GHANA SCHOOL OF LAW STUDENT JOURNAL

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SPECIAL GUEST CONTRIBUTION

ARTICLES

NOTES

COMMENTARY

IN MEMORIAM

The 2021 volume of the
Ghana School of Law Student Journal is
dedicated to the memory of
the late Justice of the
Supreme Court,

"His Lordship Samuel Marful-Sau"
who departed from us on the 10th of August, 2021.

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A Note from the Editors

After more than a year, the Covid-19 pandemic lingers and casts a shadow over the future of our world. No single event has tested and threatened to unravel the social, economic and political structures that we have come to take for granted, at least in our lifetime, like the Covid-19 pandemic. In one fell swoop, we have seen markets collapse, a cloud of uncertainty hang over the feasibility of elections, a world shrinking through technology feel vast again as we socially distanced, forsaking the right to move freely, assemble at will, much less travel across countries and regions.

That pause also brought into sharp focus many pre-existing challenges, nationally and globally. In Ghana, high-handedness among law enforcement agencies and the extent of government derogation from guaranteed constitutional rights came to the fore, side by side, the effort to tackle the pandemic. In our sub-region, we bore witness to the reckoning of a much more brutal legacy of human rights violations in Nigeria with the '#EndSARS' protests. Around the world, the death of George Floyd in the USA, captured on video, galvanized good people everywhere to re-echo a long cry for racial justice. Still, within that time of suspension of normalcy, we saw signs that our planet, in peril of climate change, can be brought back from the precipice if the world can muster the collective effort.

There is still optimism that the world would seize this moment created by the pandemic. In many places around the globe and across many spheres of endeavour are renewed demands for participation, inclusion, equity, recognition and reform. In many ways, the law is and will continue to be front and centre in making or resisting these demands. From our standpoint, it is clear to us that we are living through a watershed in history; whether nationally or globally, a post-pandemic world has to be remarkably different in many ways.

When we were appointed to produce this year's volume of the GSLSJ, we accepted that duty, mindful of the changing context of our country and our world. The pandemic has upended many settled ways of doing things and left thorny questions from employment and rents in the informal sector to business contracts, financial arrangements and service delivery in the formal sector, in addition to many issues bordering on state-citizen relations. Regardless of our station in life, whether we work in the informal sector or the formal sector, whether we are working-class or property-owning, the pandemic has useful lessons. It has demonstrated that the demands of citizenship, beyond our own needs, requires that every one of us have a working understanding of legal relations, knowledge of our government, and, more importantly, our constitutional ideals, which our courts have a unique role in upholding. It is our surest bet if we will make it through similar points of stress in the future. The more we understand our institutions and laws, the more we can buy into a common program for our collective welfare and negotiate and re-negotiate the terms on which we will continue to live in harmony.

Yet, the reality leaves much to be desired here in Ghana and even in many advanced democracies. Professor Ronald Dworkin once described a similar problem in his famous work, *Law's Empire*. He wrote:

> No department of state is more important than our courts, and none is so thoroughly misunderstood by the governed. Most people have fairly clear opinions about how Congressmen or Prime Ministers or Presidents or foreign secretaries should carry out their duties, and shrewd opinions about how these officials actually do behave. But popular opinions about judges and judging is a sad affair of empty slogans, and I include the opinions of many working lawyers and judges when they are writing or talking about what they do. All this is a shame, and it is only part of the damage. For we take an interest in law not only because we use it for our own purposes, selfish or noble, but because law is our most structured and revealing social institution. If we understand the nature of our legal argument better, we know better what kind of people we are.
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> See, Law's Empire, Harvard University Press, pp., 11.

This volume of the GSLSJ represents our very modest attempt at realignment. To respond to a growing need to bring the law closer to the wider public, who need to understand the stuff of our laws and our legal system. In so doing, as Editors, we have tried to select topics and writing that is timely and accessible to a broader audience. We accept responsibility for the success or lack thereof in these attempts. But we hope that we have built on the work of previous Editors who revived and sustained this publication over the last few years. It is work we hope future Editors will continue to improve.

The entries in this volume come in three main categories and two special entries. The first category is *full-length articles* with detailed literature reviews and more comprehensive discussions of the topics. The next category is *notes*, in which we present reviews of recent cases and legislation that impact the legal system. The final category is *commentary*, where we present a topic largely uncharted and attempt to kick start conversations in that area. Two entries stand out; the very first article in this volume is a Special Guest Contribution. The last entry is a tribute from the editorial committee to the late Justice of the Supreme Court of Ghana, His Lordship Samuel Marful-Sau.

In our Special Guest Contribution, **'We are all in this together: Covid-19 As a Leveller of Humanity',** the Dean of the University of Ghana School of Law, Professor Raymond Atuguba and Kobby Afari Yeboah, Esq., discuss the prospects of a post-pandemic world in which the lessons of Covid-19 can be, or ought to be, reasons why states adopt a new attitude to all kinds of health crisis, whether they affect the rich or poor.

Our *articles* begin with **'Of Unsettled Meanings and Uneasy Answers: A Legal Exegesis on Article 130 of the 1992 Constitution of Ghana',** where Prosper Batariwah and Ezekiel Osei critique the Supreme Court's shifting understanding of its power to interpret and enforce the constitution.

In **'Aboriginal Rights, Non-Retrospectivity and the Political Process: Akatere v. Intercity STC & Lands Commission',** Victor Nsoh Azure examines the legacy of colonial land policy in Northern Ghana and makes a case for a political process analysis by the courts in applying and correcting historical injustices against dispossessed groups.

In **'Law Practice Management in an Age of Artificial Intelligence',** Samuel Pinaman Adomako and Daniel Akuoko Dankwa Jr. explore what the age of artificial intelligence means for the legal industry.

In **'Vulnerable and Vexed: A Case for the Advancement of Consumer Protection in Ghana',** Shafic Osman analyzes the consumer protection regime in Ghana and shows pathways for improvement.

In **'Rescuing and Fortifying the Guardrails of Rule of Law in Ghana'**, Prosper Batinge takes on Ghana's declining performance on the rule of law index and discusses how the guardrails of the rule of law in Ghana could be strengthened to prevent democratic backsliding.

In the notes section, we have **'The Best Investment on Earth is Earth: Unearthing Act 1036'**, in which Irene Ali Dery reviews the newly passed Lands Act, 2020, Act 1036.

Nicholas Opoku discusses the consequences of the Supreme Court's decision in **Klomega (No.2) v. Attorney General** on public finance and financial accountability.

Abdul Aziz Gomda discusses '**Human Rights and its Enemies: Tyrone Marghuy v. Achimota School',** the outcome of that case and its impact on human rights in Ghana if any.

In the commentary section, Keziah Hillary Engman discusses surrogacy and the law in **'Surrogacy at Home and Abroad: Traversing a Multi-Billion Dollar Industry'.**

We are grateful to everyone who played a role in the successful publication of this volume.

Shafic Osman and Victor Nsoh Azure

Co-Editors-in-Chief

A.D. 2021

THE EDITORIAL COMMITTEE

ACKNOWLEDGEMENTS

This publication was made possible by the steadfast support of the SRC president, Ms Abokomah Amissah-Koomson, and the tireless work of the team of editors and peer reviewers.

CONTENT

WE ARE ALL IN THIS TOGETHER:

COVID-19 AS A LEVELLER OF HUMANITY

Raymond A. Atuguba* and Kobby Afari Yeboah**

Abstract

The COVID-19 pandemic has shown how human everyone is. Not even the colour of our skin or eyes, the strength of our wealth, or the height of our education qualifies us for exemption from the virus. The virus pursues all of us despite the wide social and economic disparities between the Global North and South, the East and the West, the Developed and Underdeveloped countries.

The writers argue that the virus reinforces the bias of the current political structure: it is only when a tragedy strikes close to home that the 'politically powerful' are enraged to eliminate it. The infiltration of the virus into the homes of the leadership of many western and other countries marked the beginning of a concerted and calculated effort to take on the pandemic and wrestle it to the ground.

The writers take the view that COVID-19 is given special treatment because of its equal health impact on the high, mighty, and powerful. Far more deadly and contagious diseases like Ebola have dwelled amongst us for a very long time, and yet, because of the confined nature of these viruses to mostly the Africa region, the global efforts to combat them are not as fierce.

This paper, therefore, discusses how COVID-19 puts every human race in the same seat in terms of contraction of the virus and sometimes death. It talks about how the non-discriminatory COVID-19 has spurred on the global powers to eradicate it. The paper also tells us that thousands of lives are being consumed each day by 'African diseases', but no one cares as much because those diseases are not levellers; they are diseases of the poor and weak.

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1.0 Introduction

Everything and everyone, including the world's most powerful people, in the world's richest and most powerful countries, has taken a severe Coronavirus (COVID-19) beating. In the much earlier events leading up to this, Trump, a former President of the United States, had ridden on a theory that America could do without the rest of the "parasitic world". The Coronavirus disease tramped the Trumpian theory. The virus negated the thinking that any country could remain isolated from the rest of the world. It discarded the philosophy that the powerful could never be vulnerable if they built a wall around themselves. We have come to terms with the fact that COVID-19 breaks the social-inequality scale and demands any victim of its own choosing.

COVID-19 affects the rich as equally as it affects the poor. Tom Hanks, Idris Elba, Dwayne Johnson, Kanye West, Larry King, Sekou Smith, Kenzo Takada, Herman Cain, Roy Horn, Sharon Osbourne, Ellen DeGeneres, Ben Carson, Vivica Fox, J.K. Rowling, Prince Charles, Princess Sofia of Sweden, President Donald Trump, Prime Minister Boris Johnson, Sarah Palin, a staff member of former US Vice President Mike Pence's office, Spain's Deputy Prime Minister, Brazil's President Jair Bolsonaro's Press Secretary, Nigerian President Muhammadu Buhari's Chief of Staff, the Vice President to the National Assembly in Burkina Faso, all tested positive for COVID-19 and some of them have sadly passed on. In particular, two musical giants in West Africa – Manu Dibango and Aurlus Mabele, have died from the disease.

If there is something we should learn from COVID-19, it is this: we are all in it together-pink, white, brown, coloured, dark, and black; it is no respecter of persons-filthy rich, rich, formal sector, middle-class, informal sector, poor. It challenges every system of governance-people-centred, democratic, populist, monarchical, dictatorial, undemocratic. And it brings all systems for the management of the economy to their knees: populism, capitalism, open economies, mixed economy, socialism, communism. It is disheartening, however, that it had to take COVID-19 to instil in us this basic truth about our humanity: we are all in it together.

The global campaign against the pandemic provokes this discussion: diseases have plagued the African continent for many years, but they have not received nearly the attention that COVID-19 has enjoyed for about twenty (20) months now. We are intellectually vexed that after all the global partnerships between the Global North and the Global South, these "African diseases" have not been

offered the attention and care they deserve. We are even more embarrassed that in our own backyard, Ghana, it was COVID-19 that prompted our leaders to invest in better healthcare infrastructure. This comes after decades of a rugged, almost suicidal, and predominantly non-existent healthcare system. We are not calling for a slow-down on the approach to curb the COVID-19 menace. Our humble but politically-incensed position is that, if we are all in it together, we should be deeply committed to each other's plight without discrimination and should thereby pay more attention to the "African diseases" that claim many more lives than COVID-19.

The article establishes that COVID-19 is an equal opportunity disease and affects everyone in the world. It also provides context on how COVID-19 levels humanity on the national scale. The article addresses the point that COVID-19 has received far greater attention than any other disease, not because it is a global pandemic, but because it affects a category of people that are positioned to resuscitate humanity from deadly diseases. The article teaches us that global powers can equally be mobilised to reduce the infection and mortality rates of African diseases and viruses if they really wanted to; but they are not incentivised to do so.

2.0 Covid-19 As An Equal Opportunity Disease

The COVID-19 pandemic mocks any form of social immunity that the rich and powerful had prior to its launch. The new equality plane introduced by the pandemic meant that all humanity, no matter their colour, status, creed, identity, or geographical location were at risk of contracting the virus.

When the virus emerged in Asia and found its way into parts of Europe and America, we, Africans, held onto a false hope that the virus would not thrive on the continent. Together, we shared in the belief that the virus was a Western affair, and Africa, the known bearer of unpleasant diseases, for once, had dodged a bullet.

On no other day but the day of love and chocolates, 14 February 2020, the first COVID-19 case in Africa was reported in Egypt.[1] A new theory began taking shape after the second COVID-19 case was confirmed on 25 February 2020 in

[1] Egypt Today Staff, 'Egypt announces first Coronavirus Infection' *Egypt Today* (Egypt, 14 February 2020) <https://www.egypttoday.com/Article/1/81641/Egypt-announces-first-Coronavirus-infection> accessed 21 August 2021

Algeria,[2] also in Northern Africa. We now convinced ourselves that COVID-19 was a disease for the more developed African states with much cooler weather conditions. This theory did not live past March 2020. African countries with ailing development and with the hottest temperatures year-round were afflicted by the virus. The virus had proven that it was no respecter of shanty towns or chandelier homes. It cared less about whether you could afford a Bentley or relied on a water source from the community stream.

If there was any initial theory to go by, it was that COVID-19 had taken over the world and had pulled down the boundaries of class and race. It brought all of mankind to its feet and established itself as a life-leveller. In a press briefing in the heat of the spread of the virus, The Director-General of the WHO, Tedros Adhanom Ghebreyesus, regarded COVID-19 as an equal opportunity disease. He stated, "*The COVID-19 epidemic is a threat for every country, rich & poor. We are calling on every country to act with speed, scale & clear-minded determination. We call on countries to activate their emergency plans through the whole-government approach*".[3]

The easy transmission of the virus beyond the human eye, and the inability to plug the source of infection made it difficult for anybody to ward off the virus. What made it worse was that persons who were asymptomatic could carry and spread the virus without knowing. You did not see it coming. The rich and the poor, finally, had been levelled.

The disease further established itself as a leveller when it triggered a domino effect declaration of state of emergencies, closure of borders and domestic lockdowns by governments throughout the world.[4] The necessities accompanied with physically connecting to another jurisdiction for trade, industrialization, tourism, education, amongst others, which were an important part of our daily activities, had to be suspended. The damaging effects of the virus, supported by its random selectiveness, invited these drastic measures, measures inspired by the equal opportunity risk of the virus to all.

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[2] WHO Africa, 'A second COVID-19 case is confirmed in Africa' *World Health Organization* (Algeria, 25 February 2020), <https://www.afro.who.int/news/second-covid-19-case-confirmed-africa> accessed 21 August 2021

[3] WHO, 'Rolling Updates on Coronavirus Disease (COVID-19)' *World Health Organization* (31 July 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> accessed 21 August 2021

[4] Daniel Dunford and others, 'The World in lockdown in maps and charts' *BBC* (7 April 2020), <https://www.bbc.com/news/world-52103747> accessed 21 August 2021

In the Global North, initially, the news on the Coronavirus infections was centred on common citizens. Soon, the virus aggressively penetrated the walls of power. Leaders of the most powerful countries in the world, blessed with 24-hour extraordinary protection and surveillance, still caught COVID-19. Coronavirus signalled that status was of no relevance to it. Below is a stock of the infections of these renowned world leaders:

1. British Prime-Minister, Boris-Johnson, was diagnosed of COVID-19 in March 2020. His health significantly waned, as such he was hospitalized in an intensive care unit.[5]
2. In 2020, the White House announced that then President Trump was experiencing 'mild' COVID-19 symptoms.[6] On 2 October 2020, the White House made it known that the former President and his wife had tested positive for COVID-19.[7]
3. President of France, Emmanuel Macron, contracted COVID-19 in 2020.[8]
4. Russian Prime-Minister, Mikhail Mishustin, also contracted COVID-19 in 2020.[9]

These world leaders who happen to also represent four (4) out of the five (5) permanent countries with veto power[10] on the United Nations Security Council (UNSC), are at the forefront of making life-and-death decisions that could potentially spin the world in an anticlockwise direction. This is indicative that even the world's 'big' guns, with all their authoritative ammunition, are susceptible to having their immune system attacked by the virus. In certain cases, the diagnosis led to the demise of people at the top: Valéry Giscard d'Estaing, former French President, died of complications from COVID-19 in December 2020.[11] In Africa, similarly, political leaders tested positive for Coronavirus. And in the same month of December, in 2020, according to the government of

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[5] Luke Harding and others , 'Boris Johnson and coronavirus: the inside story of his illness' (17 April 2020), <https://www.theguardian.com/world/2020/apr/17/boris-johnson-and-coronavirus-inside-story-illness> accessed 21 August 21, 2021

[6] BBC, 'Covid: Donald Trump and Melania test positive' (2 October2020), <https://www.bbc.com/news/world-us-canada-54381848> accessed 21 August 2021

7 Vox Staff, 'President Trump tests positive for the coronavirus' VOX (5 October 2020), <https://www.vox.com/21498510/president-trump-covid-19-test-positive-coronavirus> accessed 21 August 2021

[8] Martin Armstrong, 'World Leaders who have contracted COVID-19' *statista* (18 December 2020), <https://www.statista.com/chart/23091/world-leaders-who-contracted-covid-19/> accessed 21 August 2021

[9] Ibid

[10] Veto power is a special right to vote granted to the five (5) permanent members of the UNSC. The effect of the power is that if any of the five (5) permanent members cast a negative vote, a decision or resolution will not be approved. *See* United Nations Security Council, *Voting System* (2021), <https://www.un.org/securitycouncil/content/voting-system> accessed 21 August 2021.

[11] *See* BBC, 'Ambrose Dlamini: Eswatini's PM dies after testing positive for Covid-19' *BBC* (14 December 2020), <https://www.bbc.com/news/world-africa-55297472> accessed 21 August 2021

Eswatini, Prime Minister Ambrose Dlamini died four weeks after he tested positive for coronavirus.[12] A few months after, President John Magufuli of Tanzania died of COVID.[13]

The impact of the virus on leadership was felt across board in all regions of the world. We note the following leaders who were infected by the virus in 2020:

1. Jair Bolsorano – President of Brazil[14]
2. Nikol Pashinyan – Prime Minister of Armenia[15]
3. Juan Orlando Hernandez – President of Honduras[16]
4. Alejandro Giammattei – President of Guatemala[17]
5. Alexander Lukashenko – President of Belarus[18]
6. Prince Albert II of Monaco – Sovereign Prince of Monaco[19]
7. Andrzej Duda – President of Poland[20]
8. Jeanine Añez – President of Bolivia[21]
9. Boyko Borissov – President of Bulgaria[22]

Apart from world leaders, popular persons with the capacity to protect themselves from a host of other infections, but COVID-19, contracted the virus. The famous celebrities who contracted the Coronavirus include:

1. Larry King[23] – Celebrated Television Host of the Larry King Show.
2. Ellen DeGeneres[24] – Award Winning Comedian and Television Host.
3. Lewis Hamilton[25] – Seven (7) time Formula-One Racing World Champion.

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[12] Ibid

[13] BBC,' John Magufuli: Tanzania's president dies aged 61 after Covid rumours' *BBC* (18 March 2021) <https://www.bbc.com/news/world-africa-56437852> accessed 21 August 2021

[14] Euronews with AP, 'Who are the world leaders that have tested positive for COVID-19?' *euronews* (2 October 2020), <https://www.euronews.com/2020/10/02/who-are-the-world-leaders-that-have-tested-positive-for-covid-19> accessed 21 August 2021

[15] Ibid

[16] Ibid

[17] Ibid

[18] Ibid

[19] Ibid

[20] Martin Armstrong, 'World Leaders who have contracted COVID-19' *statista* (18 December 2020), <https://www.statista.com/chart/23091/world-leaders-who-contracted-covid-19/> accessed 21 August 2021

[21] Ibid

[22] Ibid

[23] *See* Glamour, *Coronavirus: All the Celebrities who have tested positive for COVID-19* (2020), https://www.glamour.com/story/all-the-celebrities-who-have-tested-positive-for-coronavirus

[24] Glamour, 'Coronavirus: All the Celebrities Who Have Tested Positive for COVID-19' *GLAMOUR* (19 July 2020), <https://www.glamour.com/story/all-the-celebrities-who-have-tested-positive-for-coronavirus> accessed 21 August 2021

[25] Ibid

4. Ben Carson[26] – World Acclaimed Neurosurgeon.
5. Kanye West[27] – Multiple Grammy-Award Winning Rapper.
6. J.K. Rowling[28] – Decorated Author of the Harry Potter Book series.
7. Tom Hanks[29] – Back-to-Back Best Actor at the Academy Awards (Oscars).

As of 18 August 2021, the WHO Coronavirus (COVID-19) Dashboard records 208,470,375 confirmed COVID-19 cases, including 4,377,979 deaths worldwide.[30] The ravaging of lives by COVID-19 from every angle has brought about a heightened human instinct for survival because of its levelling phenomenon on all persons.

3.0 COVID-19 AS A NATIONAL LEVELLER

On 12 March 2020, Ghana confirmed its first two COVID-19 cases.[31] Ghanaians from all walks of life, who knew the havoc the virus could cause, feared for their lives. The well-to-do, upper-class, the professionals, the working class, entered into a recluse in their homes to escape the sting of the virus.

