reflects their interests.

26 supra

Parties may opt for negotiation instead of litigation because negotiation may relatively be less expensive for the parties and may reduce delays.

Despite its advantages, parties have been discouraged from negotiation for different reasons.

1. As a matter of law, some issues or questions are simply not amenable to negotiation[27].
2. Where there is unequal bargaining power, the weaker party may be bullied into an agreement that does not adequately represent its interest.
3. Parties may adopt the wrong style of negotiation and as a result enter into agreement that do not best serve their needs or interests.
4. No party can be compelled to continue negotiating. Anyone who chooses to terminate negotiations may do so at any time in the process, notwithstanding the time, effort and money that may have been invested by the other party or parties[28].

27 Section 1 of Act 798; section 73 of the Courts Act 1993, (Act 459)
28 supra

Negotiation In Other Jurisdictions

India

India's principal ADR legislation is the Arbitration and Conciliation Act of 1996. In India, as in Ghana, negotiation does not have statutory recognition[29].

However, the India employs the use of voluntary agencies known as Lok Adalats (People's Courts). These fora resolve disputes through mechanism like Negotiation and Conciliation, and are governed by a special legislation known as the Legal Services Authorities Act, 1987[30] which came into force on 19th November 1995. The significance of Lok Adalats has been affirmed by the Indian courts[31]. Settlements arrived at in the Lok Adalats may be executed as a decree of a court[32].

Nigeria

ADR mechanisms that are frequently used in Nigeria include arbitration, mediation, negotiation and conciliation[33].

Arbitration and Conciliation are regulated by Nigeria's principal ADR Act, the Arbitration and Conciliation Act 0f 1990[34].

Mediation is regulated by laws that have been enacted by individual states[35].

In Nigeria also, there are no specific laws governing negotiation[36].

29 S. Chaitanya Shashank and Kaushalya T. Madhavan, 'ADR in India: Legislations and Practices' (Academike, January 7, 2015) https://www.lawctopus.com/academike/arbitration-adr-in-india/ accessed January 2020 ; V.G. Ranganath, 'Negotiation-Mode of Alternative Dispute Resolution (ADR)' (Legal Service India, 2018) http://www.legalservicesindia.com/article/245/Negotiation-Mode-Of-Alternative-Dispute-Resolution.html accessed 14 February 2020

30 Vinay Vaish, 'India: Alternate Dispute Resolution (ADR) in India' (Mondaq, December 11, 2017) https://www.mondaq.com/india/Litigation-Mediation-Arbitration/654324/Alternate-Dispute-Resolution-ADR-In-India/ accessed January 2020 ; Lok Adalats are dealt with in sections 19, 20, 21 and 22 of the Act.

31 Abdul Hasan and National Legal Services Authority v. Delhi Vidyut Board and Others AIR 1999 Del 88

32 S. Chaitanya Shashank and Kaushalya T. Madhavan, supra

33 Michael Abiiba and Azeezat Ogunjmi, 'Nigeria: Litigation and Dispute Resolution 2019' (IGLC, 12 February 2019) https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/nigeria accessed 14 February 2020.

34 Victor Akazue Nwakasi 'Alternative Dispute Resolution in Nigeria: New Frontiers in Law' (OAL, 21 May 2019) https://oal.law/alternative-dispute-resolution-in-nigeria/ accessed 14 February 2020

35 ibid

36 Ibid

South Africa

South Africa has been said to have one of the fastest developing ADR systems in Africa[37]. Aside the courts, South Africa has many dispute resolution centres. These include;

- The Arbitration Foundation of South Africa and the Association of Arbitrators, which are the main bodies for Arbitration[38];
- the Commission for Conciliation, Mediation and Arbitration – established for the resolution of labour disputes;
- the National Land Reform Mediation Panel – established for the resolution of land disputes;
- Family Mediation Boards, and several other agencies.

South Africa's ADR system has been said to be a "model for many African States who are still struggling with ADR in their legal systems like Sudan, Ghana, Malawi and Democratic Republic of Congo", even though the most utilised modes of dispute resolution are arbitration and conciliation[39] and mediation[40]. The principal Act on ADR is the Arbitration Act No. 42 of 1965 which regulates arbitration. There is no statute which regulates negotiation.

United States of America[41]

ADR in the United States of America is primarily governed by the Alternative Dispute Resolution Act of 1998[42]. This Legislation unlike its counterparts offers a wider framework for the operation of ADR. Section 3 of the Act defines ADR as follows;

For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an

37 Petrina Ampeire, 'ADR in South Africa: A Brief Overview' (International Mediation Institute, 9 December 2017), https://www.imimediation.org/2017/12/09/adr-south-africa-brief-overview/ accessed 14 December 2020

38 Jason Smit and Perusha Pillay, 'Main Dispute Resolution Methods', Cross-border Dispute Resolution Handbook 2011/12 http://www.bowmanslaw.com/article-documents/Dispute_SouthAfrica.pdf accessed 14 February 2020

39 Petrina Ampeire, 'ADR in South Africa: A Brief Overview' ibid.

40 Jason Smit and Perusha Pillay supra

41 This information was obtained from the official website of the United States Government, U.S. Department of Transportation [website] https://www.transportation.gov/civil-rights/pl-105-315-28-usc-651-alternative-dispute-resolution-act-1998/ accessed on

42 The Act was passed to amend title 28 of the United States Code

adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658.

This definition is more expansive and admits more processes than other Legislations. Despite this expansive definition, the writers failed to identify any legislation that directly regulates negotiations in the USA. Instead, the mechanisms recognised in the Act include mediation, neutral evaluation and arbitration. Districts courts are given the authority to make use of alternative dispute resolution processes in all civil actions, and shall implement its own ADR program to encourage and promote the use of Alternative Dispute Resolution in its district.

Canada[43]

Although there is no specific legislation regulating negotiation in Canada, Canada provides by far the most well laid-out provisions for the operation of negotiation. The right of the party to act on its own behalf or through third parties such as dispute resolution professionals or lawyers whose services have been retained because of their negotiating skills, is recognised. Counsel is bound to act by the principles of professional ethics. The following duties are imposed on Counsel when negotiating on behalf of its client.

- When negotiating on behalf of the client, counsel must ensure that there is no divergence between his or her negotiating stance and the mandate of the client.
- When negotiating on behalf of the client, counsel must ensure that there is no divergence between his or her negotiating stance and the mandate of the client.
- A duty is imposed on the Justice Counsel to ensure that any agreement reached does not breach the terms of any law or policy directive.

Further, it is provided that any agreement reached between the parties cannot override the terms of the Access to Information Act, the *Privacy Act* or the *Official Languages Act* as these laws

43 All information about Negotiation in Canada was obtained from the Government of Canada, Department of Justice, Canada webpage.

are of general application. The Department of Justice, Canada through the Dispute Prevention and Resolution Services, further provides a Negotiation Checklist44 that parties to a negotiation may adopt.

In many other jurisdictions, unlike with other ADR mechanisms, there is no express statutory recognition for negotiation. Negotiation is mostly encouraged to the extent that it arises in a litigious matter. By itself, negotiations are not regulated by any statutes. This may be attributable to a number of reasons.

Negotiation is mostly recognised by its non-binding nature and is often times introduced as the first point of call in any dispute resolution process. Many dispute resolution clauses include negotiations as the first step in dispute resolution, and often follows it with a more enforceable mechanism.

Further, there are no prescribed rules for negotiation. Negotiation is an informal process and does not require the admission of laid-down rules of law. Parties are at liberty to adopt whatever rules they choose, if any.

The Exclusion, A Weakness?

The Act has been commended for its expansive and effective definition of ADR. According to Justice Torgbor, "unlike other jurisdictions that eschew controversial definitions, section 135 of the Act defines 'alternative dispute resolution' as 'the collective description of methods of resolving disputes otherwise than through the normal trial processes."[45] Justice Nene Amegatcher, writes that some people have defended the omission by relying on the definition of ADR provided by the Act. They argue that, "since the Interpretation section of the Act defines ADR to include resolution of all forms of dispute otherwise than through the normal trial process, impliedly, the law regulates negotiation.[46]"

44 Appendix A of the Dispute Resolution Reference Guide

45 Torgbor Edward, 'Ghana's Recently Enacted Alternative Dispute Resolution Act 2010 (act 798): A Brief Appriasal' [2011]

46 Nene O.A. Amegatcher, 'A Daniel Come to Judgment: Ghana's ADR Act, A progressive or retrogressive piece of legislation?'[2011] available on Marian Conflict resolution Centre [website] http://mariancrc.org/?p=572

Perhaps the most fatal flaw of the Act is that it provides no framework for the enforcement of negotiation agreements. Justice Nene Amegatcher notices this fundamental flaw in the ADR Act. In his article,[47] he expresses the view that the omission of negotiation by the Act defeats the object of the Act.

> In my opinion, this is a serious omission. If arbitration awards and mediation agreements can be enforced as judgments of the courts, what happens to agreements reached and signed by the parties as a result of negotiation? Will parties who seek to enforce such negotiated agreements have to initiate fresh suits at the courts? In the absence of any specific provision for the enforcement of negotiated agreements as there are for arbitration and mediation, the omission clearly defeats the object of the Act to use all ADR mechanisms to ensure speedy and less expensive methods of dispute resolution.

It may be argued that a negotiation agreement may be enforced as a contract in the courts. In that case, parties will still have to initiate actions in court to enforce such agreements. It is only when the negotiation agreement was reached in the context of a litigious dispute that the agreement can be adopted and registered with the court.

The Department of Justice, Canada in setting out the guidelines for negotiation noted that, 'a negotiated settlement can be recorded in the form of an agreement. Once signed, has the force of a contract between the parties. If the settlement is negotiated in the context of a litigious dispute, then the parties may wish to register the settlement with the court in conformity with the applicable rules of practice.'

If negotiation agreements cannot be enforced outright, parties may pursue other dispute resolution mechanisms to resolve their disputes thereby increasing cost and defeating the purpose of the Act to ensure less expensive means of resolving disputes.

47 Nene O.A. Amegatcher, supra

Conclusion

For an Act that has made strides to ensure that Customary Arbitration receives statutory recognition as an efficient dispute resolution mechanism, it speaks badly of the Act as it fails to accord Negotiation the same status under the laws. The exclusion indicates a lack of interest in developing the theory and practice of negotiation as a dispute resolution mechanism. In order to encourage and promote the use of alternative dispute resolution, the primary processes known to the people should be identified and reinforced.

However, it cannot be said that under Ghanaian Law, negotiation is completely not recognised as a dispute resolution mechanism. For instance, in the Judicial Service of Ghana Uniform Practice Manual on Court-Connected ADR Practice, negotiation is listed as one of the court-connected ADR methods. Like customary arbitration existed in our laws prior to it attaining statutory recognition, negotiation exists, except that there is no legislation under which to enforce the agreement unless the parties negotiate within the context of a litigious dispute or they initiate an action to enforce the agreement as a contract.

Without an Act, Canada has made elaborate pronouncements on the role of counsel in a negotiation, the rights of the parties in a negotiation, as well as the laws applicable to a negotiation agreement. If Canada has found a place to set out these guidelines, Ghanaian law through the applicable authorities can establish similar guidelines as to how people should negotiate, and the laws that will impact on the negotiation agreement.

Even if the law may not be able to regulate how negotiations should be conducted by the parties involved, the law may provide a framework for the enforcement of negotiation agreements as it does with mediation under sections 81 and 82 of Act 798.

In spite of the exclusion of negotiation from the Act, Act 798 provides a framework for the operation of other ADR mechanisms. The Act remains a working instrument for ADR in Ghana. To achieve the objective of ensuring speedy and inexpensive resolution of disputes, recognition should be giving to other modes of resolving disputes aside what are contained in the Act. Steps should be taken to make negotiation agreements enforceable in the same manner as mediation settlements and arbitration awards.

THE SECESSION OF WESTERN TOGOLAND: EXPLORING THE POSSIBILITIES AND RAMIFICATIONS

Selasi Bedzrah

Abstract

The discussions on the possibility or otherwise of the secession of Western Togoland needs to become more informative and not limited to its criminal or treasonable aspects. This paper aims at recapping the history of Western Togoland and the plebiscite which united it with the Gold Coast.[12] It will also examine why the proposed declaration of independence or secession of Western Togoland may be contrary to Ghana's Constitution, current international jurisprudence and practice. It will also highlight relevant political concerns which must be addressed to ensure the stakeholders are thoroughly informed on whether there may be a basis for unilateral secession. Also, it will discuss issues that arise when secession occurs, including the concepts of Statehood and Succession to treaties, assets, and liabilities and demonstrate why secession may not provide a solution to problems that a region of the country may be facing. Finally, the paper will discuss other practical and legal considerations which should be at the forefront of national dialogue regarding the unification of Ghana.