On confirmation of the detected COVID-19 cases, the Ministry of Health cautioned all Ghanaians to exercise social distancing.[32] Subsequently, heads of private institutions and corporations directed their workers to remain at home. Schools stopped working, and those with accommodation facilities asked students to leave for their homes. The formal sector of the population quickly took steps before the government intervened with its measures. There was no time to waste.

By video broadcast on 15 March 2020, the President of Ghana, Nana Addo-Dankwa Akufo-Addo, addressed the entire nation on the COVID-19 outbreak in Ghana.[33] The projected impact of the Coronavirus on every single Ghanaian

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[26] Ibid
[27] Ibid
[28] Ibid
[29] Ibid
[30] *See* WHO CORONAVIRUS (COVID-19) DASHBOARD, https://covid19.who.int/
[31] Yaw Asare Afrane, 'The COVID-19 situation in Ghana' RSTMH (2020), <https://rstmh.org/news-blog/news/the-covid-19-situation-in-ghana> accessed 21 August 2021.
[32] *See* GardaWorld, 'Ghana: Ministry of Health confirms first case of COVID-19 March' *GARDA WORLD* (13 March 2020), <https://www.garda.com/crisis24/news-alerts/322446/ghana-ministry-of-health-confirms-first-case-of-covid-19-march-13> accessed 21 August 2021
[33] Jonas Nyabor, 'Coronavirus: Government bans religious activities, funerals, all other public gatherings' *Citi Newsroom* <https://citinewsroom.com/2020/03/government-bans-church-activities-funerals-all-other-public-gatherings/> accessed 21 August 2021

required direct communication with the Commander-in-Chief of the Ghana Armed Forces. Indeed, we were not in normal times.

The President, in his COVID-19 first national briefing, banned *all* public gatherings, including conferences, workshops, funerals, festivals, political rallies, sporting events and religious activities.[34] The President's instructions affected persons in all of the social ranks who participated in the named gatherings.

About two (2) weeks later, the number of infections surged. The President, in another televised broadcast, visited Ghanaians again. This time, it was a declaration of a two-week partial lockdown in the heavily affected areas, namely, Greater Accra Metropolitan Area, the Kumasi Metropolitan Area and contiguous districts for fourteen (14) days, subject to review.[35] The effect of the lockdown was to restrict the movements of individuals residing in these areas with the exception of essential workers.[36] Movement for essential items like food and water was permitted.

In the early stages of the Coronavirus pandemic in Ghana, Ghanaians adopted an alias for the disease: "the richman disease" (*asikafo) yare3*). Persons living in rural and peri-urban areas were confident that the Coronavirus disease was "poverty-phobic", and so they could not be infected. Their belief was influenced by the first set of media reports of most infected persons having had recent travel history in a foreign country with reported cases. These were known as "the imported case". That too, died prematurely; the poor received their fair share of the virus.

COVID-19 has spared no one. The daily counts and soaring numbers in Ghana are a mixed bag of persons from all walks of life, regardless of their class or rank in society. We may think that the disease is far more pronounced in urban communities where individuals have direct interactions with foreigners or Ghanaians returning abroad, but this is a wrong premise. The lack of testing in rural communities and the insensitivity of rural people to the COVID-19

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[34] Ibid

[35] APA news, 'Covid-19: Ghana goes on partial lockdown'*APA news* (2020), <http://apanews.net/en/news/covid-19-ghana-goes-on-partial-lockdown> accessed 21 August 2021

[36] Those who conduct a range of operations and services that are typically essential to continue critical infrastructure operations such as healthcare, power, electricity, food etc. *See* NSCL, *COVID-19: Essential workers in the state, https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx*

pandemic taints the true picture of how serious the disease has eaten into community life there.[37]

The urban settlers remain a major part of the COVID-19 equation. The prominent, who grind the wheels of power, are also stricken by the virus. At least, for these categories of persons, there is enhanced testing and data collection to properly assess the rate of infections and to track recovery. However, the existence of an equipped information tracking system in urban communities does not mean in rural communities where COVID-19 data infections cannot be easily generated, its locals are not at risk of equal opportunity of contracting the virus.

Like Lady Justice, COVID-19 wore a blindfold in the West African state of Ghana, titling her scale without regard to wealth, power, or status. She tore into the pores of anyone she met on her journey, and she continues to. Important people, including politicians and celebrities in Ghana, were infected by the Coronavirus and battled for their lives like everybody else. Unfortunately, some gave up the ghost.

4.0 COVID-19 NEEDS ATTENTION BUT WHAT ABOUT OUR "AFRICAN DISEASES"?

If you really want to learn a thing or two from this article, you should suppress these two opinions you may hold:

1. That COVID-19 being an unprecedented virus, requires more world focus than the other diseases that continue to decimate African populations.

2. The global community has been as much committed to the fight against another dangerously contagious disease – Ebola.

The Global and National Responses to COVID-19 quite visibly have been markedly different from responses to other infectious and deadlier diseases. The widespread nature of the virus is never justification to treat the "African diseases" such as Ebola, malaria, cholera, tuberculosis, and cerebrospinal meningitis as third-class diseases.

[37] Alvi Muzna Fatima, Shweta Gupta, Barooah,' Assessing the impact of COVID-19 on rural women and men in northern Ghana' (2021) GCAN COVID-19 Impact Fact Sheet 1. Washington, DC: International Food Policy Research Institute (IFPRI), <https://doi.org/10.2499/p15738coll2.134446> accessed 21 August 2021

There have been firmer and more organized collective responses to the economic challenges of COVID-19, in addition to its health challenges, as compared to other killer diseases. Magically, we have been able to settle all our ethnic and racial differences to present a united front against COVID-19.

Public health advocacy on the COVID-19 safety precautions has been very loud; to the extent that, in Africa, our limitations in health literacy, cultural beliefs and practices, social stigma, and inadequate communication technology could not reduce COVID-19 advocacy. Yet, malaria has been with us for God knows how long but has not been campaigned against with the same rigour and vigour.

COVID-19 vaccines are available after less than 12 months of clinical trials and testing. As of 18 August 2021, a total of 4,543,716,433 have been administered globally.[38] After many centuries, Malaria has no completely effective or approved vaccine. The Ebola vaccine was only approved recently in 2020, six (6) years after the most horrific outbreak of the Ebola epidemic in West Africa.[39]

At the national level, we are already pushing an agenda to build more hospitals and healthcare facilities. Suddenly, funds are ready (whether from our own coffers or through grants and debt) to take on a generational problem that has been present with us before the name Ghana. The inordinate attention given to COVID-19 is sponsored by the world's giants who are threatened by the virus. We proceed to add more weight to this fact.

Traditional medicines have always been known to the world. However, before the pandemic, discussions on traditional medicines were casual debates on intellectual property. That is, whether or not traditional medicines could be patented. Now, into the COVID-19 regime, the debate is no longer cursory. We are concerned about whether traditional medicine therapies can actually cure COVID-19 infections. In July 2020, the WHO and Africa Centres for Disease Control and Prevention (Africa CDC) launched a 25-member Regional Expert Committee on Traditional Medicine to provide independent scientific advice and support to countries on the safety, efficacy, and quality of traditional medicine therapies.[40] The Global North has never been oblivious of the fact that traditional

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[38] *See* WHO CORONAVIRUS (COVID-19) DASHBOARD, https://covid19.who.int/ accessed 21 August 2021

[39] Prabhjote Gill, 'Diseases deadlier than COVID-19 are already in the making — here are the top ten candidates that could cause the next pandemic', *Business Insider India* (5 January 2021) <https://www.businessinsider.in/science/health/news/here-are-the-top-10-virus-and-diseases-that-could-cause-the-next-pandemic-if-they-arent-stopped-in-their-tracks/slidelist/80116787.cms > accessed 21 August 2021

[40] WHO, 'WHO, Africa CDC push for COVID-19 traditional medicine research in Africa', *World Health Organization* (22 July 2020), <https://www.who.int/news-room/feature-stories/detail/who-africa-cdc-push-for-covid-19-traditional-medicine-research-in-africa> accessed 21 August 2021

medicine works. The debate has shifted because the Global North sees that, in these troubling times where they are equally impacted, traditional medicines may not be so bad after all.

Other diseases have claimed more lives than COVID-19, but since they are not levellers, the statistics are not common. The Centers for Disease Control and Prevention (CDC) states that between 2014-2016 when the Ebola epidemic was on the rise, 28,616 people were diagnosed with the Ebola virus in Guinea, Liberia and Sierra Leone, which resulted in the death of 11,310 people. Another 36 cases and 15 deaths occurred outside these countries. All digits put together [28,652 cases; 11,325 deaths], this means 39.5% of the people who contracted Ebola died of the disease. Currently, there are 208,470,375 confirmed COVID-19 cases, including 4,377,979 deaths worldwide. This means only 2.1% of persons diagnosed with COVID-19 all over the world have died. If the number of COVID-19 deaths is quadrupled, maintaining the same number of confirmed cases, 8.4% of people would have died. A fanciful expansion of the COVID-19 deaths cannot even take up 50% of the total number of Ebola-related deaths. The statistics also suggest that after six (6) years of COVID-19, that is, if the virus persists, it will not match up to three (3) years of Ebola-related deaths.

As of 7 February 2021, the Democratic Republic of Congo (DR Congo) had endured its 12th Ebola outbreak since its discovery in 1976.[41] Ebola has been prevalent in DR Congo for forty-five (45) years, before the first woman US Supreme Court Justice was appointed (Sandra Day O'Connor) (1981),[42] before Apartheid ended in South Africa (1990),[43] and before Friends debuted on ABC (1994)[44] and way before Google was invented (1998).[45] For a disease with a fatality rate as high as 90%, logically, we should be more terrified.

In 2018, the case fatality rate of Ebola in DR Congo was 66%.[46] The case fatality rate of COVID-19 in the country with the highest number of infections – the United States – is 1.68% for the years 2020 and 2021. Set side by side, the national

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41 WHO, 'Ebola - Democratic Republic of the Congo' *World Health Organization* (4 May 2021), <https://www.who.int/emergencies/disease-outbreak-news/item/2021-DON325> accessed 21 August 2021

42 *See* Securities and Exchange Commission Historical Society, Timeline 1980s

43 Rachel Jones, 'Apartheid ended 29 years ago. How has South Africa changed?', *National Geographic* (26 April 2019), <https://www.nationalgeographic.com/culture/article/how-south-africa-changed-since-apartheid-born-free-generation> accessed 21 August 2021

44 James Barrett, '15 Things That Happened In The '90s That We'll Never Forget' *redbook* (2021), <https://www.redbookmag.com/life/charity/g31088041/memorable-90s-events/> 21 August 2021

45 Ibid

46 Statista, 'Chronology of Ebola virus disease outbreaks 1976-2020', <https://www.statista.com/statistics/328962/ebola-virus-disease-outbreaks-by-country-deaths-case-fatality/> accessed 21 August 2021

fatality figures for Ebola far outweigh the national fatality figures for COVID-19. COVID-19 is no match for the deadlier Ebola, but who cares about Ebola?

Admittedly, in any given sample size, the rate of COVID-19 infections is higher than Ebola infections. However, upon global and national assessments, COVID-19 death rates are lower than Ebola death rates. This is testament to the rapid, coordinated, and sophisticated responses that COVID-19 receives daily to minimise Coronavirus mortality.

By the facts, Ebola too could have benefited from lower death rates if the same treatment was accorded it during its outbreaks. In 2015, an independent body of health experts indicated that the Global Response to the 2014 Ebola outbreak was "too slow".[47] The body of experts was convened by the Harvard Global Health Institute and the London School of Hygiene and Tropical Medicine[48] to discuss the Ebola crisis. In their report, they criticized the World Health Organisation (WHO) for their mediocre response to the crisis.[49] They found that, by being slow to declare Ebola an international public health emergency, and in not providing resources to these affected countries to detect and respond effectively to the outbreak, WHO had failed in its responsibilities in addressing a global health crisis.[50] The Global Responses to the Ebola crisis, at its peak, was a joke. The WHO herself admitted that it could have handled the situation better.[51]

However, for COVID-19, the WHO's Global Response to COVID-19 is thorough. It includes a Strategic and Technical Advisory Group on Infectious Hazards that has met at least 50 times;[52] **the** OpenWHO **platform, which has had more than 4.7 million total course enrolments, with 149 courses available to support the COVID-19 response, spanning 22 topics and 44 languages for COVID-19;**[53] **frequent convening of international expert networks, covering topics such as clinical management, laboratory and virology, infection prevention and control, mathematical modelling, seroepidemiology, and research and development for diagnostics, therapeutics and vaccines;**[54] **52 candidate vaccines in clinical evaluation and 162 in preclinical evaluation,**[55] **and many many others. Again, s**et side by side, the Global Responses to COVID-19 surpass

47 BBC, 'Ebola global response was 'too slow', say health experts' *BBC* (23 November 2015), <https://www.bbc.com/news/health-34877787> accessed 21 August 2021

48 Ibid

49 Ibid

50 Ibid

51 Ibid

52 WHO, 'Listings Of Who's Response To Covid-19' *World Health Organization* (29 June2020), <https://www.who.int/news/item/29-06-2020-covidtimeline> accessed 21 August 2021

53 Ibid

54 Ibid

55 Ibid

the Global Responses to Ebola because the drivers of COVID-19 responses are directly concerned.

Another African disease that hacks-downs the African population is malaria. Malaria wipes out the youth of under-developed countries by every minute. In 2019, it was estimated that 409,000 people, which consisted mostly of children in sub-Saharan Africa, died of malaria;[56] but this will not break the news. The headlines will prefer to read, "death toll increases, 177, 815 people in Africa have died from COVID-19 as of August 2021".[57] If WHO says 94% of the 409,000 malaria death cases, that is, 384,460 belongs to Africa, then the death toll for malaria in Africa is twice as much as the death toll for COVID-19 in Africa.[58] Further, the rate of malaria infections in the world is at level pegging, if not slightly above COVID-19 infections. In 2019, there were 229 million cases of malaria,[59] and in 2018, the number was 228 million.[60] The COVID-19 infections globally are 208 million cases.

Despite the above, the statistics of the malaria disease will still not make the high-priority list for National Responses. Since the start of COVID-19, there has been far greater attention to COVID-19 than any of these "African diseases". For a period in our Ghanaian History, the President provided weekly Presidential updates on a "foreign virus". The Ghana COVID-19 Private Sector Fund was created to "provide a prompt response to the hardship and suffering arising out of COVID-19 pandemic".[61] Out of this Fund, Ghana has constructed her first ultra-modern infectious diseases centre.[62] The country experienced a successive enactment of laws on one subject-matter like never before: The Imposition of Restrictions Act, 2020 (Act 1012); Establishment of Emergency Communications System Instrument, 2020 (E.I. 63);[63] Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) Instrument, 2020 (E.I. 64);[64] Imposition of

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56 Global Health-Division of Parasitic Diseases and Malaria, ' Malaria's Impact Worldwide' *Centers for Disease Control and Prevention* (26 January 2021), <https://www.cdc.gov/malaria/malaria_worldwide/impact.html> accessed 21 August 2021

57 *See* Statista,' Number of coronavirus (COVID-19) deaths in the African continent as of August 8, 2021, by country' *statista* (2021) <https://www.statista.com/statistics/1170530/coronavirus-deaths-in-africa/> accessed 21 August 2021

58 WHO, 'Malaria' *World Health Organization* (2020), <https://www.who.int/news-room/fact-sheets/detail/malaria> accessed 21 August 2021

59 Ibid

60 Ibid

61 COVID-19 Private Sector Fund, <https://ghanacovid19fund.com> accessed 21 August 2021

62 Ibid

63 Marian Asantewah Nkansah, '[Case Study] Ghana's multifarious response to COVID-19: Through a citizen's lens', *International Science Council* (2020) <https://www.ingsa.org/covidtag/covid-19-commentary/asantewah-nkansah-ghana/> accessed 21 August 2021

64 Ibid

Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No.2) Instrument, 2020 (E.I. 65);[65] and Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No.3) Instrument, 2020 (E.I. 66).[66]
Looking at the historical pattern of infectious diseases and Global and National actions, it will be hard for the "less" global diseases to become beneficiaries of special treatment in their own homes.

5.0 WHY THE GLOBAL NORTH MAY SEEM MORE CONCERNED ABOUT COVID-19 IN THE GLOBAL SOUTH?

COVID-19 has not received this much attention because it is more infectious or any deadlier than the lingering African diseases. The reason why there is so much attention for COVID-19 is because it is an equal opportunity disease; the main point we are trying to make is that the governors of nations, the powerful, are capable of solving African health crises. There is money for such crises, but these will only be deployed when they themselves are affected by the disease. At the material moment, that disease is COVID-19.

The Global North and its citizens are worried and interested in our National Response because they can be impacted. The disease is a global one. A COVID-19 case anywhere is more or less a COVID-19 case everywhere. Until global elimination of the virus is achieved, the Global North will come to Africa's aid eagerly. Take, for instance, in March 2020, when the G-20 resolved to pump over $5 trillion into the global economy as part of targeted fiscal policy to counteract the economic and financial impacts of the pandemic.[67] Also, in April 2020, the G-20 agreed to a debt suspension scheme for the 76 poorest countries until 2022[68]. In DR Congo, 62,378 people have already received the COVID-19 vaccination,[69] a little over a year since COVID-19 struck. It took 44 years for an Ebola vaccine to be developed.

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[65] Ibid

[66] Ibid

[67] Stephen Kalin, David Lawder, 'Thomson Reuters, G-20 leaders to inject $5 trillion into the global economy in the fight against coronavirus' *Reuters (*26 March 2020) <https://www.reuters.com/article/us-health-coronavirus-g20-saudi-idUSKBN21D0XL> accessed 21 August 2021

[68] Patrick Smith, 'G-20 states postpone postpone some of Africa's debt but block cancellation' *The Africa Report, Coronavirus* (17 April 2020) <https://www.theafricareport.com/26370/coronavirus-g20-states-postpone-some-of-africas-debts-but-block-cancellation/> accessed 21 August 2021

[69] Relief Web, 'Democratic Republic of Congo (DRC)-Ebola Situation Report #42-July 8, 2021' *Relief Web* (8 July 2021) <https://m.reliefweb.int/report/3755068/democratic-republic-congo/democratic-republic-congo-drc-ebola-situation-report-42-july-8-2021> accessed 21 August 2021

CONCLUSION

In Ghana, malaria, cholera, tuberculosis, and cerebrospinal meningitis each kill far more people annually than COVID-19 would ever kill in that country, but as diseases of the poor, they have never seen national nor international responses at this scale. The reason is simple: these other diseases are not levellers.

COVID-19 has taught us many lessons. One, that we are all in this together, black or white, and that Trumpian ultra-nationalism and building of walls is not the most intelligent thing to do. The deep irony of Trumpism is that America's previous wealth and glory was built parasitically; as she dug her fangs into the labour and lives of generations of black slaves; pillaged the natural resources of the lands whose citizens she now spends some of those resources to keep out; and carefully engineered financial extractivism through predatory lending practices, transfer pricing, and complicated tax evasion and avoidance tactics. Two, COVID-19 has confirmed our long-held suspicions that people will only be kind when they stand to benefit in return. Africa is alone in Ebola, malaria, cholera, tuberculosis, and cerebrospinal meningitis, because the rich and powerful are hardly affected by these diseases. Those diseases are not an immovable curse. With the adequate attention and the right amount of money, we can save a lot of lives. However, what triggers the necessary attention and resources, nationally and globally, is whether or not the disease is a leveller.

Of Unsettled Meanings and Uneasy Answers: A Legal Exegesis on Article 130 of the 1992 Constitution

Prosper Batariwah* and Ezekiel Osei*

Abstract

In Ghana, the power of interpreting and enforcing the Constitution has been vested in the Supreme Court under article 130. This power is not of recent origin and has its genesis in the 1969 Constitution, which appears to be an earlier and rudimentary version of the present Constitution. In the case of *Republic v. Special Tribunal, Ex parte Akosah,*[1] the Court seemed to have expressly delineated the grounds or circumstances under which this exclusive power can be exercised. Nonetheless, a recent phenomenon has emerged in the Supreme Court, variously constituted, where it has been questioned whether the power of interpretation and enforcement ought to be construed conjunctively or disjunctively. While some cases have strongly canvassed support for the view that the power of enforcement is contingent on and ancillary to the power of interpretation, others consider these two powers as almost mutually exclusive with some degree of convergence in certain situations. We undertake to review more recent case law to set out, more clearly, free of all niceties, the two views articulated. We further examine the merits of each approach to determine whether the two approaches are reconcilable. Additionally, we hack an attempt at resolution by either exploring the feasibility of making a case for one of these approaches or proposing alternative arrangements free of the shackles of these two constricting views.