1 Ashley Bulgarelli, 'Togoland's lingering legacy: the case of the demarcation of the Volta,' (2018) 39(2) Aus. Rev. Afr. Std. 222, 222-228 <www.afsaap.org.au/assets/39_2_222-238.pdf> accessed 3 March 2020.

2 Ashley Bulgarelli, 'Is this Africa's newest secession dilemma?' (African Arguments, 11 February 2019) <www.africanarguments.org/2019/02/11/is-this-africa-newest-secession-dilemma/> accessed 20 February 2020.

Introduction

Independent states, such as Ghana, guard their territorial integrity and independence jealously. Hence secessionist movements are viewed as unconstitutional, liable for treason, and rebellious. There are many reasons to think that in light of prevailing international law or situations and Ghana's constitution, the secession (or breaking away) of former Western Togoland may not be possible. However, the secessionist movement seems relentless and Ghanaians must realise that this situation presents a nexus of thorny legal, political and emotive issues.

Also, If secession were possible, secessionists must bear in mind that recognition as a state is not automatic in the international arena. In the end, Ghanaians need to continue to pursue equitable development across all regions, an ethnically heterogeneous society and abandon hyper-partisanship as a means of uniting the country to prevent future attempts at secession.

A Brief History of Western Togoland

In 1884 the Germans declared three-quarters of Ewe territory as belonging to the German protectorate of Togoland.[3] This began the division of Ewe territory by colonial and national borders.[4] Following the World War I victory over Germany, the British and French shared in the spoils by splitting Togoland vertically into British (Western) Togoland and the Eastern French Togoland. This sparked off the spirit of Ewe reunification within British Togoland.[5] A competing wave of nationalistic sentiment in Western Togoland centred around groups of people within this region including the Ewe, who first encountered education and development through the German tradition also arose.[6] Western Togoland became a playground for any person who sought to influence the future of the territory.[7]

3 Bulgarelli (n 1), 224-225
4 Ibid
5 Ibid
6 Ibid
7 Ibid

There were three prevailing ideologies:[8]

I. For a united Eweland

II. For an independent Western Togoland to complete Togoland reunification.

III. For integration with the British colony of the Gold Coast

The two paths which were presented for voting in the 1956 Western Togoland plebiscite were the option of union with the Gold Coast or remaining separate. The union vote was victorious although the plebiscite was fraught with ethnic divisions and political manoeuvring. This plebiscite determined the issue regarding competing nationalisms.[9]

The northern part of Western Togoland favoured a union with the Gold Coast and became the Northern Region of Ghana. The southern, majority separatists and Ewe, merged with a small Ewe territory in the southern Gold Coast to form the Volta Region. There were protests addressed to the United Nations that the votes should be considered separately, and the south should retain its autonomy as Western Togoland. These fell on deaf ears.[10]

Similar nationalist ideas that prevailed in the era of the plebiscite have been kindled in recent times. This has been fuelled by slightly different sentiments: a major one is the underdevelopment in the region. It also appears that the split of the region in recent times into the Oti and Volta regions reignited the secessionist sentiments. According to Bulgarelli, 'The Oti Region may just prove to be the hump that broke the camel's back for Ewe and Western Togolanders, and the start of a more powerful Volta Region identity.' [11]

8 Ibid
9 Bulgarelli (n 1)223
10 Ibid, 224
11 Ibid, 236

There are various strands of nationalist movements that have been identified. They are the Ewe, Western Togoland and Volta nationalism movements.[12] This article does not delve into these strands or attempt to categorise the current nationalist or secessionist movement. It would merely discuss Ghana's constitution in light of the current secessionist movement and examine the ramifications of independence or secession for Western Togoland if secession ever saw the light of day. Then it would proffer solutions to permanently put secessionist movements to rest in Ghana.

The Current Secessionist Movement In Light Of Ghana's Constitution

About six decades after the Plebiscite, on 17th November 2019, Ghanaian media reported that a group Known as the Homeland Study Group Foundation (HSGF) declared independence for the territory they call 'Western Togoland'.[13] The declaration was made by Mr Charles Kormi Kudzodzi, the Leader of the group.[14] The HSGF has been championing a cause for the secession of parts of Ghana along the border with Togo.[15] This area stretches from Kulungugu in the Upper East Region to Keta on the Southern coast by the Atlantic ocean or parts of the Upper East, Northern, North East Regions and the Volta Region.[16]

This Western Togoland area is a part of the territories of present-day Ghana. The territories of Ghana, as defined by the 1992 Constitution of Ghana, consists of 'those territories comprising the regions which, immediately before the coming into force of this Constitution, existed in Ghana, including

12 Ibid, 224-225, 231-234

13 Linda Daisie, 'Separatist group declares 'independence' for 'Western Togoland'' (My Joy Online, 17 November 2019) <www.myjoyonline.com/news/2019/November-17th/separatist-group-declares-western-togoland-independent.php> accessed February 20, 2020.

14 Ibid

15 Ibid

16 Enoch Darfah Frimpong, 'Police expose 'Western Togoland' secessionist group's plans' (Graphic Online, 6 May 2019) <www.graphic.com.gh/news/politics/ghana-news-police-expose-breakaway-group-s-plans.html> accessed February 20, 2020.

the territorial sea and the air space.'[17] The territories referred to in the Constitution include Western Togoland.

The process through which a part of a territory or subunit of a state breaks off, usually to form a new state or to join an existing neighbour is referred to as secession.[18] The definitions of secession found in legal and political science literature often sharply differ.[19] However, both definitions agree that secession involves at least the withdrawal or detachment of territory and its population from the jurisdiction of an established state.[20] Both definitions also admit that the established or parent state loses the sovereignty or the capacity to exercise its sovereignty over the detached territory.[21] To keep this paper from being too long, I will not delve into the differences. However, some relevant political issues that must be addressed regarding why secession may be justified will be raised, nonetheless.

Secession may be consensual or unilateral. Unilateral secession is the breaking away of a territory of a state without the consent of the parent of already existing state.[22] Such an occurrence breaches the territorial integrity and political unity of an existing state and consequently begins a conflict between secessionist movements and the government of the existing state.[23]

Whether or not a demand for secession is made; or how the demand plays out if it is made may depend on Constitutional design of the existing state.[24] Constitutions, rarely, may make explicit provisions or provide procedures for secession.[25] However, it is more common for states to prohibit secession

17 1992 Constitution of Ghana, Art 4(1)

18 Tom Ginsburg, 'Constitution Brief: Secession' (IDEA, August 2018) <www.idea.int/sites/default/files/publications/constitution-brief-secession.pdf> accessed February 20, 2020

19 Aleksandar Pavković, 'Secession and its diverse definitions,' <www.auspsa.org.au/sites/default/files/seccession_and_its_diverse_definitions_alexsandar_pavkovic.pdf> accessed March 8th, 2020

20 Pavković (n 19)

21 Ibid

22 Aleksandar Pavković, 'Recognition of unilateral secession,' (The Routledge Handbook of State Recognition, 2020) < https://www.academia.edu/40834114/Recognition_of_unilateral_secession> accessed 9 March 2020, 161-162

23 Pavković (n 22)

24 Pavković (n 19)

25 Ibid

either expressly or implicitly in their constitution.[26] A constitution may require citizens to commit to the territorial integrity of the country, and this can mean that anyone who advocates secession might be violating the constitution.[27] The constitution may also prohibit political parties organized based on ethnicity or religion, or organised in a manner which undermines the basic democratic order or existence of the state.[28]

The 1992 Constitution does not appear to envisage or support secession. As applicable within the territory of Ghana, it provides procedures for creating new regions within the country, altering the boundaries of existing regions or merging various regions.[29] However, there is no provision regarding the breaking away of a part of the territory.

The wording of Article 4 of the Constitution refers to Ghana as a Sovereign State and a unitary republic consisting of the territories described. The constitution has provided that the territorial integrity of the State must be safeguarded by placing the administration of territories under the Sovereign state. This may be because an effectively controlled territory is inherent in the description of a state.[30]

The Constitution also enjoins citizens to defend the constitution.[31] Any attempt at or actual suspension, overthrow or abrogation of the Constitution or any part of it amounts to of high treason is punishable by death.[32] It gives all citizens of Ghana, at all times, the right and duty to defend the Constitution and to resist any person or group of persons seeking to disrupt it in any way.[33] This implies that to the extent that the Constitution defines the territories of Ghana and submits such territories to the Sovereign state, the citizens

26 Ibid
27 Ibid
28 Ibid
29 1992 Constitution of Ghana, Art 5
30 Under the Montevideo Convention, Article 1 describes a State as a person of international law which should possess a permanent population; a defined territory; government; and capacity to enter into relations with the other states. Moreover, the UN Charter in Article 1 promotes the protection of the territorial integrity of States.
31 1992 Constitution of Ghana, Art 3
32 Ibid
33 Ibid

must protect the territorial integrity of the state. The citizens, in whom the sovereignty of the nation resides,[34] must protect the constitution.

Again, the Constitution provides for the democratically elected government through a process in which political parties cannot be formed based on ethnic, religious, regional or sectional lines.[35] In many constitutions in the world, such a provision would aim to limit homogenous organisations which would promote secessionist ideologies.[36]

Furthermore, the Constitution outlines various human rights which ought to be protected or promoted by the state. Most of the rights guaranteed under the Constitution are found in both 1966 United Nations Covenants on Human Rights to which Ghana is a party. These covenants both commence with the phrase "all peoples have the right of self-determination." The Constitution, however, does not provide explicitly for a right to self-determination. The principle of self-determination, under international law, is to the effect that the people of a colonially defined territory may freely determine their political status. Such determination may result in independence, integration with a neighbouring state, free association with an independent state or any other political status freely decided upon by the people concerned. Within the context of the creation of statehood, it is the principle that preserves the sovereignty and independence of states and provides criteria for the resolution of disputes regarding the permanent sovereignty of states over natural resources.[37]

Self-determination has been used in conjunction with the principle of territorial integrity to protect the territorial framework of the colonial period in the decolonization process and to prevent a rule permitting secession from independent states from arising.[38] An existing state whose

34 Ibid, Art 1, 35 (1)
35 Ibid, Art 55
36 Ginsburg (n 18) 4
37 Malcolm N. Shaw, International Law (5th Edn, Cambridge University Press 2003) 231.
38 Shaw (n 37)

government represents the whole of the people or peoples within it and respects the principle of self-determination in its internal arrangements is entitled to protect its territorial integrity under international law.[39] Most scholars argue that territorial integrity prohibits secession because secession fragments the territory of a state. The uti possidetis juris rule which requires the maintenance of the territorial status quo to preserve stability, order and traditional legal boundaries is a major expression of this rule.[40] Hence to many, this concept of secession conflicts with the principle of self-determination.

The International Covenant on Civil and Political Rights extends the right of self-determination to citizens of independent states. Article I established self-determination as a participatory right, and Article 25 further defines the method of political participation required.[41] This includes participating in public affairs through elected representatives, voting in a manner that guarantees the free expression of the will of the voter, and access to public service.[42] A people can, therefore, assert denial of their right to self-determination where these standards are violated.[43]

Even though the Ghanaian Constitution does not expressly mention a right to self-determination, Article 33 (5) of the Constitution envisages that the explicitly mentioned rights do not exclude others.[44] Therefore, the right to self-determination may be inferred. Where inferred, this right can only be exercised in accordance with the Constitution.

Within its scope, 0ne can safely assume and conclude that the Constitution recognizes the right to self-determination. This

39 Jeffrey L. Dunoff, Steven R. Ratner, and David Wippman, International Law: Norms, Actors, Process: A Problem-Oriented Approach (2nd Edn, Aspen Publishers 2006) 135.

40 The case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), (Judgment) 1986 ICJ 554, p 565-566

41 Marija Batistich, 'The Right to Self-Determination and International Law' (1997) Auckland U. L. Rev. 1013 < www.nzlii.org/nz/journals/AukULRev/1995/7.pdf> accessed 20 February 2020, 1020.

42 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 25

43 Batistich (n 41)

44 In the case concerning the Ghana Lottery Operators Association & Others v. National Lottery Authority (2008) J6/1/2008, Date-Bah JSc alluded to the fact that there were rights which were not mentioned in Chapter 5 of the Constitution but nevertheless were regarded as fundamental human rights or freedoms were protected under the constitution. He added that "Evidence of such rights can be obtained either from the provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states"

is to the extent that citizens are guaranteed their right to participate in governance and the right to be adequately represented to ensure the development and realization of other human rights. These rights are entrenched in the Constitution in Chapter 7. Chapters 8, 9 and 10, which provide for the various arms of government, do not discriminate or specify which region of the country persons who are eligible to be elected or appointed must be from. All citizens are guaranteed equal opportunity to represent their people or be represented. These reasons fuel the assumption and conclusion that the Constitution of Ghana recognizes the right to self-determination.