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1.0 Introduction

The 1992 Republican Constitution of Ghana[2] establishes the judiciary as an arm of Government. The judiciary is simply a hierarchy of courts comprising the Supreme Court, Court of Appeal, High Court and other inferior courts established by an Act of Parliament.[3] These courts are meant to serve as institutions for the pacific settlement of disputes and act as watchdogs over the executive, legislature, and all other public administrative bodies and persons so that they are kept within the strict confines of the Constitution and laws generally. To further these objectives, the framers of the Constitution 1992 imbued the courts with separate and distinct powers to be exercised regarding litigious and constitutional matters that may arise over time.

One of such powers is the Supreme Court's exclusive original jurisdiction in the interpretation and enforcement of the Constitution under article 130. In its ordinary meaning, the exclusive original jurisdiction of the Supreme Court in the interpretation and enforcement of the Constitution aims at giving the citizens of Ghana the right to challenge the constitutionality of the actions and conduct of the Government, public bodies, public officials or persons generally. Additionally, the power seeks to create a suitable judicial atmosphere where legal clarifications may be sought with respect to certain provisions of the Constitution. The exercise of the Court's jurisdiction under article 130 equally fosters the tenets of sovereignty, equality and the supremacy of the 1992 constitution.

Over the years, in its bid to honour and uphold the tenets of the 1992 Constitution, the Court has exercised its exclusive original jurisdiction under article 130 in various constitutional matters. Nonetheless, it has failed to give a settled answer to the pertinent question of whether its interpretative and enforcement jurisdiction ought to be construed conjunctively or disjunctively. Prior to its decision in the case of *Osei Boateng v National Media Commission (NMC) and Appenteng*[4] (hereinafter called the "*Osei Boateng* case"), the Court had consistently suggested that its enforcement jurisdiction is not contingent and ancillary to its interpretative jurisdiction. Thus the two respective jurisdictions ought to be construed disjunctively. However, the Court in *Osei Boateng* and subsequent cases has ruled that its interpretative and enforcement jurisdiction is a unit jurisdiction and thus ought to be construed conjunctively. Given the continued "hot and cold" response of the Court regarding this question, the present paper looks at whether, within the lenses of articles 130, the

[2] Throughout this article, it shall be referred to as the "1992 Constitution" or where appropriate "the Constitution".
[3] 1992 Constitution, art 126(1); see Courts Act, 1993 passim.
[4] [2012] 2 SCGLR 1038.

interpretative and enforcement jurisdiction of the Court consists of inseparable jurisdictions and thus ought to be construed conjunctively or otherwise. It seeks to determine which of the two constructions is more apposite.

Following this introduction, Part II examines in detail the history of the exclusive power of interpretation and enforcement before the entry into force of the 1992 constitution. In Part III, we recount how the Supreme Court has construed its interpretative and enforcement jurisdiction in different cases over the years. This exercise will assist us in setting out in clear terms the contrasting views pervasive throughout the case law. We detail how the Court has construed its interpretative and enforcement jurisdiction under articles 2 and 130 before and after the decision in the *Osei Boateng* case by painstakingly reviewing both older and recent decisions delivered by the Court. Drawing from and building on the discussion in the immediately preceding part, Part IV assesses the merits and feasibility of each approach to determine whether the two approaches are reconcilable. Part V concludes the discussion with a recommendation on the most appropriate approach of the two articulated views that the Court should uphold and apply when deciding on questions regarding its interpretative and enforcement jurisdiction under article 130.

2.0 History of the Supreme Court's exclusive interpretative and enforcement jurisdiction prior to the entry into force of the 1992 Constitution

Justice Sowah, as he then was, wrote in *Tuffour v Attorney–General*, "a written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history".[5] Though the import of these words seems to have been lost because of the emblematic notoriety they have gained throughout the courts of the land, they are very much relevant when considered in the larger context of Ghana's constitutional development, especially that pertaining to the role of history in constitutional interpretation.

The Committee of Experts responsible for drafting the 1992 Constitution expressly stated that they had no intentions of reinventing the wheel.[6] In fact, they went on to add that in making proposals for Ghana's Constitution in 1991, they built on the provisions of the abrogated 1969 and 1979 Constitutions. Recognising the immense value of Ghana's previous post-independence Constitutions, it is not useful to charge the Committee of Experts with a lack of ingenuity. Instead, it lends much credence to the wise words of Justice Sowah. Therefore, any attempt to provide a legal exegesis on the Court's power of interpretation and enforcement as provided in article 130 must tap from the vine

[5] [1980] GLR 647.
[6] Report of the Committee of Experts proposals for a draft Constitution of Ghana 1991, 3.

of these previous Constitutions with a view to understanding the theoretical, practical and pragmatic influences which affected the drafting of these provisions.

That notwithstanding, particular emphasis will be placed on the 1969 Constitution for three reasons. Firstly, the 1969 Constitution was enacted on the heels of a military coup d'état and subsequent military rule under the National Liberation Council (NLC) and in reaction to the excesses of the Nkrumah regime. Secondly, the power to interpret and enforce a Constitution was first expressly set out *in extenso* in the 1969 Constitution. Thirdly, all other constitutions subsequent to the 1969 Constitution retained this power in not all too dissimilar terms. Article 106 of the 1969 Constitution provided that:

> (1) The Supreme Court shall, save as otherwise provided in article 28 of this Constitution, have original jurisdiction to the exclusion of all other Courts in (a) all matters relating to the enforcement or interpretation of any provision of this Constitution, and (b) where any question arises whether an enactment was made in excess of the powers conferred upon Parliament or any other authority or person by law or under this Constitution.
>
> (2) Where any question relating to any matter or question is referred to in the preceding clause arises in any proceedings in any court, other than the Supreme Court, that Court shall stay the proceedings and refer the question involved in the Supreme Court for determination and the Court in which the question arose shall dispose of the case in accordance with the decisions of the Supreme Court.

2.1 *1969 Constitution on the Interpretative and Enforcement Jurisdiction(s) of the Courts*

Reading the provision, the fundamental question that arises is, what influences warranted such an elaborate provision? The answers can be obtained without much difficulty from the Report of the 1968 Constitutional Commission. The second chapter of the Report titled 'Historical Introduction' told the story of Ghana's constitutional development from its Gold Coast days to the Nkrumah regime[7]. The Report spared no words in attacking the Nkrumah regime for what one can aptly sum up as the degeneration and eventual breakdown of responsible Government. It charged the National Assembly of betraying the sacred trust of the people and "hear hearing" the people's rights away. The executive power, it was said, was vested in one man, "who dressed in a little brief authority, played such fantastic tricks as to make the heavens weep". Thus, it was proposed that the "Constitution… should be a legal document should [sic] be the supreme law of the land as expressing the will of the people. All persons and authorities must look at it and adjust their actions, and conduct accordingly. The

[7] Memorandum on the proposals for a Constitution for Ghana 1968, 6–12.

exercise of powers by any person or authority must be in accordance with the law as laid down by the Constitution."[8] The irresistible import of the foregoing is that the 1969 Constitution was moulded around an armature of constitutionalism and supremacy; it sought to limit the powers of Government while ensuring that the powers exercised by the state and its ancillary institutions were for the welfare of the people.

Mere constitutionalism is not enough without providing some way of ensuring compliance. To this end, the Constitutional Commission made a case for the enforcement of the Constitution.[9] They proposed that a provision be inserted to allow any person who feared a threatened infringement or alleged an infringement of any provision of the Constitution to seek redress in the Courts. The proposal also suggested that the Courts should have the necessary power to make a declaration or remedy available as a response to the threatened or alleged infringement.

We can call these first two grounds the pragmatic basis for article 106 of the 1969 Constitution. When one considers the history, which hung around the heads of the members of the Constitutional Commission like the sword of Damocles, one cannot be drawn to any other conclusion than that any proposals for a Constitution must substantively place limits on the powers of Government while creating a concrete institutional configuration in the form of an impartial judiciary to enforce compliance with the provisions of the Constitution.

Much more importantly, the concept of judicial review was the fundamental reason for article 106 of the 1969 Constitution.[10] That final judicial power be vested in the judiciary was critical to the determination of justiciable questions. It was also thought that this power implied judicial review. The Commission did not shy away from associating itself with the words of Chief Justice Marshall in the United States Supreme Court's decision of *Marbury v Madison*:[11]

> 'It is emphatically the province of the judicial department to say what the law is… Thus, the phraseology of the Constitution [of the United States] confirms and strengthens the principle supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and that Courts as well as other departments are bound by that instrument'.

The Commission, however, felt that the persuasiveness of this foreign decision could not be a *tabula naufragio* when it came to the exclusive power to interpret and enforce the Constitution. A firmer ground would be needed. Drawing inspiration from Sir Alladi Krishnaswamy Ayyar, an Indian jurist of world

[8] Ibid 21.
[9] Memorandum on the proposals for a Constitution for Ghana 1968, 22.
[10] Ibid 139–142.
[11] 1 Cranch 137 (emphasis added).

repute, it recommended that the power of judicial review should not be left to reasonable implications but rather stated in express terms.

Upon a reading of the Report of the Commission, an equivocation in the use of the words 'judicial power' and 'judicial review' is apparent. The Commission seemed to be of the view that once the judiciary had final judicial power, it had the power of judicial review. The logical conclusion of this will mean that all courts would have had the power of judicial review. However, a rather startling proposal was put forth to vest the power of interpretation in the Supreme Court.[12] The power of enforcement was not stated in the same proposal. The inference which can be drawn from this is that the Commission envisaged a situation where all courts would have the power of judicial review subject to the exclusive power of the Supreme Court to interpret the Constitution. Support for this position is drawn from the proposal related to the "enforcement of the constitution" referred to earlier. The specific proposal did not mention which "court" a person could bring an action to enforce the Constitution. It referred to "courts" generally. As fate would have it, the Constituent Assembly amended the proposals of the Constitutional Commission, rendering article 106 in the form in which it was inserted into the 1969 Constitution.[13] As a result, the Supreme Court's original jurisdiction was expressed in terms of interpretation or enforcement.

2.2 The 1979 Constitution Follows Suit

The 1979 constitutional provision was not materially different from that of 1969.[14] The 1979 Constitutional provision has slightly been adapted for the 1992 Constitution. The Report of the Committee of Experts for 1992 does not provide much guidance as the 1969 Report did in understanding what judicial review should look like.[15]

Though the Supreme Court under the 1969 Constitution had opportunities to expound the meaning of its exclusive original jurisdiction in cases such as *Republic v. Maikankan*[16] and *Gbedemah v. Awoonor Williams*[17], the case that has become the most emblematic of the Supreme Court's settled doctrine on the question of interpretation and enforcement in the 1979 and 1992 Constitutions came from the Court of Appeal in the case of *Republic v. Special Tribunal, Ex Parte*

[12] Memorandum on the proposals for a Constitution for Ghana 1968, 148.
[13] Hansard, No 63 of 23 May 1969.
[14] Constitution of Ghana 1979, art 118.
[15] Report of the Committee of Experts on proposals for a draft Constitution of Ghana 1991, 112–13.
[16] [1971] 2 GLR 473.
[17] [1969] 2 G & G 438.

Akosah.[18][19] In this case, Justice Anin established four circumstances under which this power of the Supreme Court may be invoked. In that case, it was said:

> We would conclude that an issue of enforcement or interpretation of a provision of the Constitution under article 118(1)(a) arises in any of the following eventualities: (a) where the words of the provision are imprecise or unclear or ambiguous. Put in another way, it arises if one party invites the Court to declare that the words of the article have a double–meaning or are obscure or else mean something different from or more than what they say; (b) where rival meanings have been placed by the litigants on the words of any provision of the Constitution; (c) where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision shall prevail; and (d) where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation.

Justice Anin did not end there. He went on to add:

> On the other hand, there is no case of "enforcement or interpretation" where the language of the article of the Constitution is clear, precise and unambiguous. In such an eventuality, the aggrieved party may appeal in the usual way to a higher court against what he may consider to be an erroneous construction of those words; and he should certainly not invoke the Supreme Court's original jurisdiction under article 118. Again, where the submission made relates to no more than a proper application of the provisions of the Constitution to the facts in issue, this is a matter for the trial court to deal with; and no case for interpretation arises.

Suffice it to say that the learned Justice regarded these four factors as "a summary of the case law on enforcement and interpretation". The Court seemed to distil these principles from three cases. *Republic v Maikankan*, *Gbedemah v Awoonor-Williams* and *Tait v Ghana Airways Corporation*.[20] A critical reading of the portions of the first two of the three cases referred to reveals that judges, Chief Justice Bannerman and Justice Azu-Crabbe, respectively, did not purport to lay down the law as to the "enforcement" of the Constitution as against the "interpretation" of the Constitution. In other words, the extracts relied on do not mention "enforcement" as the judges, not seeing the forest for the trees, were preoccupied with the ambit of its interpretative jurisdiction. The third case, *Tait v Ghana Airways Corporation* does not cut it either. In that case, particularly the portion of the judgment relied on in *Akosah*, Justice Anin paid perfunctory attention to the limb of "enforcement" by mentioning it once at the beginning and then proceeding to deal with the interpretation of statutes as if same was

[18] Hereafter referred to as the "Akosah case" or "Akosah"
[19] [1980] GLR 92–608.
[20] [1970] 2 G & G 527, SC.

true for the interpretation of a Constitution, "a living organism, capable of growth or development".[21] The summary of the principles reducible from the case law as stated in *Akosah* appear for all intents and purposes to pertain to the "interpretation" of the Constitution rather than both "interpretation and enforcement". By the time *Akosah* had been decided, it seemed inevitable the seeds of the confusion that would befuddle the Court had been sown with the "enforcement" limb achieving a subservient status to the more dominant "interpretation" limb. The next part begins with the 1992 Constitution. It will critically analyse the schools of thought that have emerged from further attempts to clarify the position in *Akosah*.

3.0 The interpretative and enforcement jurisdiction of the Supreme Court under article 130 of the 1992 Constitution

Article 130 imbues the Supreme Court with the power to interpret and enforce the Constitution, and it provides as follows:

> (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in –(a) all matters relating to the enforcement or interpretation of this Constitution; and (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.
>
> (2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that Court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.

This provision, usually invoked in conjunction with article 2 of the Constitution, has over the years been the subject of judicial discussions in many constitutional cases.[22] To assist in a more illuminating discussion, we set out the relevant parts of article 2.

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[21] In *Tuffour v Attorney General* supra, Justice Sowah, as then was, referred to a Constitution as a living document capable of growth and development. To the learned judge, a doctrinaire approach will not be adequate to interpret the Constitution and a broad and liberal approach is required.

[22] See the cases of *Edusei v Attorney–General* [1996–I 97] SCGLR 1; *Edusei (No 2) v Attorney–General* [1998–99] SCGLR 753; *Oppong v Attorney–General* [2003–2004] SCGLR 376; and *Ghana Bar Association v Attorney–General (Abban Case)* [2003–2004] SCGLR 250 where the Supreme Court discussed its jurisdiction under articles 2 and 130 of the Constitution 1992 before deciding whether or not to admit the claims of the respective plaintiffs.

> A person who alleges that – (a) an enactment or anything contained in or done under the authority of that or any other enactment; or (b) any act or omission of any person, is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

Despite the extensiveness of the judicial debates in the Supreme Court, the Court has not been able to provide a definite meaning as to the provisions of article 130 of the Constitution. In many cases prior to the Osei Boateng case supra, the Court seems to have upheld a disjunctive theory. Nonetheless, in *Osei Boateng,* the Supreme Court divorced itself from the disjunctive theory and aligned itself with the conjunctive theory. Even after this, in some of its decisions, the Court digressed from the Osei Boateng principle, which seems to have been resuscitated in recent times.

3.1 To "Interpret" or "Enforce" the 1992 Constitution: The meaning of the Supreme Court's jurisdiction under article 130 before the Osei Boateng Case

Prior to its decision in the *Osei Boateng* case, the Supreme Court held that its jurisdiction under the combined effect of articles 2 and 130 of the Constitution 1992 is disjunctive. As a point in fact, in the cases of *Adumoa II v Twum*[23] and *Bimpong–Buta v General Legal Council and Others,*[24] the Supreme Court indicated that the power it could exercise in light of articles 2 and 130 is one of two things, namely, interpreting or enforcing the Constitution. In *Adumoa II v Twum,* the relevant facts were that the plaintiff invoked the Court's jurisdiction under articles 2 and 130 and challenged the chieftainship of the defendant pursuant to article 275[25] of the Constitution alleging that since the defendant was previously convicted of defrauding by false pretence contrary to section 131 of the Criminal Offences Act, he was precluded from being the chief of Akim Kade. The defendant objected to the jurisdiction of the Court on the basis that the matter seized with the Court was a "cause or matter affecting chieftaincy", and as such, it does not fall within its original jurisdiction. The Court declined jurisdiction because it did not have jurisdiction in chieftaincy matters as a court of first instance under articles 2 and 130 of the Constitution. The learned Justice Acquah (as he then was) at page 169 of the Report in a percipient manner defined the Supreme Court's jurisdiction under articles 2 and 130 of the Constitution 1992 as follows:

> [T]he original jurisdiction vested in the Supreme Court under articles 2 and 130 of the 1992 Constitution to interpret and enforce the provisions of the Constitution is a special jurisdiction meant to be invoked in suits

[23] [2000] SCGLR 165

[24] [2003–2005] 1 GLR 738

[25] Article 272 provides that: "A person shall not be qualified as chief if he has been convicted for high treason, treason, high crime or for an offence involving the security of the State, fraud, dishonesty or moral turpitude".

> raising *genuine or real* issues of *interpretation of a provision of the Constitution; or enforcement of a provision of the Constitution*; or a question whether an enactment was made ultra vires Parliament or any other authority or person by law or under the Constitution.[26]

The reasoning of the learned Justice Acquah in *Adumoa II v Twum* supra was affirmed by the Supreme Court in the case of *Bimpong–Buta v General Legal Council and Others*. In that case, the plaintiff triggered the jurisdiction of the Supreme Court under articles 2 and 130, challenging his removal from office as the director of legal education. He contended *inter alia* that since he was initially entitled to retire at age 65 as the editor of the Ghana Law Report of which same was underscored when he was appointed as a director of legal education, he was by virtue of section 8(1)(7) of the Transitional Provisions of the Constitution 1992, section 8(1)(*c*) of the Interpretation Act, 1960 (CA 4) and sections 5 and 7 of PNDCL 320, he had an accrued right to retire at 65 and therefore the termination of his appointment as the director of legal education was null and void. The astute Justice Sophia Akuffo (as she then was) delivering the lead judgment of the Court held that the jurisdiction of the Supreme Court under articles 2 and 130 of the Constitution could only be activated by a person in respect of *genuine* or *real* questions relating to *the interpretation or enforcement* provision of the Constitution as well as any question regarding whether an act has been done in excess of powers conferred on Parliament or any other body by the Constitution or any other law. Consequently, the Court ruled that given that the plaintiff's action was only a matter or cause concerning the wrongful termination of his employment, it did not fall within the Supreme Court's original jurisdiction under articles 2 and 130 of the Constitution.

Interestingly, the eminent constitutional law jurist Justice Date–Bah, who would later formulate the conjunctive theory in the *Osei Boateng case,* approved of the disjunctive construction of the Supreme Court's original jurisdiction under articles 2 and 130 of the Constitution. Taking juridical solace from the cases of *Adumoa II v Twum* supra, *Ex Parte Akosah* supra and *Oppong v Attorney–General,*[27] the learned jurist noted that:

> It is clear from the above that case–law makes a conceptual distinction between the application of a clear provision of the Constitution, 1992 and the *enforcement* or *interpretation* of the Constitution, 1992. Lower Courts may *apply* but only the Supreme Court may under its original jurisdiction, *interpret* or *enforce* the Constitution, 1992 within the meaning discussed above.

Gleaning from the Court's connotations in the *Adumoa and Bimpong–Buta* cases, it would be apt and fair to say that the Supreme Court was originally inclined to

[26] Emphasis added.
[27] [2003–2004] SCGLR 376

the long-standing disjunctive theory jurisprudence and thus allowed citizens to institute constitutional actions to either enforce or interpret the Constitution, 1992. Therefore, until *Osei Boateng* impeached the decisions in *Adumoa* and *Bimpong–Buta* amidst other decisions, the Supreme Court, in the construction of its jurisdiction under articles 2 and 130, did not necklace the interpretation and the enforcement of the Constitution together. Instead, the Court entertained actions even if it solely regarded the constitutionality of acts and conduct of public bodies and other persons (in the light of a clear, precise and unambiguous provision), without necessarily concerning itself with whether a question of interpretation has arisen in the action.[28] This, however, changed upon the delivery of its decision in 2012 in the *Osei Boateng* case, which put in abeyance the *disjunctive theory* jurisprudence echoed in the *Adumoa* and *Bimpong–Buta* cases above amidst other cases.[29]

3.2 To "Interpret and Enforce" the 1992 Constitution: The outgrowth of the conjunctive theory from the case of Osei Boateng v NMC and Appenteng

The decision of the Supreme Court in *Osei Boateng* sparked the controversy with respect to the "*or*" or "*and*" application of the Court's enforcement and interpretative jurisdiction under articles 2 and 130 of the Constitution. In this case, the decision of the Supreme Court defied the long-standing disjunctive construction of the interpretative and enforcement jurisdiction of the Court. The Court opined that its interpretative and enforcement jurisdiction under articles 2 and 130 must be read conjunctively, with its enforcement jurisdiction being contiguous to its interpretative jurisdiction.