Viewing the history of the Gold coast and Western Togoland through the lens of this concept of self-determination, one may infer that the plebiscite by which Western Togoland became a part of the Gold coast (so that both together became Ghana)[45] was an act of self-determination. The process by which Ghana attained independence through decolonisation was also an act of self-determination. This principle of self-determination, which is closely associated with the principle of sovereignty, territorial integrity as well as the independence of the whole of Ghana's territory appears jealously guarded under the 1992 constitution. Thus, it is no surprise that secessionists are arrested and accused of rebelling against the constitution or having committed treason. Independent states guard their territories and independence jealously. Thus, secessionist movements are viewed as liable for treason or unconstitutional acts.

Even though the concept of self-determination can develop further to include the right to unilateral secession from existing states, some authors believe that this has not yet convincingly happened.[46] Reigl suggests that there are three historical-political situations which lead to the unilateral declaration of an entity have been categorized. They include:

45 The University of Central Arkansas, 'British Gold Coast/Togoland (1946-1957)' <www.uca.edu/politicalscience/dadm-project/sub-saharan-africa-region/british-gold-coasttogoland-1946-1957/> accessed February 20, 2020

46 Shaw (n 37), 263

1. Secession in compliance with the right to self-determination: i.e. entities which declared independence during the decolonization process (This view regards decolonization as secession[47]),
2. Secession in conflict with the right to self-determination: i.e. entities forming on a dependent territory which did not undergo the decolonization process and whose emergence conflicted with the principle of a nation's right to self-determination
3. Secession outside the context of decolonization (a fairly large group of entities emerging after formal decolonization of dependent territories and the establishment of internationally recognized sovereign states, on whose territories there were post-independence attempts to unilaterally declare independence for parts of such territories).[48]

Is There A Right To Secede?

Arguments against secession suggest that the very existence of a right to secede may stifle efforts at coexistence in the undivided state which would include the adoption of federalism or regional autonomy (which might address some of the grievances of secessionist minorities).[49] Also, there is the view that secession does not follow democratic principles because secessionists do not want to accept the rule of the majority in a state.[50]

On the other hand, As J. Raskin has written, "governmental legitimacy depends upon the affirmative consent of those who are governed."[51] Thus where the people withdraw their

47 Pavković (n 19)

48 Martin Reigl, 'Secession in the post-modern world: cases of South Sudan and Somaliland,' (2014) 58 AGUC 173 <www.researchgate.net/publication/283939425_Secession_in_post-modern_world_cases_of_South_Sudan_and_Somaliland> accessed 20 February 2020, 181

49 Miljenko Antić, 'Procedure for Secession' (2007) 44 Croat. Pol. Sci. Rev. 145–159, 147

50 Ibid

51 Ibid

consent to the rule of a majority in the parent state; but within their territory express, by a majority, their desire to secede, the latter must prevail.[52] And this must be the case regardless of the presence or absence of oppression or violations of human rights or persecution.[53] For example, in 1905, the majority of people in Sweden (which comprised the states of Sweden and Norway) was probably against the secession of Norway. Nevertheless, in Norway, 368,208 people voted for secession and only 272 people voted against secession. The majority within Norway prevailed over the Majority within the parent state of Sweden.[54] The referendum carried out on the territory that seeks to secede was considered more important.[55]

However, in practice, some jurisdictions do not hold the view that a referendum is the only important consideration. The Canadian Supreme Court, in a response to a request by the Canadian parliament for an opinion on the legality and unilateral secession under both Canadian and international law,[56] held that Quebec could not unilaterally secede, but that the federal government would be obligated to negotiate secession if there were a clear majority in the territory were in favour, as determined by a clear expression of will in a referendum. The court also noted that 'international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.'[57]

It appears that the Canadian constitutional court acknowledges a right to secede if it is consensual and if the majority of the people in the territory agree to it. However, in the case of the Quebecers, a constitutional referendum in 1995 organized to determine whether the Quebecers were in favour of secession yielded a majority of 50.58% pro-unionist votes supporting a remain in Canada.

52 Antić, (n 49)
53 Ibid, 152
54 Ibid
55 Ibid, 151
56 Reference re Secession of Quebec [1998] 2 S.C.R. 217
57 Ibid, 280 [122]

In a more recent example, the Spanish government has resisted attempts at secession altogether, referring to it as unconstitutional. Spain's Constitutional Court officially annulled the Catalan parliament's unilateral declaration of independence by declaring it unconstitutional and void.[58] In Catalonia, two unilateral referendums in contravention of Spain's 1978 constitution, which is founded on the "indissoluble unity of the Spanish nation,"[59] have been marred by violence. Subsequently, there have been arrests and trials for treason and rebellion; and self-imposed exile of a few pro-secessionists.[60]

Many scholars assert that the right of self-determination entitles people subjected to extreme oppression or unremitting persecution from the side of the central government to secede.[61] Essentially, the people group seeking to break away must assert and prove that they are an oppressed minority and lack any reasonable prospect for redress. In the case concerning the secession of Quebec, the Canadian supreme court assessed the possibility of the operation of this rule. The court examined whether the Quebecers were victims of attacks on the physical existence or integrity or massive violations of human rights; whether they had been denied access to participate in government and whether they could freely make choices and pursue social and economic development within Quebec, across Canada and throughout the world.[62]

The court noted that out of the 40 of the last 50 years preceding its opinion, the prime minister of Canada had been Quebecer. Between 1989 and 1997 many important positions in the country had been held by Quebecers.[63] Quebecers were

58 Sam Jones, 'What is the story of Catalan independence – and what happens next?' (The Guardian, 14 October 2019) <www.theguardian.com/world/2019/oct/14/catalan-independence-what-is-the-story-what-happens-next> accessed February 20, 2020
59 Ibid
60 Ibid
61 Reigl (n 48), 182; Shaw (n 37), 444
62 Dunoff, Ratner and Wippman (n 39), 134-136
63 Ibid

equitably represented in the legislature, judiciary and the executive arms of government.[64] Also, they could freely make choices and pursue social and economic development within Quebec, across Canada and throughout the world.[65]

Bringing this home into the Ghanaian context, it is instructive to examine whether natives of former Western Togoland are victims of attacks on the physical existence or integrity or massive violations of human rights. Other issues to consider are whether they have been denied access to participate in government and whether they can freely make choices and pursue social and economic development within and across Ghana and throughout the world.

Arguably, natives of former Western Togoland are neither victims of attacks on the physical existence or integrity, nor massive violations of human rights. Some may argue that the integrity of the region has been tampered with due to the split of Western Togoland into the Oti Region and the Volta region. However, this development occurred due to a referendum in which a whopping majority of people in the Oti Region preferred a split region to foster development.[66] Which again is an act of self-determination exercised within the scope of the 1992 constitution.

Moreover, many natives of former Western Togoland would or could agree that they have not been denied access to participate in government. Beginning with former president Jerry John Rawlings, Philip Gbeho, AKP Kludze, Gbadegbe JSC we can name many from the region who have served in the executive, legislature, and judicial arms of government. Natives of former Western Togoland can freely make choices and pursue social and economic development within and across Ghana and throughout the world.

Going by the criteria set out in the case regarding Quebec, secession may fail in the case of the proposed secession by

64 Ibid
65 Ibid
66 Bulgarelli (n 2)

the former Western Togoland. This is because the current circumstances of people from that region do not fulfil the criteria laid out in this case study.

However, flowing from the points raised in this section, the answer to the question of whether Western Togoland has a right to secede may not be cut and dried. Nevertheless, if secession were possible, the seceding entity must be prepared for the aftermath of secession.

Emergence From Secession, Statehood And Recognition

States have been formed through peace treaties (creation of new states in Western Europe after World War I) and mergers of different states (Federal Republic of Germany & the German democratic republic; North and South Yemen). There have also been dissolutions of states (the USSR and the Socialist Federal Republic of Yugoslavia (SFRY), the Austro-Hungarian Empire) and decolonization of colonized territories of states (Many African states including Ghana, Côte D'Ivoire, Togo, Nigeria and many states in Latin America). Then there is secession (Pakistan from India: 1947; Bangladesh from Pakistan: 1971; Eritrea from Ethiopia: 1993; South Sudan from Sudan: 2011).[67]

Regardless of how states are formed, they must assert their statehood. Statehood is asserted and exerted in a framework of a process of claim, effective control, and international recognition.[68] A people may attain the first two because those factors are internal; however, the concept of recognition is external and depends on the international community. The challenge with unilateral secession is that other states are reluctant to view the entity emerging from it as a State because of risks involved. Such risks include the ripple effect on other nations where more secession may be triggered, the

67 Dunoff, Ratner, and Wippman (n 39), 112
68 Shaw (n 37), 444

recognition of rogue non-state actors or rebel groups and the weakening of efforts of independent states to quell rebellions. States would hold off recognition to avoid premature recognition of an insurgent group while a government tries to regain its hold of a territory. Also, the recognising state would effectively be denying the host state's sovereignty by supporting the breach of its territorial integrity.[69]

However, a lack of recognition implies that other states would not relate with the emerging state as a state properly so-called. This emphasizes the general aversion to unilateral secession in the international community.

There are two views of statehood. The declarative view and the constitutive view. According to the constitutive view, the political existence of a state is independent of recognition by the other states. Even before recognition, the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. Recognition merely restates what already exists.[70] However, recognition is an element of statehood and statehood is not merely a satisfaction of some criteria.[71] Under this theory, Unrecognized states are not entitled to rights and responsibilities. According to Oppenheim, "Recognition while declaratory of an existing fact is constitutive in nature, at least so far as concerns relations with the recognizing state."[72] This is the risk regarding unilateral secession as demonstrated in the Somaliland situation as discussed below.

Secession may be successful or semi-successful or not successful at all. By 'successful' I mean that there would be an emerging state which is duly recognized as a new state by other states. The most recent success is an African example: the emergence of South Sudan. The process of (consensual)

69 Pavković (n 22), 161
70 Dunoff, Ratner and Wippman (n 39), 138
71 Dunoff, Ratner and Wippman (n 39), 138
72 Ibid

secession of South Sudan from Sudan involved the signing of the Comprehensive Peace Agreement between the Government of Sudan and the Sudan People's Liberation Movement.[73] (This statement appears to be an oversimplification of the process. However, this merely highlights an example of a state which has successfully emerged from secession.)

On the contrary, Somalilanders remain trapped in de facto statehood without wide international recognition after undergoing unilateral secession.[74] Secession with the consent of the central government in case of South Sudan and the continuing struggle for independent statehood in Somaliland thus provides us two cases that illustrate the preconditions expected by the international community to agree with secession. The International community's agreement is demonstrated by a recognition of the seceded territory as a state.

Somaliland made significant progress in its international networking. Somaliland has established offices in the USA, Canada, the UK, Sweden, France, Norway, Belgium (Brussels), Ethiopia, Djibouti, Ghana, Kenya, South Sudan, South Africa, and Yemen, and the Somaliland passport is accepted by South Africa, Kenya, Djibouti, and Ethiopia.[75] However, its status as an unrecognized state prevents it from successful political and economic development, building relations at regional and global level, or receiving international loans or development aid. [76] Landlocked Ethiopia trades closely with Somaliland as its port at Berbera is the second-most important harbour, after Djibouti. Due to imports to and exports from Ethiopia, Ethiopian Airways has regular scheduled flights to Berbera.[77] In May 2012 governments of Somaliland and Djibouti signed agreements enhancing their diplomatic, economic,

73 Reigl (n 48), 179
74 Ibid, 179
75 Ibid, 186
76 Reigl (n 48), 186
77 Ibid

and security relationship.[78] Authorities of other countries paid a visit to Somaliland at various levels, including France, Great Britain, Switzerland, or the USA.[79] German naval ships operate from the port of Berbera, trade between Somaliland and Sweden is increasing.[80]

However, Somaliland formally applied to join the African Union in 2005 and the application is still pending, it also seeks observer-status in the Commonwealth, East African Community or Organisation of the Islamic Conference. It is not a member of the United Nations yet. The reluctance in recognition is due to the fear of setting off a domino effect and destabilizing the continent.[81]

In the same way, unilateral secession for Western Togoland may give the people of Western Togoland some 'autonomy' but may largely merely put the region in Limbo. There is no guarantee of recognition if Western Togoland takes this path.