Therefore, the Supreme Court's enforcement jurisdiction does not arise unless an issue of interpretation arises. Here, the plaintiff invoked the exclusive original jurisdiction of the Supreme Court under articles 2 and 130 of the Constitution, 1992 for a declaration that on a true and proper construction of articles 168, 23 and 296 of the Constitution, the National Media Commission cannot appoint one of its members to the position of Director-General of Ghana Broadcasting Corporation (GBC) without affording qualified Ghanaian the opportunity to apply for the position and as such the appointment of the second defendant contravenes articles 23 and 296 of the Constitution, 1992. The defendant objected

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[28] See the cases of *National Media Commission v Attorney–General* [2000] SCGLR 1; *Agbevor v Attorney–General* [2000] SCGLR 403; *Adofo v Attorney–General* [2005–2006] SCGLR 42; *Sumaila Bielbiel (No 1) v Adamu Daramani and Attorney General (No 1) [2011] SCGLR 132* where the Supreme Court exercised its exclusive original jurisdiction in respect of clear and unambiguous provisions of the Constitution.

[29] For instance, in *Edusei v Attorney–General* [1996–97] SCGLR 1, 51, Kpegah JSC (as he then was) held that 'for a plaintiff to be able to invoke the original and exclusive jurisdiction of the Supreme Court his writ or statement of claim or both must prima facie raise an issue relating to (1) enforcement of a provision of the Constitution; or (2) the interpretation of a provision of the Constitution'. cf *Samuel Okudjeto Ablakwa and Anor v The Attorney–General and Another,* Suit No J1/4/2010 (10 November 2011), unreported.

to the jurisdiction on the basis that article 168, pursuant to which the first defendant made the second defendant's appointment, is clear and unambiguous and therefore does not raise any question of interpretation. Responding to this objection, the plaintiff conceded that article 168 is clear and unambiguous but argued that the Supreme Court's enforcement jurisdiction is not predicated on its interpretative jurisdiction, which could only be invoked where there is a real issue of interpretation. The Supreme Court unanimously overruled the objection as unmeritorious. However, on the minor issue of whether the enforcement and interpretative jurisdiction of the Supreme Court are separable or inseparable, the Supreme Court ruled that its enforcement jurisdiction is contingent on its interpretative jurisdiction and as such where there is no question of an interpretation of a provision of the Constitution, its enforcement would not arise.

Fashioning his reasoning around the *locus classicus* rule in *Ex Parte Akosah* supra, the learned Justice Date–Bah, as he then was (through whom the majority spoke) held as follows:

> [T]he exclusive original jurisdiction of the Supreme Court under the previous equivalent of the current articles 2(1) and 130 of the 1992 Constitution, asserted that the requirement of an ambiguity or imprecision or lack of clarity applied as much to this Court's enforcement jurisdiction as it did to its interpretation jurisdiction. This is clearly right in principle since to hold otherwise would imply opening the floodgates for enforcement actions to overwhelm this Court. Accordingly, in my view, where a constitutional provision is clear and unambiguous any court in the hierarchy of courts may enforce it and this Court's exclusive original jurisdiction does not apply to it… it should be stressed that ambiguity or imprecision or lack of clarity in a constitutional provision is as much a precondition for the exercise of the exclusive original enforcement jurisdiction of this Court as it is for its exclusive original interpretation jurisdiction.

However, dissenting from the conjunctive approach upheld by the majority, the then Acting Chief Justice, William A Atuguba, held that the enforcement jurisdiction of the Supreme Court does not depend on the incidence of an ambiguous constitutional provision. In his attempt to restate the *locus classicus* of Anin JA (as he then was) in *Akosah,* the learned Justice analogised and delivered his position in the following terms:

> No court other than the Supreme Court has jurisdiction to entertain an action to enforce any article of the Constitution even if its clarity is brighter than the strongest light. However, when an enforcement issue coincidentally arises in any court and the article involved is crystal clear such Court may apply the Constitution to it.
>
> This means that for example if the President appoints a superior court judge of the High Court or Court of Appeal without the advice of the

> Judicial Council as required by article 144(3) of the Constitution he would have acted in clear breach of that provision. That provision is one of the clearest in the world and runs thus: "(3) Justices of the Court of Appeal and of the High Court and the Chairmen of Regional Tribunals *shall be appointed by the President acting on the advice of the Judicial Council*." (e.s.) An action to enforce the Constitution for the breach of this provision by way of declaration and ancillary reliefs can only be brought in the Supreme Court under articles 2 and 130 and in no other court. However, if in an action in a court other than the Supreme Court relating to title to land a party relies on a grant that contravenes article 266(5), for example, which converts previous tenancies of land to non–citizens exceeding 50 years to a term of 50 years, such a court can apply such a provision which also arose incidentally in that Court.

It is important to note that this case is not an easy one to take apart and analyse. This is mainly due to the fact that while Justices Date-Bah and Atuguba were vocal about their views on the exclusive power of interpretation and enforcement, some merely joined them. In contrast, others remained silent or somewhat ambivalent.

Despite the robust character of the view of the minority, the majority view in the *Osei Boateng* case thrived for some years. However, its longevity was not guaranteed after the cases of *Emmanuel Noble Kor v Attorney General and Anor*[30]and *James Kwabena Bomfeh Jnr v Attorney General,*[31] which are reviewed in the next section of the part.

3.3 To "Interpret" or "Enforce" the Constitution, 1992: After Osei Boateng

The funereal moment for the *Osei Boateng* case occurred in the case of *Emmanuel Noble Kor v Attorney General and Another* (hereafter called the "Kor case"). The facts of this case are far from complex. The Marian Ewurama Addy Committee produced a report on the recommendations of salaries for article 71 public officers. President John Mahama purported to accept the implementations of the Committee subject to a variation. The plaintiff commenced proceedings at the Supreme Court challenging the President's power to vary the Committee's Report. The defendants, on the other hand, the Attorney General and a retired Court of Appeal judge, contended that article 71 of the Constitution was clear and unambiguous and therefore required neither interpretation nor enforcement. By so contending, the Court had to resolve the issue of jurisdiction. In raising and resolving the issue, Atuguba JSC held:

> The first two issues raise the question of whether the original jurisdiction of this Court has been properly invoked. The contention is that, as laid

[30] Unreported judgment of the Supreme Court, WRIT NO. JI/16/2015.
[31] Unreported judgment of the Supreme Court, WRIT NO. J1/14/2017.

> down in Osei Boateng v National Media Commission & Appenteng [2012] 2 SCGLR 1038 no action can be brought in this Court to enforce a clear provision of the Constitution. With celestial respect to the proponents of this view the converse of the matter is rather true. It is rather trite law that no action can be brought in this Court to interpret a clear and unambiguous provision of the Constitution.…
>
> It will be seen that article 2 of the Constitution is headed "Enforcement of the Constitution" and the ensuing provisions are meant to attain the enforcement of the Constitution. There is therefore express authority in the Constitution itself for the view that the enforcement jurisdiction of this Court is a conspicuously independent item of jurisdiction of this Court. Indeed, though it will be erroneous to say that a declaratory action cannot be brought within article 2 towards the enforcement of an ambiguous provision of the Constitution, it appears that while the enforcement purpose of that article is clear on the face of its provisions, its interpretative purpose is comparatively latent.…
>
> *For all the foregoing reasons we would on this issue adopt the well-reasoned editorial note to the decision of this Court in Osei-Boateng v National Media Commission & Appenteng, supra and depart from that decision.*

It must be firmly stated and vigorously emphasised that on this particular issue of jurisdiction, there was unanimous concurrence by all the judges who partook in this case: Justices Dotse, Anin Yeboah, Gbadegbe, Akoto-Bamfo, Benin and Akamba. Only three of these justices were part of the Coram for the *Osei Boateng* case. These were Justices Atuguba, Gbadegbe and Akoto-Bamfo. Thus in the *Kor* case, the dissent in *Osei Boateng* became the majority and then prevailing view of the Court.

In a rather curious turn of events, the Supreme Court appeared to have turned its back on this decision in the unanimous decision of *Mayor Agbleze and Others v Attorney General*.[32] This case pertained to the creation of the new regions. The Commission of Inquiry responsible for making recommendations for the creation of new regions in 2018 recommended that only persons in those areas where new regions were to be created be considered eligible for the referendum that serves as a pre-requisite to the creation of new regions in Ghana. The plaintiffs took exception to this recommendation of the Commission and brought an action to challenge it. To them, it offended articles 5 and 41 of the Constitution, and they sought declarations to that effect. Before the substantive matter could be heard, the Court had to dispose of the preliminary issue of whether or not the plaintiff's claim raised questions of interpretation or enforcement so as to have properly invoked the jurisdiction of the Court. The Court then cited a plethora of cases that expound its original jurisdiction under articles 2 and 130 of the Constitution.

[32] Unreported judgment of the Supreme Court; NO. J1/28/2018.

Conspicuous among them being the *Osei Boateng* case. Standing on these cases as stilts, the Court proceeded to hold:

> Our understanding of the law especially as expounded in the cases cited above is that the existence of an ambiguity or imprecision or lack of clarity in a constitutional provision is a precondition for the invocation and exercise of the original interpretative jurisdiction of this Court. Where the words of a provision are precise, clear and unambiguous, this Court has insisted that its exclusive original interpretative jurisdiction cannot be invoked or exercised.

Though the principle of law laid down by the Court appears to relate to the Court's exclusive interpretative jurisdiction, the Court went further to cite instances of some of the judgments it had listed, particularly the extract of the *Osei Boateng* case stated supra. Had this been the Court of Appeal, which is bound by their previous decisions, one would have concluded that the apparent but latent reliance on the *Osei Boateng* case was per incuriam.[33] On the contrary, the Supreme Court is not bound by its previous decisions. The question then becomes to what extent tacit departure of its decisions is a permissible ground on which the Supreme Court may be said to have departed from its decisions. It is our considered view that to the extent that the Court's reliance placed on *the Osei Boateng* case did not affect the ratio decidendi of the case as it relates to the grounds on which the exclusive interpretative jurisdiction of the Court may be invoked, it is mere surplusage.

It is noteworthy to state that in the Court's decision in *James Kwabena Bomfeh Jnr v Attorney General*, the Court relied on all the cases of *Kor* and A*gbleze* decisions without referring to the *Osei Boateng case*. In this case, the plaintiff essentially sought to challenge the Government's involvement in the building of the national cathedral. Amongst the reliefs sought was a declaration that articles 21(1), 35, 37, and 56 of the Constitution made it unconstitutional for the Republic or its organs or agencies to excessively entangle itself in religious matters. The Court's approach was two-tier. It first examined whether or not a question of interpretation arose. After concluding that no question of interpretation arose, the Court proceeded to inquire into whether or not a question of enforcement arose. In this case, we find the first open expression of an approach to the exclusive original jurisdiction of the Court that is disjunctive and massively coherent.

3.4 Resuscitating Osei Boateng?: Professor Stephen Kwaku Asare v Attorney–General and Another.

[33] See 1992 Constitution, Art. 136(5); 129(2) and (3)

Despite the seemingly settled position in favour of the disjunctive approach, the Supreme Court's recent decision in *Professor Stephen Kwaku Asare v Attorney General and Another*[34] seems to have resurrected the *Osei Boateng* principle. The Plaintiffs attempted to invoke the exclusive original jurisdiction of the Court to challenge the dichotomy which exists in Ghana's legal education. That is the distinction between academic legal education in Ghanaian tertiary institutions and professional legal education offered by the Ghana School of Law. Amongst several reliefs, the plaintiff sought a declaration that the current monopoly held by the Ghana School of Law violated article 25 of the 1992 Constitution. As usual, the question of jurisdiction was a contested issue. In resolving it, the Court held:

> This Court has in several cases determined or defined the circumstances under which its original jurisdiction under Articles 2 (1) and 130 (1) could be invoked. The Court has consistently held that where words or provisions of the Constitution are plain, clear and unambiguous and there is no genuine dispute as to their meaning, no constitutional interpretation arises and the Court would decline any invitation, however attractive, to embark upon any exercise of interpretation in the circumstances. In much the same way, Article 2(1) of the Constitution empowers this Court to monitor and ensure compliance of the Constitution and for that matter a person who alleges non-compliance and invokes the said Article 2 (1) must demonstrate clearly that the acts or omission complained of are inconsistent with particular provisions of the Constitution. In other words, the inconsistency of the act or omission must be plain and clear from the constitutional provisions.

The Court, after citing *Akosah* and endorsing the case, proceeded to rely on the cases of *Ghana Bar Association v Attorney General and Another*, *Osei Boateng v Another* and the *Bimpong-Buta v General Legal Council* and then delivered itself thus: 'What it means is that a Plaintiff seeking to invoke the original jurisdiction of this Court under Articles 2 (1) and 130 (1) must satisfy at least one of the threshold requirements listed above'.

It is interesting to note that the Court appeared to have concluded that the enforcement jurisdiction of the Court is only triggered if the plaintiff can show some non-compliance with the provisions of the Constitution and that non-compliance can only be proved if it is brought within one of the grounds in *Akosah*. It has already been stated that the *Akosah* decision, in as much as it purports to speak to the enforcement jurisdiction of the Court, is with due respect to the learned lordships, not entirely accurate. The tests are more attuned to satisfy the requirements of interpretation. Indeed, as stated by Justice Atuguba in the *Osei Boateng* case, the *Akosah* decision requires restatement in some respect. In effect, the citing of the *Osei Boateng* case and the wholesale adoption of the

[34] Unreported judgment of the Supreme Court; Writ No J1/01/2020

Akosah principles seem to have reverted the state of affairs to where the conjunctive approach in *Osei Boateng* was favoured. Perhaps, this is the reason why the Court did not itself faithfully apply the principles it had set forth to the facts before it. Though the *Akosah* principles seem to have been applied at the point of determining whether there were questions of interpretation with respect to article 25 of the 1992 Constitution, it was a matter of the plaintiff having failed to adduce evidence in relation to the particular parts of the Constitution which were purportedly breached. Thus, there is now a situation where *Osei Boateng* has been slipped in through the back door after having been laid to rest in the *Kor* case.

4.0 Weighing the conjunctive and the disjunctive approaches

4.1 The two approached overviewed

The cases cited to give a bird's eye view of the two approaches the Court has adopted in giving teeth to its exclusive original jurisdiction are by no means exhaustive. Nonetheless, the forceful discussion that ensued in this respect is what we call the *Date-Bah – Atuguba/Bimpong Buta debate*. We discuss their views and their relative merits infra.

Justice Samuel Date-Bah is the leading proponent of the conjunctive approach, as pervasively seen in the cases cited.[35] To him, ever since the exclusive original jurisdiction of the Court was introduced in the 1969 Constitution, the Supreme Court has consistently held that all Courts in Ghana have some power to interpret and enforce the Constitution, particularly where the provisions being contested in a particular dispute are clear and unambiguous. Indeed he says all Courts apply the Constitution "up and down the country". To him, a literal approach to this jurisdiction will simply bring the legal system to its knees since Courts will be bound to refer every matter in which a party raises the interpretation or enforcement of a constitutional provision to the Supreme Court. Such a situation could potentially overwhelm the Supreme Court with cases leaving little space for more serious matters which deserve the undivided attention of the highest Court of the land. Only a purposive approach will do. The motivating factor in adopting this approach for the learned jurist is based on policy. It seems to him that the view in *Akosah* that other Courts may 'apply' the provisions of the Constitution where they are clear and unambiguous is really a smokescreen that seizes the lower Courts with the jurisdiction to enforce the Constitution.[36] Thus, the two, "application" and "enforcement", are not any

[35] See also Samuel Date-Bah, *Reflections on the Supreme Court of Ghana* (Wildy Simmonds and Hill Publishing, 2015), Chapter 2.

[36] He admittedly acknowledges the principle in *Sumaila Bielbiel (No 1) v Adamu Daramani and Attorney General (No 1) [2011] SCGLR 132* which essentially holds that the power to enforce a Constitutional provision is unavailable to the High Court. He suggests that the Supreme Court revisit the area to bring some clarity.

different. With the jurisdiction to enforce the Constitution being diffused throughout the Court hierarchy, only when there are questions of clarity or ambiguity can the Supreme Court be seized with jurisdiction to interpret the Constitution and enforce the Constitution. Enforcement cannot arise on its own. In response to the point raised by his dissenters that there are cases in which the Supreme Court have only enforced the Constitution without going through any process of interpretation, he says those cases are often excess of power cases. To that extent, there is a separate constitutional dispensation for cases of that sort.

There is only a pressing observation that should be made. The position of Date-Bah would have been robust and impenetrable if only the Report of the 1968 Constitutional Commission was the only thing available. In fact, he relied extensively on it. However, it has been indicated, and it bears iteration, that though the jurisdictional arm of enforcement was originally viewed as one applicable to all Courts, the final position was altered. Only the Supreme Court was given that exclusive power. Given this very glaring fact of constitutional history, there is significant doubt whether the language of the provision supports the view of the learned jurist. Therefore, the question of jurisdictional exclusivity is not in contention. What is in contention are the necessary conditions under which the enforcement limb of the Supreme Court will be triggered.

On the other hand are the "great dissenters": Justice Atuguba and the late Bimpong Buta.[37] They have argued that though there is no express provision in the Constitution to show that the jurisdiction to enforce is severable from the jurisdiction to interpret, the language of article 2 of the 1992 Constitution is clear. They contend that it expressly gives a precondition for the invocation of the Supreme Court's jurisdiction to enforce the Constitution, i.e. whether or not an act or omission contravenes the Constitution. Our view is that the disjunctive view should be considered more thoroughly, and we shall deal with this much deeper in the next part.

4.2 Why have the differences in approach persisted?

There are several reasons why these two approaches have persisted. We explore these briefly.

First of all, the differences in opinion can be attributed to an absence of judicial leadership. This is itself attributed to the structural nature of the nation's Supreme Court, which does not have an upper limit in terms of the number of judges that can be appointed.[38] To compound the situation, the Court is properly constituted by at least five judges or seven in the case of a review. The effect of

[37] For Bimpong Buta's views, see S. Y Bimpong Buta, The Role of the Supreme Court in the Development of Constitutional Law in Ghana (Advanced Legal Publishers Publications 2007) and Samuel Date-Bah, *Reflections on the Supreme Court of Ghana* (Wildy Simmonds and Hill Publishing, 2015), Chapter 2.
[38] 1992 Constitution, Arts 128 and 133.

this is the multiplicity of views expressed by different panels properly constituted.

Additionally, *Akosah* itself has not been critically scrutinised in its application. The application of a case for interpretation cannot, with all due respect to the conjunctive view holders, become a ground for the automatic adoption of the same principles to enforcement. In determining whether its exclusive original jurisdiction has been properly invoked, the Court has held times without number that the test is whether or not a real or genuine case of constitutional interpretation has arisen. In doing so, the *Akosah* principles are considered. On the other hand, in arriving at a decision on the enforcement jurisdiction of the Court, the test applicable is not so clear.

In some cases, the test is whether or not the acts or omissions complained of contravene the Constitution. To this end, the Court has held that it will examine the pleadings to arrive at an answer. In others, such as the *Asare* case, the *Akosah* principles are invoked in addition to the tests of acts or omissions and examinations on the pleadings. The first of the enforcement jurisdiction test is popular among the disjunctive school, while the second is popular among the conjunctive school. The state of affairs is clearly unsatisfactory, and a more uniform test is required.

5.0 Negotiating an appropriate approach

5.1 *An enhanced disjunctive approach with conjunctive considerations*

We support the disjunctive approach for the following reasons:

In the first place, the proponents of the conjunctive approach continue to rely on a "purposive approach to interpretation" which considers the policy rationale. We say two things. First, the reliance on a purposive approach does not mean that the letter of the Constitution is not essential or that it does not matter. The words will always matter.[39] The spirit follows the letter. Second, policy should not be used as a basis to frustrate the language of the Constitution. This has the propensity to undercut the enduring nature of law and its primary predictability function.[40]

Also, even where the so-called purposive approach is applied, it must take the history of the Constitution into account. The position of the 1968 constitutional processes has been exhaustively dealt with in respect of the original meaning of

[39] "A constitutional document must be interpreted sui generis, to allow the written word and the spirit that animates it, to exist in perfect harmony. It is interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation" *Francois JSC in New Patriotic Party v Attorney General (31st December case)* [1993-94] 2 GLR 78-79

[40] Ronald Dworkin, *Taking Rights Seriously* (HUP, 1977), passim.

the jurisdiction to interpret and enforce the Constitution. That history cannot simply be erased. If the people of Ghana expressly decided in the 1960s that only the Supreme Court should have the exclusive power to interpret and enforce their Constitution, the policy reason that all Courts apply the law and it will cause severe hardship to litigants where they have to come all the way to Accra to resolve a small matter of constitutional interpretation is inconsequential.