Emergence From Secession And Succession

The emergence of new states (from secession) is followed by questions of succession to treaties or international agreements and property. The concept of state succession refers to the replacement of one State by another in the responsibility for its international relations or the transfer of a territory from one State (the predecessor State) to another State (the successor State).[82] This implies that secession would lead to a new factual situation in which a state is substituted for another in the sovereignty over a given territory.[83]

78 Ibid
79 Ibid
80 Ibid
81 Joshua Keating, 'When is a nation, not a nation? Somaliland's dream of independence' (The Guardian, 20 July 2018) <www.theguardian.com/news/2018/jul/20/when-is-a-nation-not-a-nation-somalilands-dream-of-independence> accessed 20 February 2020
82 C. Emanuelli, 'State Succession, Then and Now, With Special Reference to the Louisiana Purchase (1803)' (2003) 63 La. L. Rev. 1277 < https://digitalcommons.law.lsu.edu/lalrev/vol63/iss4/19> accessed 20 February 2020, 1285
83 Rosalie Schaffer, 'Succession to Treaties: South African Practice in the Light of Current Developments in International Law' (1981) 30 ICLQ 593-627, 593

Under international law regarding treaties, the pacta tertiis principle in Article 34 of the Vienna Convention on the Law of Treaties generally precludes third parties or third states from rights or responsibilities under treaties. There are exceptions under principles of international custom found in Articles 11 and 12 of the Vienna Convention on succession to treaties[84] for treaties that create a boundary or territorial regime would continue to bind a succeeding state.[85] These are also known as 'Real' treaties because they create real rights and obligations with respect to a territory including boundary treaties, treaties governing fishing rights in national waters, or navigation rights in national waterways. In the Free Zones of Upper Savoy and the District of Gex case, the PCIJ accepted the principle that a territorial treaty is binding on a successor State.[86] Following a dispute regarding the position of a customs line, the PCIJ held that France was bound to accept this customs line because she succeeded Sardinia in the sovereignty over that territory.

Moreover, In the Gabčíkovo-Nagymaros Case Hungary and Czechoslovakia signed a treaty in 1977 to jointly build the Gabčíkovo-Nagymaros system of locks and dams on the Danube River. Hungary later elected to abandon the project. However, Slovakia, the successor to Czechoslovakia, completed work on a variant of the system and began damming the river. This led to a dispute which Hungary and Slovakia submitted to the ICJ. The ICJ upheld Slovakia's contention that the 1977 treaty remained valid and binding in keeping with international custom because it was a treaty that established a territorial regime.[87] The court reasoned that the treaty created rights and obligations "attaching to" the parts of the Danube and thus the Treaty itself could not be affected by a succession of States.[88]

84 Vienna Convention on the Succession of States in Respect of Treaties (1978), 1946 U.N.T.S. 3

85 Documents of the United Nations Conference on Succession of States in Respect of Treaties, 1977-1978, Volume III A/CONF.80/16/Add.2, 26-27

86 Case of the Free Zones of Upper Savoy and the District of Gex (Switzerland v France) 1930 P.C.I.J. Rep Series A No. 24 (Order of Dec. 6) [22]

87 The court held that this was within the meaning of Article 12 of the 1978 Vienna Convention on Succession of States in Respect of Treaties (the VCSS-T) which the court considered a reflection of custom.

88 Gabčíkovo-Nagymaros Project (Hungary / Slovakia) (Judgment) [1997] ICJ Rep 7, 72

With reference to parties to bilateral treaties, upon secession, the emerging state may be considered a third state. However, the International Law Commission (ILC) has explained that new states within this context are not third states due to the legal nexus that existed between the treaty and the territory before the date of the succession of the states.[89]

Bilateral treaties may automatically continue to be in force as of the date of succession if state parties explicitly or tacitly agree to such a continuation. According to the Restatement (Third) of the Foreign Relations Law of the United States, when part of a state becomes a new state, it does not succeed agreements of the predecessor state unless the state expressly or by implication accepts the agreement and the other party agrees or acquiesces.[90] However, usually, after secession or dissolution, unless the new state succeeds the predecessor, it does not become a party to treaties or assume the rights or obligations it would previously have been subject to.

If Ghana has any agreements regarding any of the existing boundaries of Western Togoland or its territorial waters such as the Volta river or lake, these would be succeeded by the new state. If there are treaties with other states who would recognize Western Togoland and continue relations with it based on existing treaties and the new state consents, they would apply. However, ordinarily, agreements which Ghana is a party would not automatically benefit Western Togoland if the latter after secession. These may include especially Bilateral International Trade Agreements; as well as treaties of regional and global organisations such as the United Nations, the African Union, the Economic Community of West African States, among others.

A lack of recognition would imply that other states would be unwilling to partner with the new state and without this, development would come to a halt. For example, in 2019, Ghana agreed with the Ivory coast (because the two nations

89 Malgosia Fitzmaurice, 'Third parties and the Law of Treaties', J.A. Frowein and R. Wolfrum (Eds) (2002) 6 Max Planck UNYB 37-137, 77

90 Dunoff, Ratner, and Wippman (n 39), 147

together produce 65% of the world's cocoa) to coordinate on cocoa bean prices to protect farmers.[91] If Ghana and Ivory Coast are able to achieve this, Cocoa farmers in Western Togoland may not benefit from it in the event of secession. This kind of situation depicts how secession would lead to losses for both Ghana and Western Togoland.

There may also be a question of whether responsibilities, debts, archives or property would be transferred as well. In the case of partial succession (where the predecessor State continues to exist), it seems that property located on the territory transferred or which is linked to that territory would pass to the successor State.[92] Likewise, debts incurred directly by the local government of the territory transferred or incurred by the predecessor State for the improvement of that territory would pass to the successor State.[93] Although this appears fair, this rule is not clearly supported by State practice.[94]

The states involved thus may agree on what may pass on to the successor or remain with the predecessor. In the case of the Louisiana purchase, the Treaty of 1803 provided for the passing to the United States of "all public lots and squares, vacant lands and all public buildings, fortifications, barracks and other edifices which are not private property."[95] The United States agreed to take over the debts due by France to American citizens which arose from the so-called Quasi-War.

In non-colonial situations, the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts[96] is not applicable but may provide some guidance. The convention provides that the successor State is entitled

91 Sofia Christensen, 'Cocoa buyers agree to floor price proposed by Ghana, Ivory Coast' (Reuters, 12 June 2019) <www.reuters.com/article/us-cocoa-ivorycoast-ghana/cocoa-buyers-agree-to-floor-price-proposed-by-ghana-ivory-coast-idUSKCN1TD20G> accessed 20 February 2020

92 Emanuelli (n 82), 1287

93 Ibid

94 Ibid

95 Convention between the United States of America and the French Republic (Signed 30 April 1803) (1803) 7 Bevans 818

96 (1983), UN Doc. A - CONF. 117-14

to an equitable part of the public property of the predecessor State which is not otherwise transmitted.[97] The predecessor State may, in return, be entitled to some compensation.[98] Regarding debts, the Vienna Convention provides that, unless the parties agree to the contrary, an equitable portion of the public debt of the predecessor State passes to the successor State. To establish that portion, factors such as the amount of property, rights, and other interests that the successor State has acquired by succession may be taken into consideration.[99]

There are circumstances where the successor state rather may claim a right to compensation. These include situations where the secessionist territories have been exploited or have been the 'milk-cow' of the parent state or have.[100]

Concerning public archives, the basic idea which is reflected by the Vienna Convention of 1983 is that the successor State is entitled to documents which are necessary to administer the territory transferred or which are directly related to that territory.[101] In the case of the Louisiana purchase, the Treaty of 1803 provided that "the archives, papers and documents relative to the domain and sovereignty of Louisiana" will be transmitted to the United States authorities.[102]

Assuming secession occurs in the Ghanaian-Western Togoland context, this implies that some Ghanaian treaties may apply to Western Togoland. Whereas assets that belong to Ghana may remain in Western Togoland, the latter would have to compensate Ghana for these assets. Western Togoland may have to take up some debt from Ghana as well.