Thirdly, the *Akosah* criticisms further consolidated our views. These have been echoed throughout this paper, and there is no need to restate them.

By arguing this way, we believe that any enforcement test that applies the *Akosah* principles, popular among the conjunctive school, should not be used. We also take cognisance of the fact that the only other enforcement test, "whether or not the act or omission contravenes a specific provision of the Constitution," is not adequate. In particular, it does not address one critical point. It does not adequately provide answers on what kind of enforcement actions the Court will entertain and those that should be left to other Courts. This is where our proposals begin. We, therefore, propose an enhanced disjunctive test.

We argue that the real and genuine question test used in matters of interpretation should be deployed in enforcement actions in a fresh and different way from the *Akosah* tact. Evidently, the real and genuine question of whether an issue of enforcement has arisen is not sufficient in itself. A further test is needed. We propose a jurisdictional test which is itself based on a subject-matter test. When there is a question of enforcement, the Court should first consider whether some other Court has jurisdiction or not. This is not new. In fact, it is settled practice.[41] The Court has consistently declined jurisdiction where a party dresses his action in the garbs of constitutional interpretation or enforcement. The subject matter will often be a good indicator. For example, the High Court has original jurisdiction in human rights matters. In any case in which a party alleges the infringement of his rights, no question of enforcement in the Supreme Court and the High Court should have original jurisdiction. Where it appears to the Court on the basis of the pleadings before it that no other Court has jurisdiction in relation to that subject matter under the 1992 Constitution, the Court should assume jurisdiction. In that sense, the exclusive jurisdiction of enforcement is *residual*. That is, what is left after other Courts have claimed their jurisdictions under the Constitution.

When we configure the enforcement jurisdiction of the Court in this way, we avoid the semantic problems accompanying "application" of the Constitution and "enforcement" of the Constitution. We also confidently engage the policy

[41] See *Nana Yiadom I v Nana Amaniampong And Others* [1981] GLR 3 in which the Supreme Court resisted a chieftaincy matter couched in ways as to make it appear as a matter of constitutional interpretation and enforcement; also *Edusei (No 2) vs Attorney General [1998-99] SCGLR 753* and *Ghana Bar Association v Attorney General (Abban Case) [2003-2004] SCGLR 250.*

considerations of the conjunctive school. In other words, litigants who know that the Court is likely to decline jurisdiction when they couch mundane matters in terms of constitutional enforcement will be advised and encouraged to find the most appropriate forum to bring their actions. In sum, we move the debate on enforcement from the issue of clarity or otherwise to one that proposes a balance of jurisdictions. Issues of clarity or ambiguity should be consigned to the interpretation question, and where it is the plaintiff's case that interpretation also arises, the plaintiff should invoke both jurisdictions. Both may arise in a subject matter, but it is equally possible for either to occur separately. The test is restated in the following questions:

i. Is it the plaintiff's allegation that the act or omission complained of contravenes or is inconsistent with a specific constitutional provision?
ii. Under the Constitution, does some other Court have jurisdiction to remedy the act or omission complained of?
iii. If yes, the Court should decline jurisdiction.
iv. If no, then the Court should assume jurisdiction.

5.2 *Conclusion*

Throughout this paper, we have confronted a daunting area of the law where the literature is sharply contradictory and unclear. It is not our expectation that this paper will resolve these pressing problems with respect to the exclusive original jurisdiction of the Supreme Court. Nevertheless, at the very least, it has been our modest aim to draw attention to the current state of affairs and to anticipate further debates that will lead to long-lasting reforms and certainty.

Aboriginal Rights, Non-Retrospectivity and the Political Process: Akatere v. Intercity STC & Lands Commission

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Abstract

For a long time in common law courts, judges simply applied the law made by parliament. If the application would be absurd or unjust in a particular case, it was not for the court to worry about such an outcome. Increasingly, this literalist posture of the Court changed as it embraced new (non-literal) rules and cannons to construe legal text to avoid absurdity and unfairness. But, through this evolution of the courts, what has not changed is the central notion that a Court should not substitute its wisdom for that of parliament or that the Court must give an interpretation nearest to the mind of parliament. It is still true today that courts do not embark on non-textual interpretation as a first resolve. A Judge has a duty to give words of a text their ordinary meaning before considering extra-textual cannons where necessary. This paper takes on this long-standing ordinary meaning of text orthodoxy. It shows contexts in which it is inadequate and explores an approach to interpretation (Political Process Approach), making up for this inadequacy. It is an approach that commends itself in instances where the legislative process is flawed and oppressive, and a court cannot apply laws emanating from that process without ratifying injustice.

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1.0 Background and Introduction

There are different approaches to interpreting a legal text. The various approaches can be broadly categorized under interpretivist and non-interpretivist approaches at the level of constitutional interpretation. The former approach holds that a court engaged in constitutional interpretation must have fidelity to the text of the constitution and the intention of the framers of that constitution. The latter approach holds that although the text and intention of the framers of constitutions are important, it is often necessary and justified that courts go beyond these sources to enforce constitutional norms not readily discernible either from the text or the framers' intentions.[1] At the level of statutory interpretation, the approaches again can be broadly categorized into literalists and non-literalists approaches. Literalists consider the work of a court to be one of giving meaning to the text of a statute as it is and within the four corners of that statute.[2] Non-literalists treat the words of a statute as a starting point and consider extra-textual factors such as legislative history, subjective or objective purpose, social impact, and public policy, among other things, in determining what effect to give to a statute.[3]

Across these broad dichotomies, there is consensus that fidelity to the ordinary meaning of a legal text is important, even if not decisive. This consensus places an additional hurdle on non-interpretivists and non-literalists in constitutional and statutory interpretation alike to first and foremost demonstrate the gap between the text and its authorial intent or purpose in a given case before embarking on extra-textual considerations to give effect to a legal provision. Therefore, where a text's plain meaning in any given situation is not inconsistent with its authorial intent or purpose, extra-textual considerations have no place. Fidelity to the ordinary meaning requires that where there is no gap between text and intent or purpose, non-interpretivist or non-literalist extra-textual considerations and cannons are not to be utilized. So goes the orthodoxy.

Courts, however, have a much more complex role than the theoretical one posed by interpretivism and non-interpretivism or literalism and non-literalism. There are cases in which a literal or textual approach would yield results that might even be in the view of the court; 'unfortunate', yet, there is no gap between text

[1] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review, (Harvard University Press, Cambridge Massachusetts, 1980).

2 Literalists in non-statutory interpretation would apply technical meaning over ordinary meaning where the document is prepared by a lawyer. See Dennis Domnic Adjei, Modern Approach to the Law of Interpretation in Ghana, (third edition, 2019, G-PAK Ltd.)

[3] Intentionalism Purposivism, Modern Purposivism are examples of non-literal approaches to interpretation.

and authorial intent or purpose for non-literalists approaches to fill. A court, in such instances, forces a 'just' outcome in its view at the risk of judicial overreach. It is safer and within the proper limits of the judicial function to sanction unfortunate outcomes where it is the clear will of a legislature, for example, or a person with authority, to make those choices. *Akatere v. Intercity STC & Lands Commission*[4] presented one of such difficulties. It is a difficulty of the plain meaning of a statute whose consequences will offend general notions of what is just and fair but at the same time plain and clear enough to make extra-textual considerations unnecessary.

Within the fidelity to ordinary meaning orthodoxy, a court in such a situation will have its hands tied even if it finds the results of its holding regrettable. This limitation is seen as necessary according to some schools of thought which hold that it is not the task of a judge to make law or alter the will of a political branch such as the legislature. But where it involves relations of power and authority and the political process, however, one obscure approach to interpretation presents an interesting rebuttal to the dictate that a judge must enforce the law as it is, from which the ordinary meaning orthodoxy is derived. The Political Process Approach (PPA) of interpretation holds that where enacted laws and exercise of power emanate from a flawed or lopsided political process involving disregard for minority rights, a court is entitled to give that law or act exceptional treatment, which includes denying it its clear intended effect. It is an approach that allows courts in specific instances of systemic exclusion or oppression of minority groups to leapfrog the ordinary meaning orthodoxy to correct present or historical injustice. This article considers the Political Process Approach in relation to the *Akatere v. Inter City STC & Lands Commission* case.[5] I argue that even though the political process approach is yet to be embraced by Ghanaian courts, the Akatere case is a good example of why it should and why the PPA would yield a better and fairer outcome in that case and similar cases.

1.1 Akatere v Inter City STC & Lands Commission

The government of Ghana carried out land acquisitions totalling 9.7 acres in Bolgatanga in 1958 and 1960 for the State Transport Corporation (STC) to establish a bus terminal. The 9.7 acres of land belonged to the family of Akatere

[4] [2019]DLHC8155
[5] Ibid

Azinga, the plaintiff in *Akatere v. Intercity STC & Lands Commission*.[6] The first respondent, in this case, is a successor company to the State Transport Corporation. At the time of the acquisition, the Akatere clan lived in three houses on parts of the land and cultivated seasonal crops on other parts. For the houses and farms, the government of Ghana offered, after its assessment, 200 pounds and 44 pounds respectively in fulfilment of the requirements under the Northern Territories Administration Ordinance 1902 (NTAO). What the government of Ghana did not give, and was not required to give, was compensation for compulsorily acquiring the land. According to the Northern Territories Administration Ordinance, unlike lands in the former Gold Coast Colony and Ashanti, the colonial government, which the government of Ghana succeeded, did not have to purchase lands in the Northern Protectorate because it was deemed the concept of private property was unknown to the people there. Recognizing the right of ownership of the land meant much higher sums in compensation because the government would not only be paying for the loss of the present dwellings and farms but the loss of future usage of the land. These include farming, sale or any other economic or social benefit that the family members and successive generations of family members could have applied to those lands.

The absence of compensation for loss of ownership rights in the NTAO changed with the passage of the State Lands Act, 1962 (Act 125). However, the question the court faced in this case is in the twilight of the application of the NTAO, 1958 to 1962. The NTAO was a law drafted on the premise that unused lands in the Northern Protectorate were ownerless lands. It further presumed that even those occupied were not privately owned because the concept of private property was unknown to the people in the protectorate. Thus, because the government did not recognize the right to private ownership of land in the protectorate, the government could just take those lands whenever it wanted to. It just had to pay for 'dwelling places' and 'seasonal crops' that belonged to the pre-acquisition users.

In 2015, almost sixty years after the acquisition of the Akatere clan lands, Akatere Azinga challenged the legality of the acquisition by making two claims. First, the plaintiff argued that as pre-acquisition owners, his family was entitled to compensation, and without it, the government of Ghana never acquired a good

[6] Ibid

title to the land. Secondly, the plaintiff made a claim under article 20(6) of the Constitution of Ghana, 1992, that he had a right to repossess 5.40 acres of the land that remains unused by the corporation and its successor companies for almost sixty years after the acquisition. The High Court in Bolgatanga dismissed both claims. In the court's analysis, the plaintiff's first claim was misconceived because the NTAO does not require the government to pay any compensation for land acquisition in the Northern Protectorate. The court also said that even if such a right to compensation existed, it was probably "too late in the day" for the plaintiff to assert that right. In dismissing the second leg of the plaintiff's claim, the court relied on the averment of the first respondent that it needed to keep the land for its future needs. Further, the court said the plaintiff could not rely on the provisions of the 1992 Constitution of Ghana because the acquisition was carried out "long before the birth" of that constitution.

These holdings of the court have two significant consequences. Firstly, they reinforce the view that the provisions under article 20 of the 1992 constitution concerning prior requirements for exercising the government's power to compulsorily acquire private property have no retrospective application. That view emanates from the Supreme Court's decisions in *Nii Kpobi Tettey Tsuru III v. Attorney General (La Wireless Case):*[7] *Ellis v. Attorney General:*[8] *Ablakwa & Another (No.2) v. Attorney General*[9] and also *Sagoe & Others v. Social Security and National Insurance Trust (SSNIT).*[10] Secondly, and more importantly, the court's unquestioning acceptance and application of the NTAO derives the outcome that the plaintiff and others like him have no right to property for the time that the NTAO was in force. The court effectively arrived at that conclusion but was silent on the justification for the loss of that right. If the court undertook an assessment of the justification for the loss of land rights of the people of the northern protectorate, perhaps, the processes leading to such an outcome would have come to play in court.

This article discusses these fallouts from the Akatere case. It will propose an alternative analytical framework for the court's analysis. It argues that even though there is no ambiguity in the text of the NTAO, its patent injustice ought

[7] [2010] SCGLR 904
[8] [2000] SCGLR 24
[9] [2012] 2 SCGLR 845
[10] *(2012) 2* SCGLR 1093 the court in this case by way of obiter dictum said that it is common sense that compulsory acquisition cannot be questioned.

to trigger a 'heightened judicial scrutiny' in assessing the rights of the parties under it. That scrutiny requires going beyond giving effect to its plain or ordinary meaning to a broader inquiry of substantive justice concerns. Two reasons warrant such a heightened scrutiny. First, although the acquisitions were constitutionally and statutorily permissible at the time, the law under which the acquisitions were made constituted an abuse of the general human right to own property and the aboriginal rights of the people of the northern protectorate. Second, the legislative history of the NTAO reveals that its fundamental basis— the notion that the concept of private property was unknown to the people of the Northern Protectorate was false, a political gimmick aimed to obtain land for colonial administration at a reduced cost.

Part I of this article will provide a background and introduction. In Part II, I discuss the history of colonial land policy and laws, including the NTAO and reveal the politics of exclusion and minority prejudice that created the injustice that underlies the legislation. Part III contains a deeper analysis of the court's treatment of the questions posed by the plaintiff. In part IV, I argue that by the nature of the legislation and the injustice that underlies it, a court should apply a 'heightened judicial scrutiny' in line with the Political Process Theory (out of which the Political Process Approach is derived) spawned by the famous footnote four written by Justice Stone, formerly of the United States Supreme Court, in the case of the *United States v. Carolene Products*[11] and expounded on by John Hart Ely in his seminal book *Democracy and Distrust: A Theory of Judicial Review.*[12] In part V, I rationalize the heightened judicial scrutiny standard by demonstrating that it provides an objectively better outcome.

2.0 Colonial Land Policy and Compulsory Acquisitions

The *Akatere v. Intercity STC & Lands Commission* case lies at the intersection of law and politics. First is the nature of colonial administration of the area known as the Northern Protectorate. The second factor is the political and economic goals that shaped colonial land policy, especially in the protectorate. The third is the different capacities of the indigenous peoples of the Gold Coast to influence colonial policy.

[11] (1938) 304 U.S 144
[12] Ely (n.1)

At the beginning of the colonial experiment, the Northern Protectorate of the Gold Coast was administered by the colonial administration under the Foreign Jurisdictions Act of the British Parliament.[13] That act gave the colonial administration, led by the governor, the power to enter into ad hoc agreements with the chiefs of the northern protectorate for political purposes beneficial to the British colonial experiment. However, the Foreign Jurisdictions Act did not make the administration of the northern protectorate the primary duty of the colonial administration. This forms the difference between the Gold Coast Colony and the Northern Protectorate. The Gold Coast Colony was a British Settlement administered under the British Settlement Act before the Supreme Court Ordinance of 1876.[14] In many ways, the colonial administration was responsible for the Gold Coast Colony, and it made separate rules for its holistic administration, unlike the Northern Protectorate.[15] The colonial administration was not interested in the areas beyond the north of Ashanti, which were deemed as hinterlands where domestic revenue could not pay for administrative costs.[16] Rather, the strategy was to informally influence chiefs in those areas to go along with the colonial policy.

In 1902, the Northern Territories Administration Ordinance (NTAO) was promulgated to make rules for the administration of the Northern Protectorate. The Ordinance was amended in 1923 and became known as the Northern Territories Administration Amendment Ordinance. Section 2(5) of the ordinance reads:

> No compensation shall be allowed for any land so taken except for growing crops or in respect of disturbance or interference with buildings, works or improvements on or near the land taken.

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[13] The Foreign Jurisdiction Act of 1843 by the British Parliament was a legal device to legalize conquest and exercise of sovereign control over disorganized tribes. It has been described as the juridical simulation of conquest see C.R Pennell (2010). The Origins of the Foreign Jurisdiction Act and the Extension of British Sovereignty. Historical Research, Volume 83, issue 221 p. 465-485.

[14] The British Settlements Act of 1843, "empowered the British Crown to establish such laws, institutions and ordinances, and to constitute such courts and offices as may be necessary for the peace, order and good government of the territories concerned", section 1.
Hauser Global Law School Program, 'Researching Ghanaian Law' <www.nyulawglobal.org/globalex/Ghana> accessed 25th July, 2021.

[15] Governor Gordon Guggisberg in an address in 1919 noted the marginalization of the northern protectorate, he said: "the Northern territories have, for so many years been deprived of sufficient funds to help them (Colony and asante) along in that great progress which we expect them" he stated further that "the career of the North as the Cinderella of the Gold Coast is nearing its end; as Cinderella she has done good and unobstructive work. Her reward for that and the gallantry of her soldiers is in sight". See ADM. ll/1/293 ; NAG, Accra. Government Gazette Extraordinary of Monday, October 13, 1919.

[16] R.B Bening, Land Policy and Administration in Northern Ghana, 1898-1976, [1995] Historical Society of Ghana, 227.

The absence of a right to be compensated for the loss of ownership of land is at the core of the plaintiff's case. Essentially, it makes it a specific grievance tied to geography and time. It emanates from the political status of the Northern Protectorate given by the colonial administration, who referred to it as a 'wasteland' occupied by people who had not evolved the concept of private property. Whereas in 1897, the Aborigines Rights Protection Society (ARPS) impressed the colonial administration that there were no ownerless lands in the Gold Coast Colony, colonial land policy in the Northern Protectorate reveals that for all practical purposes, they deemed lands in the area ownerless lands.

The plaintiff's predicament is thus, on the one hand, geographical—it is a problem only for the Northern Protectorate. On the other hand, it is temporal. For instance, if the acquisitions that form the basis of this case were carried out in 1963, five and three years later than they happened, the plaintiff would have no need for this action. Even if the plaintiff did, his claim would be fundamentally different because he would be asserting a right to compensation recognized by the State Lands Administration Act, which came into force sometime in 1962. That legislation provided statutory backing for the payment of compensation in compulsory acquisitions by the government of Ghana without geographical exception. Thus, owing to geographical exclusion and the dumb luck of timing, the plaintiff's family's land were acquired under the unique circumstances in which their aboriginal right (rights which flow from a people's historical occupation and continued use of certain areas) to land, their right to property—a human right—was politically watered down, and the actual expropriation without compensation early enough to be statutorily and constitutionally permissible.[17]

Unlike many cases attempting to reclaim lands or compensation because the government did not use it for the purpose for which it was intended, see *Nii Kpobi Tettey Tsuru III v. Attorney General;*[18] *Nii Nikoi Olai Amontia v. Managing Director, Ghana Telecom Co.,*[19] or that the government did not pay compensation fully or at all, or challenging the validity of the acquisition itself with a retrospective application of article 20(1) to (5) of the 1992 Constitution see *Ellis v Attorney General;*[20] at the core of this case was whether the government could legitimately

[17] See The Constitution of Ghana, 1957 section 38.
[18] Nii Kpobi Tettey Tsuru (n.8)
[19] [2006] 2 G.L.M.R 69-115
[20] Ellis (n.9)

decide whether some section of the country does not have a right to private property and hence does not have a right to compensation. That is on the first leg of the plaintiff's case. On the second leg, the plaintiff invited the court to consider his rights under article 20(6), but because the court followed earlier superior court decisions on the non-retrospectivity of article 20, that approach to article 20 made the court uninterested in any analysis of the potential retrospectivity of clause 6 of article 20 which is different in essence from the preceding five clauses. The court also relied on the word of the defendant company that it still required the unused portions of the land even though it had not found any use for them after sixty years in dismissing the second leg of the plaintiff's case. Crucially, before the court were questions as to the property rights of the plaintiff and whether previous owners of a pre-1993 compulsory acquisition can trigger article 20(6) of the 1992 Constitution.

2.1 *History of the Northern Territories Administration Amendment Ordinance*

Colonial land policy differed across the various regions of the Gold Coast. The differences can be accounted for by the relative strength of the people of the various regions namely; the Colony, Ashanti, the Northern Protectorate and Transvolta Togoland.