It appears that so far, many have toyed with the idea of secession without considering all the implications of a failed attempt at secession, or a successful attempt in the eyes of the

97 Articles 17 (1) (c); 18 (1) (b), (c)
98 Articles 17 (3); 18 (2)
99 Articles 37 (2); 40 (1); 41
100 Michael Tomz, 'Political Obligation and Political Secession,' (1994) Working Paper<www.web.stanford.edu/~tomz/working/poloblig.pdf> accessed on March 7, 2020.
101 Arts 27 (2) (a), (b); 28 (1) (b), (c); 30 (1) (a), (b); 31 (1) (a), (b)
102 1803 Convention (n 95) Art 2

international community. I hope the foregoing would provide some perspective to both pro-unionist and pro-secessionists to engage in more meaningful conversations regarding secessionist ideas.

These are the considerations which I think should be at the forefront of national discussions to curtail secessionist inclinations or ideologies; to prevent the formation of more secessionist groups in Ghana.

The Way Forward For Ghana: Other Considerations

While discussing the foregoing in national discussions, the issue of citizenship and familial relationships of persons from or living in the Western Togoland area must not be excluded. What would be the nationality of persons whose hometown is in Western Togoland but are Ghanaians? Would they be able to decide to remain Ghanaian? How about persons who live in Western Togoland and want to remain Ghanaian or have Ghanaian families or vice versa? Secession would lead to uncertainties regarding citizenship and it would tear families apart.

The 4th republic of Ghana is almost three decades old. These are times when Ghana should be maturing past all the issues that hold us back from ensuring that our nation is united. The Ghanaian society is continually becoming more and more culturally heterogeneous but politically hyper-polarised. Even though there are more inter-ethnic marriages, tribalism remains a problem in Ghana. The country is becoming more politically polarised as our democracy grows. Political power and development are bound hand and foot to ethnicity. There is a lack of equitable development which is heightened by cronyism, corruption; rural-urban migration and lack of continuity in development projects whenever there is a change in government. It is, therefore, not surprising that an ethnic group or peoples in the more rural regions would decide to pursue autonomy.

We need to give thought to the issues fuelling the calls for secession in a manner that enables us to nip the problem in the bud. This is because the situation could easily degenerate into conflict. We have the example of Cameroun to learn from. On 1 January 1960, the French colony of Cameroon gained independence and became Cameroon.[103] Neighbouring Nigeria gained independence from the UK on 1 October 1960.[104] The UK also controlled the former German colony of French-speaking Cameroon which is located between Nigeria and Cameroon.[105] its citizens were given a choice of joining either Nigeria or Cameroon. Southern Cameroonians opted to unite with Cameroon, while Northern Cameroon joined Nigeria.[106] Cameroon's English-speakers claim they have been marginalised for decades by the central government and the French-speaking majority. The current crisis started in 2016 when lawyers and teachers went on strike over the use of French in courts and schools. In October 2017, activists declared autonomy over the two English-speaking regions - a move rejected by Cameroon's President Paul Biya. Some took up arms in 2017 and the crisis has forced more than 500,000 people from their homes.[107]

Admittedly the Cameroonian situation differs immensely from the Ghanaian Situation in that in Cameroon, decolonisation did not bring about an end to oppression led to Anglophones becoming a category of inferior people.[108] Government investment in education, healthcare, roads, industry and even electricity generation has been centred in the Eastern French-speaking areas.[109] Most of the infrastructure in the Western Anglophone side of the country was built before

103 The British Broadcasting Corporation, 'Cameroon crisis: Ambazonia separatists get life sentences,' <www.bbc.com/news/world-africa-49406649> accessed March 9th, 2020
104 Ibid
105 Ibid
106 Ibid
107 Ibid
108 D.P. Morris-Chapman, 'An Ambazonian theology? A theological approach to the Anglophone crisis in Cameroon', 75(4) HTS Teologiese Studies/Theological Studies a5371. <www.researchgate.net/publication/336143688_An_Ambazonian_theology_A_theological_approach_to_the_Anglophone_crisis_in_Cameroon> accessed 8 March 2020
109 Ibid

(1961) reunification – and it is fast crumbling.[110] Until the University of Buea was founded (1992), it was impossible to pursue higher education in English. It is reported that there is widespread discrimination. Most positions in government – the civil service, the military and the police force – are given to Francophones. Even the ambassadors and high commissioners appointed to serve in English-speaking countries like Nigeria, the USA and the UK are Francophones.[111] [112]

While this may not mirror the Ghanaian situation, the common thread between both situations is that the history of the secessionist movements arose from the effect of colonialism and decolonisation. Also, the claim of underdevelopment is part of the basis for seeking to secede.

Since Ghanaians want our country to be a better place, we as a nation must address any issue that would fuel the cause of secessionists. Secession may not provide solutions or answers to inequitable development. Regardless of where we are from in our country, we need to contribute to unifying and developing our country. Everyone must begin to consider the causes and possible outcomes of this situation and there must be national dialogue and action (development) to promote the unification of the Country. This is very important because secession poses both legal, political and highly emotive questions which must be the subject of dialogue to make progress in whichever direction on this issue.

110 Ibid
111 Morris-Chapman (n 108)
112 Ibid

Conclusion:

It appears that so far, some Ghanaians who are pro-secessionists have toyed with the idea of secession without considering all the implications of it, in the eyes of the international community, and the effect it would have on natives of the territory. Pro-unionists have also not included these implications in nationwide discussions. What would be the aim of unilaterally breaking away from an existing state when, consequently, being recognised as a new state is near impossible? Why should the symptoms (secessionist movements) of underlying problems be quelled only by arrests and prosecutions when in addition those problems of under development and non-inclusion need to be resolved? Why risk other secessionist movements arising elsewhere in our country? We need to engage in more meaningful and informative conversations regarding secessionist ideas and be channel our efforts into unifying and equitably developing the country.

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ISSN 2720-7757