For the northern territory, the absence of an educated elite in the late 19th century and early 20th century has been cited by scholars like Bening as one of the factors that disabled the area from resisting the classification of its land as ownerless lands as was done in the Gold Coast and Ashanti.[21] In the Gold Coast Colony, it was the educated elite led by lawyer John Mensah Sarbah who argued against the colonial administration's move to declare lands in the Gold Coast Colony ownerless. In Ashanti, the decision to treat lands as ownerless lands was rescinded by the colonial administration after it sensed a formidable backlash by the people of Ashanti.[22]

The need to run a government cheaply is also one of the reasons identified for the need for ownerless lands in the protectorate. For the most part, the colonial administration determined that governance in the Northern Protectorate was not profitable and hence decided to spend as little on it as possible. According to its

[21] Bening (n.16)
[22] Ibid

estimates, the northern territories were a wasteland with no significant economic potential.[23] Periodically, however, private interest in prospecting mining resources in the area required that the colonial administration be able to take lands at a cheap cost. For example, the Minerals Ordinance was drafted to outlaw all mining activities in the protectorate carried out without a license issued by the commissioner. The Wa Syndicate, which operated well into the first decade of the twentieth century, was a beneficiary of the Mineral's Ordinance. It obtained a mining and prospecting license from the commissioner, who had powers under the act to outlaw the participation of others in the industry.[24]

Under Governor Guggisberg (1919-1927), the prospect of building a rail line to connect the Northern Protectorate to the Gold Coast Colony occupied the colonial government and also served as a justification for a land policy that allowed the government to acquire land at least cost.[25] The Land and Natives Rights Ordinance, which was enacted in 1927, made the governor the trustee of lands in the Northern Territory and limited the disposition of land by the chiefs and people of the area.[26] This, according to correspondence between the colonial government officials, was the only way to keep the project at a cost that Britain would support.[27] Thus although colonial land policy in the Northern Territory was shaped by a seemingly benevolent impulse and did not at the time have any serious impact on the people in the territory because there was too much land than their needs at the time required, the framework built by the colonial government will later have unintended consequences.

Where pre-acquisition owners of lands taken by the colonial government in the colony or Ashanti would receive or at least were entitled to compensation, and if they were stools—royalties—chiefs in the northern protectorate as well as pre-acquisition owners were not so entitled. At a meeting held on lands in the Northern Protectorate without the participation of the Chiefs of the area, the colonial administration resolved that the concept of private property was unknown in the protectorate.[28] Again, when the colonial administration sent their official, Major Morris, to assess the rights of the local people of the area, it

[23] Ibid
[24] Ibid
[25] Ibid
[26] Ibid
[27] Nana James Kwaku Brukum, The Northern Territories of the Gold Coast Under British Colonial Rule 1897-1956: A Study in Political Change (Department of History, University of Toronto, Canada)
[28] Bening (n. 16)

is reported that he simply upheld the opinion of the agents of companies seeking concessions—the notion that indigenous people had no territorial rights to unoccupied land.[29] By contrast, in the Gold Coast Colony and Ashanti, chiefs were granting concessions and receiving rents to develop their areas and maintain their stools. In the Northern Territory, the colonial administration took away that right.

The colonial land policy was not without a challenge from the emerging northern elite in the final years of colonialism towards independence. In 1953, S.D Dombo tabled a motion in the Legislative Council demanding that the colonial administration return the rights to lands in the Northern Territory to the Local Authorities. The legislator noted that if the government did not act with speed, "by the time we lay our hands on the land, there shall be nothing for us to live on".[30] In addition, J. A Braimah noted in respect of the Native Land Rights Ordinance that it was enacted at a time when Northern Chiefs were illiterate, and there were only a few educated men in the protectorate. The people did not understand or even know of the existence of the ordinance.[31] He appealed to the colonial government to address the northern land question before independence because of the possibility that the colonial laws would be abused. The colonial administration did not successfully address the northern land issue before independence, and, hence, what is perhaps an unintended application of colonial laws forms the basis of the instant case. After the coming into force of the 1969 Constitution, the Member of Parliament for Bolgatanga, Joseph Ben Kaba, tabled a motion in parliament asking that parliament resolve to harmonize land legislation across the country.[32]

3.0 Land Expropriation and the Non-Retrospectivity of article 20 of the 1992 Constitution

Fidelity to the ordinary meaning of section 2(5) of the NTAO could only lead to one conclusion—the plaintiff had no case. The acquisition cannot be illegal or improper for non-payment of compensation because the plaintiff's family had no right to compensation to start with. Further, the plaintiff went against the tide of

[29] Ibid
[30] Ibid
[31] Ibid
[32] The Motion read: "[t]hat in view of the prevailing legislation governing the administration of land in Ghana, this house is of the opinion that the present land legislation be made uniform to conform with (sic) the spirit of the constitution" cited in Bening (n.16).

superior court decisions regarding the non-retrospectivity of article 20 and the legal presumption of non-interference with vested rights. Thus, it would seem the court correctly decided the case where it refused to apply the standard for compulsory acquisition in the 1992 constitution to acquisitions that happened "long before the coming into force" of the constitution.

Yet, the court's overall decision does not escape the incongruous notion that it has ratified the application of a legislation that is a product of a flawed or lopsided political process by the government of Ghana at the time of the Akatere land acquisition. The court has endorsed a situation where colonial powers, without a serious interest in the land tenure system of the people in the northern territories, proceeded to exclusively write legislation that had the effect that the people in the territory do not have private property rights. This flies in the face of all extant knowledge of the land tenure system of the people of the northern territories then and most especially now. Granted the colonial administration's view, even in the absence of individual property rights, group or corporate rights existed in the form of family lands and clan lands of which *tindaamba* were custodians.[33]

The court's unquestioning acceptance and application of the NTAO is matched by its analysis of the second leg of the plaintiff's claim under article 20(6). The court rehashed the position in Supreme Court decisions that article 20 is not retrospective. But the leading cases on that point, *Nii Kpobi Tettey Tsuru III v. Attorney General:*[34] *Ellis v. Attorney General:*[35] *Ablakwa & Another (No.2) v. Attorney General,*[36] turned on the government's alleged non-compliance with the constitutional standards for compulsory acquisition and usage of compulsorily acquired land found in articles 20(1) to (5). Clearly, article 20(6), which is a redemptive mechanism for pre-acquisition owners of land to get their lands back

[33] The office of the tindaamba is the oldest political office among the ethnic groups of the northern territory. It is also widely known across West Africa among ethnic groups organized around agriculture and farming. See Wilks, I., (1989: 17), Wa and the Wala: Islam and polity in northwestern Ghana. Cambridge University Press, Cambridge. Cited in Haruna Abdulla Imam (2015), State and Non State Actors in Land Appropriation: Colonial Land Policy and the Role of the Tindaana. Research on Human and Social Sciences, Vol 5 No. 4. "The tendaana was therefore the locus of authority, that is, of tendaanlun, in the teng, though he would act in consultation with the heads of the various lineages farming the land. Ultimately, however, whether in the allocation of land, the resolution of disputes, the punishment of those who violated social mores, the marketing of any surpluses, and so forth, it was the tendaana who was responsible for the well-being and indeed the very reproduction of the teng and its people".

[34] Nii Kpobi Tettey Tsuru (n. 8)

35 Ellis (n.9)

[36] Ablakwa (n.10)

where the land is not used in the public interest or was no longer needed in the public interest, has a different effect quite apart from the preceding five clauses. In this vein, the question before the court was whether the unused land after sixty years could be deemed no longer required for the public interest and therefore trigger the pre-acquisition owner's right of redemption.

The court did not reach the question of when or at what point a pre-acquisition owner of land's right of redemption is triggered. By its application of the non-retrospectivity presumption, the court concluded that only lands acquired after the coming into force of the constitution in 1993 could come within the scope of Article 20(6) for redemption. But that reading of article 20(6) defies any ordinary or purposive reading of the constitutional provision, which reads:

> Where the property is not used in the public interest or for the purpose for which it was acquired, the owner of the property immediately before the compulsory acquisition, shall be given the first option for acquiring the property and shall, on such re-acquisition refund the whole or part of the compensation paid to him as provided for by law or such other amount as is commensurate with the value of the property at the time of the re-acquisition.

From its ordinary reading, article 20(6) is a materially different provision from the previous clauses under article 20, namely clause 1 to 5, which provide the standards the government must meet in a bid to compulsorily acquire private land, the scope of the power to compulsorily acquire land and the purpose of compulsory acquisitions. Article 20 (1) to (5) contains prior requirements and standards for compulsory acquisition to safeguard the right to property within the new strengthened human rights framework under the 1992 constitution. Thus, the presumption against the retrospective application is correctly applied against a plaintiff who seeks to impugn a government action or acquisition at a time before the enunciation of the 1992 Constitution's rights framework. But that presumption cannot be correctly applied against a plaintiff under article 20(6). Article 20(6) does not demand the government to meet a standard that was non-existent at the time of the acquisition. It simply requires the government to assess its needs and relinquish land it no longer needs in the public interest, and let pre-acquisition owners have the right of first refusal. To hold that article 20(6) is non-retrospective is to equally hold that the government will be engaging in an illegality if on its own motion it acted under article 20(6) to invite pre-acquisition owners of lands acquired before 7th January,1993 to repurchase the land that

once belonged to them. Such a blockade will be artificial and contrary to a clear constitutional framers' intent to open a window for the redress of historically complicated state land policy and acquisitions in Ghana.[37]

4.0 Political Process Approach and the Akatere Case

The case of *US v. Carolene Products* is famous not for its holding, but a footnote written by Justice Stone stating that "[t]here may be a narrower scope of the presumption of constitutionality of legislation which restricts the political processes which can ordinarily be expected to bring about change or repeal of undesirable legislation".[38] He offered the view that those should be subjected to a more exacting judicial scrutiny.

In his seminal book, Democracy and Distrust: A Theory of Judicial Review,[39] John Hart Ely develops Justice Stone's idea. Essentially, the Political Process Theory is a representation-reinforcing theory of judicial review that insists that courts can concern themselves with questions of political participation and not simply the substance or legality of a political choice or policy. It is premised on the view that legitimate policy choices (laws and actions by public officials) are those that are democratically made. Therefore, where some groups, differentiated by race, culture, religion, geography or any such differential are targeted through a political process in which they had no control over or participation, under political process theory that can be termed as a systemic malfunction. Here, a court is entitled to reject laws or policies so made and restart the political process. Political Process Approach desires that all viewpoints within the political process are represented equally and weighed and accommodated.

In practice, the Political Process Approach (PPA) insists on equal treatment for hitherto unequal categories or groups within the political process. But it does not attempt to vindicate fundamental values determined a priori. Instead, its practical approach is in simply requiring that those in control of a political process (political officials) ensure that everyone within it is similarly

[37] See Christine Dowuona-Hammond, Enforcing the Constitutional Framework on Compulsory Acquisitions in Ghana: Looking Backward, Forward or Maintaining the Status Quo? (2016) Vol. 29 UGLJ "The position that article 20(5) and (6) are not applicable to issues related to acquisitions made prior to 1993, it appears, is practically untenable, evidenced by the Supreme Court's resort to the constitutional provisions to resolve challenges to the use of lands acquired prior to the coming to effect of the constitution".
[38] Carolene Products (n.12)
[39] Ely (n.1)

accommodated or be able to explain convincingly why the unequal treatment is necessary. Where such a justification is not available, a court should reject the outcome of that process either in the form of laws or political acts as a system malfunction—this is what it refers to as higher judicial scrutiny. Exercises of power or legislative enactments are not typically invalidated by courts beyond their threshold for constitutionality, i.e. where they are in want of or excess of constitutional authority or are in contradiction or inconsistent with some fundamental constitutional principles. This is what makes invalidation of a statute on the grounds of a lopsided or flawed political process a more than usual scrutiny from the courts.

What would a PPA analysis of *Akatere v Intercity STC & Lands Commission*[40] hold? It should be clear by now that under a PPA analysis, the NTAO qualifies for a more exacting judicial scrutiny for two reasons. First, the lack of participation of the people of the Northern Territory in the process towards its enactment. Second, that legislation targeted and discriminated against the people of the Northern Territory by denying this plaintiff and all the people in the area their aborigine's rights during its existence, rights the colonial administration had recognized in the colony and Ashanti down south.

A PPA response to the Akatere case is thus capable of awarding compensation to the plaintiff by rejecting the NTAO as a malfunction. It was not just or fair then, or even now that an imperial power can take lands belonging to aborigines just because it thought they had no right to such lands. Further, there is no justification for the difference in the treatment of the northern protectorate and the colony or Ashanti. Indeed, what is clear is that the colonial administration intended to take all the lands in the territory that became Ghana. It only succeeded in the northern protectorate because it had the least capacity for resistance.

A PPA frame of analysis would help the court undo that historical injustice and perhaps the unintended application of the NTAO. It allows the court to uphold the right to property of people of the northern protectorate as aborigines. That could mean the effect of the NTAO that the plaintiff was not entitled to compensation will be undone and compensation awarded because the government of Ghana, not the colonial government, is still in possession of the

[40] Akatere (n.5)

land that used to belong to them. In part III, I discussed how the court could have separated the right to reacquire compulsorily acquired land from the Supreme Court's non-retrospectivity doctrine in relation to the prior requirements and standards for compulsory acquisition under the 1992 constitution.

5.0 Conclusion

The Political Process Approach, although not a total rejection of the ordinary meaning orthodoxy, serves as a corrective mechanism to its possible excesses such as the foreclosure of fundamental rights through legal principles like non-retrospectivity where there is demonstrable oppression or disregard for the rights of minorities. It provides a justifiable bypass to the fidelity to the ordinary meaning orthodoxy. This feature of the PPA is very crucial for positivist legal frameworks with in-built inequalities. By giving courts the power to correct injustices and unfairness or systemic malfunctions with the benefit of hindsight, PPA allows the courts to do more than sanction unfortunate outcomes especially, where political processes are flawed or oppressive.

But the PPA is not without complications. For example, it allows courts to invalidate laws and executive actions not because they are in excess of the legislature's powers or facially inconsistent with fundamental principles of a written constitution, but because the processes leading to the enactment were unfair or flawed. This invites the courts into the realms of political judgment and speculation that courts typically avoid for good reasons. But, just like any other approach to construing legal texts, political process analysis can have justifiable application in some cases and unjustifiable application in other cases. Also, cases in which resort to a political process analysis will be required are few and far between and are of a particular kind—cases involving power relations and minority exclusion and clear and patent unfairness in treating similarly placed people, which screams for justification. Political Process Approach finds its essence in irregular hard cases of the kind where fidelity to ordinary meaning often leads courts to reluctantly sanction unfortunate outcomes. Where it involves power relations, such fidelity amounts to closing the court's eyes to injustice and unfairness, which draws the court's role and legitimacy into question among oppressed minorities.

Law Practice in an Age of Artificial Intelligence

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Abstract

The last three decades have seen the dawning of immense scientific breakthroughs and technological innovations that have resulted in a better life for many people worldwide. Some experts refer to this period as the dawn of the Second Machine Age. As the Industrial Revolution impacted, to no lesser degree, how work was done from the 18th Century to the 20th Century, so will the Second Machine Age impact work in this age. The legal profession is no exception. This paper seeks to analyze how Artificial Intelligence (AI), as one of the significant advances in the Second Machine Age, will impact law practice, particularly in Africa. To do this, the writers will discuss several issues spanning the impact of the Industrial Revolution on work to the jurisprudential issues arising out of the adoption and usage of AI, to the benefits and challenges that AI may bring to legal practitioners. The writers conclude that contrary to the fears of some legal practitioners, AI cannot replace lawyers. It will instead be an effective tool that will optimize productivity in law firms.

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1.0 Introduction

Artificial intelligence, one of the predominant features of the Fourth Industrial Revolution, is changing the nature of work people do and how they do them in many industries today. The legal industry will not be an exception. It will be the sole purpose of this paper to demonstrate how this change is occurring and discuss the future of work in the legal industry.

We admit from the very onset that artificial intelligence today is shrouded in mystery in the minds of many people, especially those who are not technologically inclined. Hence, to lay the foundation for the discussions which will be done throughout this paper, the authors will first demystify the concept of artificial intelligence. Then, because artificial intelligence features predominantly in the Fourth Industrial Revolution, we will briefly account for the successive industrial revolutions and demonstrate how each of them impacted various businesses and professions. In the next section of this paper, the authors will argue that the role that artificial intelligence would play in law practice was noted by eminent jurists with remarkable prescience as far back as the 20th Century. In doing this, we will explore and discuss the concept of Jurimetrics.

To show that the future which they envisaged is already here, we will discuss some notable emerging trends in law practice in which artificial intelligence features. Then, we will support that analysis with the benefits that lawyers, legal academics and law students will gain due to the currency that artificial intelligence has gained in the legal industry. Before we conclude the discussions in this paper, we will explore some challenges that we perceive artificial intelligence will pose due to its adoption and discuss how these challenges can be addressed.

2.0 The Concept of Artificial Intelligence

The words "artificial" and "intelligence" are not difficult to understand. However, whenever they are used together, they evoke different kinds of thoughts and fears in people's minds. In some minds, the term

"artificial intelligence" brings up fears of intelligent cyborgs, among many others.[1] While defining the term is crucial, we must admit that it does not lend itself to an easy definition. There is a lack of a precise and universally accepted definition. Indeed, there are as many definitions for the term as different experts have written on the subject.

The definitions proffered by different authors put different emphasis on the different abilities of artificial intelligence to think or act humanly or rationally. We will consider a few of them. In his work *An Introduction to Artificial Intelligence*, Richard Bellman defined the term as "the automation of activities that we associate with human thinking, activities such as decision-making, problem-solving, learning". This definition emphasizes the ability to think humanly as the defining characteristic of artificial intelligence. Elaine Rich, another learned author in the field, emphasizes the ability to act humanly when she defined artificial intelligence as "the study of how to make computers do things at which, at the moment, people are better."[2] To Nils J. Nilsson writing in 2010, "artificial intelligence is that activity devoted to making machines intelligent, and intelligence is that quality that enables an entity to function appropriately and with foresight in its environment."[3] To him, the quality to function appropriately or rationally is all that matters in artificial intelligence. Patrick Winston's definition of artificial intelligence as "the study of the computations that make it possible to perceive, reason, and act"[4] places a premium on the ability to think rationally.

Perhaps, in this difficulty in defining artificial intelligence, one would agree with United States Supreme Court Justice Potter Stewart who, when faced with the difficulty of defining the kinds of material which

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1 Wolfgang Ertel, *Introduction to artificial intelligence* 2nd ed (Springer 2018) 1.

2 Elaine Rich, *Artificial Intelligence* (McGraw-Hill 1983).

3 Nils John Nilsson, *The Quest for Artificial Intelligence: A History of Ideas and Achievements* (Cambridge UK: Cambridge University Press 2010).

4 Patrick Henry Winston, *Artificial Intelligence* (Addison-Wesley Publishing Company London 1984).

the term "hard-core pornography" comprehends in *Jacobellis v. Ohio,* said thus:

> "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description "hard-core pornography", and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that."[5]

We know artificial intelligence when we see it. What makes artificial intelligence self-evident is its ability to mimic human adaptivity. Humans are capable of adjusting to different environmental conditions and changing their behaviour accordingly through learning.[6] Artificial intelligence-powered applications can adjust to different conditions and change their behaviour through learning.

To do this, artificial intelligence experts or engineers create models that replicate a human's decision process and enable understanding and automation. Models are mathematical algorithms[7] created using a large data set and an expert input to replicate a decision the expert would make when provided with that same information. Trained models recognize patterns which enables them to recognize new data or make predictions with high accuracy.

Today, artificial intelligence has applications in different industry verticals. It powers the technology behind self-driving cars. Artificial intelligence has made speech recognition and language translations by machines possible today through natural language processing. An entire conversation can be guided by an automated speech recognition and dialogue management system through artificial intelligence. In-game

5 378 U.S. at 197.

6 Wolfgang Ertel, *Introduction to artificial intelligence* 2nd ed (Springer 2018) 3.

7 Algorithms are a set of instructions to do a particular thing followed by the computer.

playing,[8] autonomous planning and scheduling,[9] logistics planning,[10] spam fighting and robotics, artificial intelligence has been applied and met with great success.

While artificial intelligence seems to be capable of doing so many things in this age, there are some other things that it still cannot do. For instance, artificial intelligence can tell you that it is likely to rain based on the data-set it has been trained on, but it cannot tell you why it rained. In other words, artificial intelligence understands correlation but not causation. This limitation stems from the fact that artificial intelligence today depends on finding a correlation between the data in a large data-set to predict a likely outcome based on new input.

The act of reasoning about why things happened and asking "what if" questions, a higher level of causal thinking ability, is beyond the capability of artificial intelligence today. For instance, when a patient dies while in a clinical trial, artificial intelligence cannot determine whether it was the fault of the experimental medicine or something else. These types of tasks will continue to be performed by humans.

3.0 Industrial Revolution

Artificial intelligence is a crucial feature of the fourth industrial revolution. Consequently, a discussion on Artificial Intelligence will hardly be complete without considering the various industrial revolutions that the world has experienced over the past centuries and its impact on various businesses and professions.

3.1 First Industrial Revolution

[8] IBM's DEEP BLUE is the first computer program powered by artificial intelligence to defeat Garry Kasparov, the world champion in a chess match in an exhibition match.

[9] NASA's Remote Agent program is the first on-board autonomous planning program to control the scheduling of operations for a spacecraft. This is controlled by AI.

[10] During the Persian Gulf crisis of 1991, U.S. forces deployed a Dynamic Analysis and Replanning Tool (DART), an artificial intelligence program, to do automated logistics planning and scheduling for transportation.

The First Industrial Revolution began in England in about 1750–1760 and lasted sometime between 1820 and 1840.[11] This period was characterized mainly by the transformation of animal and human labour into machinery, new chemical manufacturing and iron production processes, improved efficiency of waterpower, the increasing use of steam power, and the development of machine tools.[12] The flagship machine in this period was the steam engine.[13] The steam engine was made of iron and mainly fueled by coal. Hence, coal played a significant role in the First Industrial Revolution.[14] According to R. M. Hartwell, the Industrial Revolution is "The sustained increase in the rate of growth of total and per capita output at a rate which was revolutionary compared with what went before." Hitherto, the predominant occupation was small-scale farming. About 80% of the people worked in small agricultural farms in rural areas, and the rest lived in small towns. Very few people worked in manufacturing, mining and trade units. Manufacturing was small and localized. People used handmade tools powered by people or animals.[15]

The First Industrial Revolution precipitated a number of developments across several areas of life. There was development in the textile industry, iron and steel industries, chemical production, improvement in transportation, among others.[16] The First Industrial Revolution also engendered economic development. Systems of transportation, communication and banking improved significantly. Britain had a successful economy.[17] During the beginning of the Industrial Revolution, landowners and aristocrats occupied the top position in Britain.

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11 HK Mohajan 'The First Industrial Revolution: Creation of a New Global Human Era', Journal of Social Sciences and Humanities Vol 5 No 4 (2019) 377.

12 Ibid.

13 P Troxler 'Making the 3rd Industrial Revolution; The Struggle for Polycentric Structures and a New Peer- Production Commons in the Fab Lab Community' p 2

14 HK Mohajan 'The First Industrial Revolution: Creation of a New Global Human Era' Journal of Social Sciences and Humanities Vol 5 No 4 (2019) 377.

15 Ibid 378.

16 Ibid.

17 Ibid 381.

Subsequently, a larger middle class made up of lawyers, doctors, and government employees grew.[18]

It is important to note that the First Industrial Revolution came with its peculiar challenges. There were poor housing and sanitary conditions, overcrowding, air and water pollution, among others.[19] Despite all these challenges, the significant positive impacts of the First Industrial Revolution cannot be thrown overboard. There was a substantial increase in urbanization and agricultural productivity, the invention of new scientific models, and improved technology.[20] In the legal sector, the revolution generated an expansion of the rule of law and law practice in general.[21]

3.2 Second Industrial Revolution

The Second Industrial Revolution lasted from 1860 to 1914.[22] This period was characterized by new technologies, including electricity, internal combustion engines, chemical industries, and electrical communication.[23]

Several significant inventions from this period have lasted to date. Thomas Alva Edison (1847-1931) introduced a number of inventions such as the light bulb, mass communication, phonograph, kinetograph (the motion-picture camera), and electric dynamo in the 1880s.[24] Also, Alexander Graham Bell (1847-1922), a Scottish-born scientist and American inventor, invented the telephone. He established the American Telephone and Telegraph Company (AT&T) in the USA in 1885.[25] Another significant invention is the computer. In the early 19th century,

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18 Ibid 382.
19 Ibid.
20 Ibid.
21 Ibid.
22 HK Mohajan 'The Second Industrial Revolution has Brought Modern Social and Economic Developments' Journal of Social Sciences and Humanities, Vol 6 No 1 (2020) 1.
23 Ibid.
24 Ibid 2.
25 Ibid.

Charles Babbage (1791-1871), an English mechanical engineer, invented the first mechanical computer. Charles is considered the "father of computers".[26] According to Andrew Atkeson and Patrick J. Kehoe, many new technologies, including electricity, were invented during the 2nd Industrial Revolution, which launched a transition to a new economy.[27]

Without any shred of doubt, the Second Industrial Revolution brought more comfort in the lives of people. It also promoted economic development.[28]

3.3 Third Industrial Revolution

The Third Industrial Revolution started in 1960 and was characterized by the implementation of electronics and information technology to automate production.[29] For Anderson, "the Third Industrial Revolution is best seen as the combination of digital manufacturing and personal manufacturing: the industrialization of the Maker Movement".[30] It is said that the Third Industrial Revolution was engendered by changes in communication technology and energy generation.[31] The adoption and usage of electronics and Information Technology (IT) in factories gained traction during this period.[32] The period was also known as the Digital Revolution. It introduced semiconductors, mainframe computing, personal computing, and the internet.

According to Jeremy Rifkin, an American economic and social theorist, the five pillars of the Third Industrial Revolution are as follows;

a) shifting to renewable energy;

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26 Ibid.

27 Ibid.

28 Ibid 11.

29 M Xu, JM David and others, 'The Fourth Industrial Revolution: Opportunities and Challenges' (2018) International Journal of Financial Research Vol 9 No 2 90.

30 P Troxler, 'Making the 3rd Industrial Revolution; The Struggle for Polycentric Structures and a New Peer- Production Commons in the Fab Lab Community' 2.

31 Ibid.

32 Y Liao and others, 'The Impact of the Fourth Industrial Revolution: A Cross-Country/Region Comparison' 28 Production (2017) 1.

b) transforming the building stock of every continent into micro-power plants to collect renewable energies on-site;
c) deploying hydrogen and other storage technologies in every building and throughout the infrastructure to store intermittent energies;
d) using internet technology to transform the power grid of every continent into an energy internet that acts just like the Internet (when millions of buildings are generating a small amount of renewable energy locally, on-site, they can sell surplus green electricity back to the grid and share it with their continental neighbours); and
e) transitioning the transport fleet to electric plug-in and fuel cell vehicles that can buy and sell green electricity on a smart, continental, interactive power grid.[33]

3.4 Fourth Industrial Revolution

The Fourth Industrial Revolution was coined by Klaus Schwab, the Founder and Executive Chairman of the World Economic Forum.[34] He predicted a new industrial revolution to begin in the near future in the World economic forum Global Challenge Insight Report (The Future of Jobs-Employment, Skills and Workforce Strategy for the Fourth Industrial Revolution [FIR] in 2016).[35] The Fourth Industrial Revolution is also known as Industry 4.0.[36] It describes a world where individuals move between digital domains and offline reality using connected technology to enable and manage their lives.[37] Others also consider it as

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33 J Rifkin, 'The Third Industrial Revolution: How the Internet, Green Electricity, and 3-D Printing are Ushering in a Sustainable Era of Distributed Capitalism' World Financial Review (March-April 2012) 9.

34 M Xu, JM David and others, 'The Fourth Industrial Revolution: Opportunities and Challenges' International Journal of Financial Research Vol 9 No 2 (2018) 90.

35 Ibid.

36 Deloitte Insights, 'The Fourth Industrial Revolution: At the intersection of readiness and responsibility' 3.

37 M Xu and others, 'The Fourth Industrial Revolution: Opportunities and Challenges' International Journal of Financial Research Vol 9 No 2 (2018) 90.

an age of advanced technology based on information and communication.[38]

The Fourth Industrial Revolution is predicated on the Third Industrial Revolution. It is, however, not to be considered as a mere expansion of the third industrial revolution. Three key factors demonstrate how the Fourth Industrial Revolution significantly differs from the Third: velocity, scope, and impact. In terms of velocity, it is apparent that the speed with which the Fourth Industrial Revolution is gaining traction is unprecedented. It is said that when compared to previous industrial revolutions, the Fourth is evolving at an exponential rather than a linear pace.[39] In terms of scope and impact, this revolution has meandered through every industry globally, including those considered most conservative, such as the legal profession. "And the breadth and depth of these changes herald the transformation of entire systems of production, management, and governance."[40]

The Fourth Industrial Revolution is characterized by the introduction of robots, drones, 3D printing, nanotechnology, the internet of things (internetworking of devices) and artificial intelligence (AI).[41] A report by McKinsey & Company has predicted that half of all existing work activities would be automated by currently existing technologies, thereby enabling companies to save billions of dollars and create new types of jobs.[42]

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38 J Min, Y Kim and others, 'The Fourth Industrial Revolution and Its Impact on Occupational Health and Safety, Worker's Compensation and Labor Conditions' 10 Safety and Health at Work (2019) 400.

39 K Schwab, 'The Fourth Industrial Revolution: what it means, how to respond' retrieved on 24th March 2021 < https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/ >

40 M Xu and others, 'The Fourth Industrial Revolution: Opportunities and Challenges' International Journal of Financial Research Vol 9, No 2 (2018) 91.

41 Deloitte Insights 'The Fourth Industrial Revolution: At the intersection of readiness and responsibility' 3.

42 M Xu and others, 'The Fourth Industrial Revolution: Opportunities and Challenges' International Journal of Financial Research Vol 9 No 2 (2018) 92.

4.0 Jurimetrics

It is important to point out at the outset that the authors do not attempt to identify the theory of jurimetrics as the root of the adoption of artificial intelligence in law practice. It may be challenging to identify one source for this purpose. However, the theory of jurimetrics is being considered to demonstrate that the idea of adopting artificial intelligence in law practice dates as far back as the 20th century or even before then.

The term "juris" simply means law. The term "metrics" means measurement. It refers to the application of mathematical and statistical techniques to any field of study.[43] Thus, terms such as econometrics, librametrics, and bibliometrics are terms generated from the fusion of the word "metrics" and economics, library, and bibliography, respectively. These metrics are used, among other things, to conduct research activities and to analyze the research activities from the micro to the macro level. Consequently, the word metrics, suffixed to juris, describes the application of quantitative methods and often especially statistics to law.[44]

The term "jurimetrics" was coined by Lee Loevinger, an American lawyer and a jurist, in his article entitled "Jurimetrics: the next step forward" in 1949. Loevinger opined that it was unnecessary, or probably impossible, to give a precise and exhaustive definition of jurimetrics. He acknowledged that any definition will be given by the activities of its practitioners and will undoubtedly change and expand as experiments and experiences give answers to specific questions.[45] Jurimetrics connotes an idea of the scientific investigation of legal problems.[46] It has

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43 E Nishavathi, R Jeyshankar, 'Mapping the Science of Law: A Jurimetrics Analysis' Library Philosophy and Practice (e-journal) (2018) 2149 1
< http://digitalcommons.unl.edu/libphilprac/2149 > accessed 24 March 2021

44 Ibid 2

45 L Loevinger, 'Jurimetrics: The Methodology of Legal Inquiry,'28 Law and Contemporary Problems (1963) 8 < https://scholarship.law.duke.edu/lcp/vol28/iss1/2/ >

46 L Loevinger, 'Jurimetrics-The Next Step Forward,' 33 Minnesota Law Review Journal (1949) 455 at 483

also been defined as 'the empirical study of legal phenomena with the aid of mathematical models based on rationalism.'[47]

There are a significant number of differences between jurisprudence and jurimetrics. Jurisprudence is concerned with such matters as the nature and sources of the law (John Chipman Gray), the formal bases of law (Giorgio Del Veccio), the province and function of law (Julius Stone), the ends of law and the analysis of general juristic concepts (Roscoe Pound).[48] Jurimetrics, on the other hand, is concerned with such matters as the quantitative analysis of judicial behaviour, the application of communication and information theory to legal expression, the use of mathematical logic in law, the retrieval of legal data by electronic and mechanical means, and the formulation of a calculus of legal predictability.[49] Consequently, while the conclusions in jurisprudence are debatable, those in jurimetrics are testable.[50]

Jurimetrics is a method born out of the realist school of jurisprudence. Loevinger appeared to have been heavily influenced by Oliver Wendell Holmes Jr., who belonged to the American Realist school of thought. Holmes had departed from the then existing schools of jurisprudence and had stated emphatically that "the Common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."[51] His opinion was the sole dissenting opinion in the matter.[52] Consequently, the ideas postulated by great jurists such as Holmes, Jhering, Roscoe Pound, and others contributed in transforming the perception of the law from being a

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47 R Singh and others, 'Jurimetrics: The Science of Law' 4 <http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09._research_methodology/14._jurimetrics___the_science_of_law/et/8160_et_et.pdf > accessed 24 March 2021

48 L Loevinger, 'Jurimetrics: The Methodology of Legal Inquiry,' 28 Law and Contemporary Problems (1963) 8 < https://scholarship.law.duke.edu/lcp/vol28/iss1/2/ >

49 Ibid.

50 Ibid.

51 Southern Pacific Co v Jensen, 244 US 205, 218, 222 (1917)

52 L Loevinger, 'Jurimetrics-The Next Step Forward,' 33 Minnesota Law Review Journal (1949) 455 at 464

supernatural institution to being a human institution that was capable of being studied and investigated by mundane minds.[53]

It is important to note that as early as 1895, Holmes acknowledged the possibility of adopting scientific methods in solving legal problems. He stated that "An ideal system of law should draw its postulates and its legislative justification from science."[54] He further noted that "the man of the future is the man of statistics."[55] "He projected the idea of 'an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends…."[56] After Holmes, others continued to subscribe to the idea of having an "experimental jurisprudence" where scientific data is used to solve legal problems.[57] Thus, it is submitted that a discussion about the role technology plays in legal practice today cannot be had without acknowledging the efforts of Holmes and other like-minded jurists.

In advocating for jurimetrics, Loevinger was heavily influenced by the developments and feats of cybernetics at the time. He reasoned that machines had been successfully programmed to imitate the thought processes of humans to the extent that they could solve differential equations and other complex logical operations much faster than the human mind. Consequently, machines could be constructed to decide lawsuits.[58] He, therefore, advocated for the scientific investigation of legal problems using symbolic logic and computers.[59]

One of the key developments in the field of jurimetrics is the utilization of electronic computers for the storage and retrieval of legal data.

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53 Ibid at 467

54 OW Holmes, 'Learning and Science,' speech delivered at a dinner of the Harvard Law School Association, June 25, 1895, reprinted in COLLEC FD LEGAL PAPERS 138 (1920).

55 L Loevinger, 'Jurimetrics: The Methodology of Legal Inquiry,' 28 Law and Contemporary Problems (1963) 6 < https://scholarship.law.duke.edu/lcp/vol28/iss1/2/ >

56 Ibid.

57 Ibid.

58 L Loevinger, 'Jurimetrics-The Next Step Forward,' 33 Minnesota Law Review Journal (1949) 455, 471.

59 M Doherty, *Jurisprudence: The Philosophy of Law*, 3rd ed (Old Bailey Press, UK 2003) 213.

Research forms the nucleus of the legal profession. There is no gainsaying that courts across the globe are inundated with a plethora of cases pending before them. Similarly, several enactments and subsidiary legislations are passed by the legislature frequently. While some of these legislations are passed to repeal or revoke some existing ones, others are passed to cover new areas to suit emerging trends. A consideration of these and many other fields of the legal profession will reveal the need for improved and refined methods in handling and storing information. It, therefore, becomes increasingly difficult to identify relevant authorities in very bulky law reports and statutes. As the difficulty increases, so does impatience and dissatisfaction with the system.[60] Consequently, Loevinger stated that the common law system itself would be in great peril.[61]

One of the principal aspects of data retrieval in the law is finding applicable analogous or relevant precedential authority in the reported cases to determine some current question.[62] Many firms now adopt computer retrieval systems to identify relevant legal precedents. Under these systems, keywords are typed into the computer, finding the cases where these words occur within the larger search area.[63]

Also, computers can work very efficiently with logical patterns. The computers may be fed with information about the courts and their approach in handling matters. The computers may then be used as an aid for predicting the likely outcome of a pending case.[64] A major shortcoming of this approach is that it requires consistency in the membership of the tribunal.[65] This, however, is not the case in most

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60 L Loevinger, 'Jurimetrics: The Methodology of Legal Inquiry,' 28 Law and Contemporary Problems (1963) 10 < https://scholarship.law.duke.edu/lcp/vol28/iss1/2/ >

61 Ibid.

62 Ibid 9.

63 M Doherty, *Jurisprudence: The Philosophy of Law*, 3rd ed (Old Bailey Press, UK 2003) 213.

64 Ibid.

65 Ibid.

jurisdictions. In Ghana, for instance, there are frequent changes in the panels in the Court of Appeal and the Supreme Court.

Another challenge with the usage of machines for prediction is that consistency in the decisions, and the court's attitude is a prerequisite for identifying a logical pattern. Judges, however, are not logical machines.[66] They have moods, change their minds and are also subject to all the weaknesses or strengths of the human condition.[67]

Despite these challenges associated with jurimetrics, its contribution to the development of the legal profession cannot be overemphasized. It ensures uniformity and a fair application of the law.[68] It will also expedite processes in and out of the courtroom. Therefore, legal practitioners will focus on other important areas of the practice while the machines handle the menial and routine parts of the practice. Also, it is noteworthy that the discussion above is not exhaustive of all the capabilities of machines under the theory of jurimetrics. Machines can be programmed to perform a plethora of other tasks, including tax planning,[69] judicial research, investigations,[70] patent and trademark applications, among others.

4.1 Emerging Trends in Law Practice

Over the last decade, artificial intelligence has made numerous inroads in the legal industry. Artificial intelligence has positively impacted the kind of work lawyers do today and how they do them. In discussing these trends in law practice that have emerged as a result of the advances in artificial intelligence, this paper will restrict itself to notable ones such as legal research, document creation, management, and review, due

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66 Ibid.

67 Ibid.

68 R Singh, GS Bajpai et al, 'Jurimetrics: The Science of Law' p 6 retrieved on 24th March 2021 at < http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09._research_methodology/14._jurimetrics___the_science_of_law/et/8160_et_et.pdf >

69 M Doherty, *Jurisprudence: The Philosophy of Law*, 3rd ed (Old Bailey Press, UK 2003) 213.

70 Ibid.

diligence, eDiscovery and case prediction or litigation analytics. These areas will be discussed below.

4.1.1 Legal research

Legal research is one of the areas where artificial intelligence has found a natural adoption in law practice. Near the end of the 20th Century, legal professions, academics and law students gained the ability to query computerized databases of legal resources such as decided cases, statutes and scholarly papers. Notable companies that are considered the pioneers in this field are LexisNexis and WestLaw in the United States. By entering keywords in a search box with a combination of Boolean operators (AND, OR, XOR, and NOT), those conducting the research were given access to a plethora of legal resources which contained the keywords. This method of legal research seemed to be more efficient than the traditional method, wherein the researcher pored over many law reports and law journals to find relevant legal resources. The latter was prone to numerous errors and cursed with much fatigue for the researcher. The scope of such research depended mainly on how far the researcher could go.

Legal research based on keywords and Boolean operators in a search query, however convenient, was not without its own problems. One major problem attendant with this method was that both relevant and irrelevant documents were included in the search results simply because the document contained a keyword in the search query. Another major problem was that the more the researcher needed to conduct a complex search, the more complex the search query became. This usually resulted in errors, the corollary of which was that irrelevant documents were included in the search results.

Today, through the adoption of artificial intelligence, these problems have been avoided. Legal search engines that employ natural language processing (NLP) algorithms, one of the artificial intelligence tools, enable their users to express their search queries in human language and process that human language in a way another human would. Through

this, they are able to fetch only documents relevant to their purposes.[71] Natural language processing uses past users' queries and results to build a predictive model of what the researcher needs in their searches. Through natural language processing, artificial intelligence legal research tools are able to understand the true meaning of a query and provide relevant results. By expressing search queries not in a complex form of keywords interspersed with Boolean operators but in readable human language and accessing only relevant results, artificial intelligence has made legal research more efficient, cost-effective, and faster.

4.1.2 Document creation, management and review

Another area in which artificial intelligence is making many inroads is document creation, management and review by lawyers. Drafting, reviewing and managing documents such as business contracts and agreements are some of the primary tasks which lawyers undertake every day. In many cases, lawyers or law firms are responsible for managing various contracts for different clients at a given time. Where these firms lack a database of all the information in those contracts and an efficient means of retrieving all that information, it requires a lot of effort on the part of the lawyers not only to draft and execute those contracts but to track, revise, manage, and improve those contracts, the contracting processes and the transactions those contracts govern.

Artificial intelligence-powered software can make document creation, management and review easy in this age. Today's artificial intelligence offerings include applications that can pick contract templates based on a client's scenario and create contractual agreements based on that

[71] LexisNexis and WestLaw have search products (Lexis Advance, Lexis and WestLaw Edge) which utilize NLP algorithms, among others, to enable legal researchers to find relevant information more efficiently in a fraction of the time. In the last decade, there have been new entrants in this market who employ cutting-edge AI tools to improve legal research. Notable among them are ROSS Intelligence and RavelLaw.

scenario.[72] Through artificial intelligence techniques such as natural language processing, essential data such as renewal dates and renegotiation terms can be extracted from numerous pages of contractual agreements. Again, such software can classify contracts based on their contents. This solves the problems law firms face in managing client's contracts.

In a study that compared the performance of artificial intelligence to human lawyers in reviewing standard business contracts, it was reported that artificial intelligence technology achieved an average accuracy rate of 94 per cent ahead of human lawyers, who achieved an average accuracy rate of 85 per cent.[73] If this study proves anything at all, it is the fact that artificial intelligence-powered software is more efficient in reviewing contracts at a fraction of the cost and time that it would take a human lawyer to accomplish the same task.

4.1.3 Due diligence

One related field in which artificial intelligence is seen to excel than humans is the area of due diligence. In their line of work, lawyers will have to conduct arduous research on facts and figures on behalf of their clients. The due diligence process is crucial in lawyer-client engagement because it enables lawyers to give informed advice on all the options the client has and steps they should or should not take. The process requires much-dedicated attention. It is time-consuming and tedious. This makes the work that lawyers produce prone to mistakes when conducting these lengthy checks. These issues can be avoided today if law firms adopt artificial intelligence-powered software like Kira Systems, which can automate the due diligence process for them. The software performs accurate due diligence reviews by searching, highlighting and extracting relevant content for analysis.

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[72] PerfectNDA is one of such companies which uses artificial intelligence to shorten the non-disclosure agreement (NDA) process. The company's NDA templates are cleverly selected by AI according to a client's specific scenario.

[73] Lawgeex, Comparing The Performance of Artificial Intelligence to Human Lawyers in the Review of Standard Business Contracts (Feb. 2018), https://bit.ly/31mTt8v

4.1.4 eDiscovery

In the area of discovery, artificial intelligence has been proven to provide better results than human lawyers.[74] As a greater part of information is stored electronically in information databases in the form of documents and media formats like audio and video, artificial intelligence-powered applications can search these digital databases for information that may be relevant for litigation. Models are trained to produce the most accurate results during several stages that involve interactions with a human reviewer. In a 2011 study published in the *Richmond Journal of Law and Technology,*[75] the authors found evidence for the proposition that technology-assisted processes which are adopted to review electronically stored information are more accurate and efficient than a manual review of documents by humans. This study determined that using automated tools or technology-assisted processes in review identified an average of 76.7 per cent of the relevant documents. Approximately 15.3 per cent of the documents retrieved were found to be irrelevant. In the case of human or manual review, it was found that it averaged 59.3 per cent of relevant documents of every document reviewed. An average of 68.3 per cent of the retrieved documents was found to be irrelevant. The authors, therefore, concluded that "overall, the myth that exhaustive manual review is the most effective – and therefore, the most defensible – approach to document review is strongly refuted. Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort."[76]

4.1.5 Case prediction or litigation analytics

The emerging trend that the present authors find most impressive is the use of artificial intelligence in case prediction or litigation analytics. Traditionally, lawyers formulate their litigation strategy based on their

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74 A whole new market around the eDiscovery field has been spawned which has numerous technology companies providing this service to law firms and lawyers.

75 MR Grossman, GV Cormack, 'Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review', 17 RICH JL & TECH 11, 37, tab 7 (2011)

76 Ibid 48.

own experiences with a judge they have appeared before and their insights gained throughout their career. Based on this, they predict the likelihood of obtaining a ruling in their favour or an outcome of an action. Litigation analytic tools powered by artificial intelligence can provide lawyers with statistics relating to the likelihood of a court or judge granting a motion, denying it or the likelihood of success of an action. Lawyers can also see the cases a particular judge cites most frequently, which may give insight into their leanings. In addition to personal insights gained over the years, this data can inform the lawyer on the litigation strategy to adopt and help build more compelling arguments.

But artificial intelligence-powered case prediction and analytic tools provide so much more. In a study published in the *Columbia Law Review,*[77] the researchers used statistical models[78] to predict the outcomes of every case before its scheduled argument before the Supreme Court of the United States of America during the 2002 term. Subsequently, they obtained a set of independent predictions from legal experts in the United States. The researchers found that the "models predicted 75% of the Court's affirm/reverse results correctly, while the experts collectively got 59.1% right."[79]

In a different study[80] published in 2017, artificial intelligence researchers built a machine learning model to predict the outcome of Supreme Court cases for each year from 1816 to 2015. The model was designed to look for associations between case features and outcomes in all previous years. After this analysis, the machine learning model would then

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77 TW Ruger and others, 'The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking', 104 COLUMBIA L REV (May 2004) 1150 < https://bit.ly/2tjRcgY > accessed 20 March 2021.

78 For the avoidance of doubt, artificial intelligence or machine learning models are basically statistical models.

79 TW Ruger and others, 'The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking', 104 COLUMBIA L REV (May 2004) 1150 < https://bit.ly/2tjRcgY > accessed 20 March 2021.

80 DM Katz and others, 'A General Approach for Predicting the Behavior of the Supreme Court of the United States', 12 PLOS ONE e0174698 (Apr. 12, 2017) < https://bit.ly/2sxg8RO > accessed 20 March 2021.

predict an affirmation or reversal of the lower court's decision and predict how each justice voted. The model was then updated to include the outcome of the cases after securing the prediction for each year. This allowed the model to learn from its previous predictions and move on to the next year. The results obtained are as follows. From 1816 to 2015, the model correctly predicted 70.2 per cent of the court's 28,000 decisions and 71.9 per cent of the justices' 240,000 votes.

Lest the reader is tempted to conclude that case prediction of this nature is only possible in the United States of America, the authors would refer to another study[81] conducted in 2019 on the judicial decisions of the European Court of Human Rights. In the study, the researchers used natural language processing tools to analyse the text of the proceedings in the European Court of Human Rights to predict future judicial decisions by the Court. They found that they were able to predict with an average accuracy of 75% the violation of 9 articles of the European Convention on Human Rights. It is submitted that as long as courts, especially those in common law jurisdictions, '*stand by things decided*', artificial intelligence models can be trained on decided cases and will be able to predict with relative higher accuracy the outcomes of cases.

A case prediction or litigation analytics tool can be a powerful addition to the arsenal of the lawyer in litigation. The predictive capability of these tools powered by artificial intelligence can guide lawyers in trial courts of a judge's statistical record of rulings on similar issues. This may include cases cited and language quoted in the judge's decisions. This tool's power is that it can help lawyers make arguments using language the judge is most likely to find persuasive - the type of language used by the judge in their previous decisions.

From the above discussion, the merits of artificial intelligence in law practice are readily seen. Lawyers who integrate artificial intelligence-

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81 M Medvedeva and others, 'Using machine learning to predict decisions of the European Court of Human Rights' Artif Intell Law 28, (2020) 237–266 < https://doi.org/10.1007/s10506-019-09255-y > accessed 20 March 2021.

powered applications or software in their workflows will enjoy many benefits in the form of time savings, produce accurate and higher quality work, increase value and reduce costs for their clients, scale rapidly and have greater satisfaction in their work.

By automating repetitive tasks like drafting contracts, due diligence reviews or using artificial intelligence-powered search engines to conduct legal research, lawyers can save a lot of time hitherto spent performing the same tasks. This will increase their ability to scale rapidly by taking on more work and delivering results faster to their clients. Lawyers will be free of the tedium which results from engaging in the minutiae of low-level tasks. They will have more time to engage with their clients more satisfyingly. They will be enabled to develop fully, explore, and explain strategies, outcomes, and keep their clients well informed at every stage of the legal representation. All these will increase client satisfaction.

As the statistics have shown, artificial intelligence-powered applications are also able to produce accurate and higher quality work than humans. Lawyers will be enabled to increase the value they provide to their clients at a fraction of the cost. To the lawyers themselves, they will enjoy greater satisfaction resulting from work that is not riddled with many errors or inconsistencies.

4.2 Challenges with the Adoption of Artificial Intelligence

While considering the positive impact that AI will have on law practice, it is equally important to consider the challenges associated with its adoption, particularly in the African setting. As noted by Iria Giuffrida, Fredric Lederer, and Nicolas Vermerys, "every technological advance is accompanied by legal questions."[82] It is axiomatic that the adoption of AI in law practice will raise a number of issues. These issues may also

[82] Sebastien Lafrance, 'The Impact of Artificial Intelligence on the Formation and the Development of the Law' (2020) 02 (01) Vietnamese Journal of Legal Sciences 3.

find different answers depending on which national jurisdiction is involved.[83] Some of these issues will be considered below.

4.2.1 Ethical Issues

The adoption of AI will undoubtedly raise issues bordering on ethics. The legal profession is a profession jealously guarded by a plethora of ethical rules. These ethical rules are found everywhere, albeit they differ from jurisdiction to jurisdiction.

The major challenge with AI application is that these machines lack ethical reasoning, which could generate myriad negative consequences in practice.[84] Despite the remarkable developments in the field of AI over the past few years, AI lacks a very key quality essential for the practice of law - the capacity of moral reasoning. Consequently, this limits its ability to make good moral and ethical decisions when it is confronted with complex situations.[85] On the issue of morals, even if the machines' learning ability is wide enough to cover morality, the next question is, by whose moral standards will the machines be programmed? Moral standards are subjective, generally depending on one's religious, geographical and cultural background. Uncertainty over which ethical framework to adopt underlies the difficulty and limitations to ascribing moral values to artificial systems.[86]

In the light of the central role that ethics play in the practice of law, it is important for the regulators of the profession in various jurisdictions to commence making provisions and guidelines to surmount these ethical issues associated with AI. Whenever there is a significant change in a

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83 Ibid.

84 Ethan Fast, Eric Horvitz, 'Long-Term Trends in the Public Perception of Artificial Intelligence', Proceedings of the Thirty-First AAAI Conference on Artificial Intelligence (AAAI-17) 964

85 Min Xu, Jeanne M David, Suk Hi Kim, 'The Fourth Industrial Revolution: Opportunities and Challenges', (2018) 9 (2) International Journal of Financial Research 94.

86 Ibid.

market or profession, regulations and rules should accompany these changes.[87]

4.2.2 Privacy/Confidentiality Issues

Privacy and confidentiality issues are inextricably linked with the preceding analysis on ethical issues that could arise from adopting AI in law practice. It is very common to have provisions in various jurisdictions that seek to promote lawyer-client privilege. Several Rules of Ethics for lawyers also enjoin lawyers to keep communications with their clients highly confidential.[88] In *Waugh v British Railways Board*,[89] Lord Wilberforce stated the rationale behind such provisions in the following words: "a man must be able to consult his lawyer in confidence since otherwise he might hold back half the truth."[90]

In *R v Jarvis*,[91] the Supreme Court of Canada held that "[t]he potential for the use of technology to infringe another's privacy is great."[92] The Court further acknowledged "the potential threat to privacy occasioned by new and evolving technologies more generally and the need to consider the capabilities of a technology in assessing whether its use breached reasonable expectations of privacy."[93]

With new technologies come new risks that can threaten clients' information and, consequently, a lawyer's good standing and reputation.[94] According to the ABA Cybersecurity Handbook, "creating, using, communicating and storing information in an electronic form greatly increases the potential for unauthorized access, use, disclosure,

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87 Cody O'brien 'How Artificial Intelligence Will Affect the Practice of Law?' Academic Festival, Event 50 (2019) 9

88 See Rule 19 of the Legal Profession (Professional Conduct and Etiquette) Rules 2020 (L. I 2423) of Ghana; Rule 19 of the Rules of Professional Conduct for Legal Practitioners 2007 of Nigeria.

89 [1980] AC 521, HC.

90 Ibid. at 531-532.

91 2019 SCC 10.

92 2019 SCC 10 at para. 116 dissenting opinion of Rowe J. but not on this point.

93 Ibid. at para 63 per Wagner C.J. for the majority.

94 Cody O'brien 'How Artificial Intelligence Will Affect the Practice of Law?' (2019) Academic Festival, Event 50 14

and alteration, as well as the risk of loss or destruction."[95] It is further opined by some that, "lawyers have become targets because they collect and store large amounts of critical, highly valuable corporate records, including intellectual property, strategic business data, and litigation-related theories."[96]

Quite recently, it was reported that a New Jersey-based law firm's e-mail account was hacked. The offender then proceeded to fraudulently obtain $560,000 from one of the clients of the law firm.[97] Also, there are reports that Jones Day, one of the largest law firms in the US, has been under cyber-attack lately. The firm has disputed such reports. It, however, admitted that it had been informed that a company the law firm used to transfer large files electronically, Accellion, "was recently compromised and information was taken."[98]

The adoption of AI will invariably oblige lawyers to build up robust electronic storage facilities to forestall issues of breach of confidentiality. Some law firms are also engaged in cloud computing. According to the ABA Handbook, cloud computing is "Any system whereby a lawyer stores digital information on servers or systems that are not under close control of the lawyer or law firms."[99] In such systems, the liability of the lawyers for any breach of confidentiality is not extinguished. Consequently, it behoves every lawyer to supervise those who gain access to confidential files in the firm, whether they are employees or independent contractors.

4.2.3 Liability for negligence

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95 Ibid.

96 Ibid. at 15

97 'Law Firm Hacked: $560,000 Stolen From Client' *New Jersey Law Journal* (New Jersey) < https://www.law.com/njlawjournal/2021/03/18/law-firm-hacked-560000-stolen-from-client/?slreturn=20210224153312 > accessed 24 March 2021.

98 Tawnell D. Hobbs, Sara Randazo,' Hacker Claims to Have Stolen Files Belonging to Prominent Law Firm Jones Day' *The Wall Street Journal* (USA,16 February, 2021) < https://www.wsj.com/articles/hacker-claims-to-have-stolen-files-belonging-to-prominent-law-firm-jones-day-11613514532 > accessed 24 March 2021.

99 Ibid 15.

Some authors have written that "the most important near-term legal question associated with AI is who or what should be liable for tortious, criminal, and contractual misconduct involving AI and under what conditions."[100] Where it is established that artificial intelligence tools have been used to perpetrate criminal activities, do the current laws of the countries apply to the tools? Do they have a legal personality on their own? Where there are breaches of the rules of ethics governing the legal profession caused by AI, who can the clients institute an action against? These are some questions that demonstrate the need for legislative reforms to align with emerging trends in the AI sector.

5.0 Conclusion/Recommendations

Artificial intelligence has come to stay with us. There is no gainsaying that it may have a rippling effect on law practice across the globe. As has been demonstrated, artificial intelligence will optimize productivity and improve law practice in diverse ways. The adoption of artificial intelligence, however, has its own ramifications. Therefore, it would not be incorrect to assert that, ultimately, the impact of artificial intelligence on law firms is a work in progress.[101] However, it appears that the majority of law firms in Africa are yet to embrace artificial intelligence fully.

It is recommended that in the light of the exponential rate at which artificial intelligence in law practice is gaining traction, there should be a revamp in the curriculum of law schools across the African continent. A course on artificial intelligence should be included in the curriculum to prepare and equip law students with the requisite skills for handling such devices. Law practice with artificial intelligence will only achieve expected results if the lawyers are well-trained. Robots and other artificial intelligence devices are only as good as their handlers, and the information the handlers (lawyers) give to them.

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[100] Sebastien Lafrance, 'The Impact Of Artificial Intelligence on the Formation and the Development of the Law' Vietnamese Journal of Legal Sciences, (2020) 02 (01) 11.

[101] Cody O'brien 'How Artificial Intelligence Will Affect the Practice of Law?' Academic Festival, Event 50 (2019) 22.

Also, there is the need for African governments to consider the best ways to develop Information Communication Technology seriously. It is clear that a successful operation of artificial intelligence is predicated on solid and quality internet connection. Unfortunately, the quality of internet connection in some parts of Africa still leaves much to be desired. This could jeopardize the efficiency of law practice.

It is submitted that artificial intelligence will not replace lawyers. Instead, it will be a good companion to lawyers in the quest to deliver quality professional legal services. Just as email changed the way we do business every day, AI will become ubiquitous – an indispensable assistant to practically every lawyer. Those who do not embrace the change will get left behind. Those who do will ultimately find themselves freed up to do more meaningful work for their clients.[102] In the light of several positive developments in Africa, such as the adoption of the Agreement establishing the Africa Continental Free Trade Area (AfCFTA), the future of law practice in Africa looks exciting. Consequently, advancements in the field of artificial intelligence ought to be embraced. However, such adoption ought to be done in a manner that considers the peculiarities in the different legal systems in Africa.

[102] Sterling Miller, 'Part I: Artificial Intelligence & Its Impact on Legal Technology: To Boldly Go Where No Legal Department Has Gone Before!' 2.

Vulnerable and Vexed: A Case for the Advancement of Consumer Protection in Ghana

Shafic Osman*

Abstract

Neoliberalism posits that the free market is a sine qua non for socio-economic development. It simultaneously admits that market failures do occur. Market failures give rise to the need to protect those it adversely affects. As of right, consumers, defined as persons who pay for goods and services for final consumption, are to be protected from the profit-maximizing activities of manufactures, sellers and suppliers. While the common law and some provisions found in scattered statutes provide some protection, it is argued that this is woefully inadequate. Coupled with this is the absence of an enforcing administrative body and a remedial tribunal vested with jurisdiction over all consumer matters. This paper examines the scope of existing protection by reviewing the literature on the subject. It further argues for a consummate body of legislation on consumer protection by assessing the practice in three jurisdictions in the global south; India, Nigeria and South Africa.

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1.0 **Introduction**

Countries in the global south, grappling with developmental challenges, are faced with a tradeoff between accelerating economic growth and ensuring the wellbeing of their citizens. Whereas these two ends may seem non-contradictory at a glance, the history of economic growth and development has shown that one is often traded-off for the other. With the increasing acceptance of capitalist systems and market solutions as the surest response to developmental questions, the absence of governmental interventions (regulation) means the famed invisible hand of the market gets to allocate as it chooses. Indeed, Ghana's 1992 Constitution[1] provides in the Directive Principles of State Policy that the country's economic objectives shall include "*affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy*". While the above provision shies away from expressly using the phrase *free market*, it does speak to the promotion of the free market.

Despite its desirability given its efficiency in allocating resources amongst scarce competing ends, all markets are characterized by some degrees of failure. Neoclassical economic theory points out the following four:[2]

a) Monopoly and Market Power
b) Externalities
c) Public Goods
d) Asymmetric Information

These inefficiencies have repercussions on consumers in the marketplace, especially in developing countries like Ghana. With a few multinational companies amassing significant market power in industries like telecommunication, pharmaceuticals and food processing, consumers are left at the mercy of these "profit first" institutions who, in the absence of antitrust (Competition) legislation, have enough incentive to engage in price-fixing activities. The unbalanced dynamics of the market in Ghana also extends to

[1] Constitution Of The Republic Of Ghana, 1992 Article 36 (2)(b).

[2] R Cooter and T Ulen *Law and Economics* (6th edn, Berkeley Law Books 2016).

- Monopoly: refers to a situation where only one entity supplies the market demands of consumers. As such, the price level is not reflective of the competitive level achieved in a free market
- Externalities: a situation where a market activity produces an unintended result, either negative (as in the case of pollution) or positive (nice scenery), which is not reflected in the price level of that activity
- Public Goods: these are goods whose consumption/enjoyment cannot be limited to paying customers. An oft cited example is a lighthouse which shines its light on all.
- Asymmetric Information: refers to the imbalance in access to information by market players. For instance, a seller does not know how much a buyer is willing to pay neither does the buyer know what the factory price of the good is. This is prevalent in industries like insurance where the insurance company does not know the pre-existing ailment of the person purchasing the policy.

asymmetric information, which affects the ability of consumers to opt for better-priced alternatives.

Despite these factors, which act either directly or indirectly against the interest and welfare of consumers, Ghana lacks a comprehensive body of legislation on consumer protection. Article 36 of the 1992 Constitution, mentioned earlier, demands the state to take steps to maximize the welfare of every person in the country. Doing so in a market and consumerist economy invariably requires consumer protection. While the constitution does not expressly make reference to consumer rights, reliance can be made on Article 33(5) of the Constitution. This provision guarantees human rights, which, even though not mentioned in the 1992 constitution, are "*considered to be inherent in a democracy and intended to secure the freedom and dignity of man*". In advanced democracies in Europe and North America[3] and even in some African states like Nigeria and South Africa, consumer rights are recognized and well established.

It is fair to note that Ghanaian law is not mute on consumer rights and protection, but what exists in Ghana's legal system on this subject are scattered provisions in several legislations, common law, case laws and policy directions. As such, the vexed and vulnerable consumer not trained in the law is left scampering around to piece together what rights are available to them and how to go about enforcing those rights. This article makes an argument for the consolidation of Ghana's laws on consumer protection into one statutory document and advocates for an expansion of the scope of the protections afforded consumers. It further argues for the establishment of a statutory body in charge of consumer complaints. The article does this by undertaking a literature review on the seminal work of the Ghanaian legal scholar Christine Dowuona-Hammond on the subject and other text writers. It then examines the scope of consumer protection as it exists in India, Nigeria and South Africa and extrapolates learning points for the Ghanaian context.

2.0 **Consumer Protection Law: Fashioning Out a Definition and Rationale**

The attainment of justice remains one of the most cherished ends of the law. The preamble to the 1992 Constitution makes that abundantly clear by stating the commitment of *we the people of Ghana,* to justice. Without delving deeper into the question of what justice is, the adoption of Rawls's definition of this subject matter suffices. In his Theory of Justice, Rawls states that, amongst other things, justice is about *fair equality of opportunity and the elimination of all inequalities of*

[3] Sinai Deutch, 'Are Consumer Rights Human Rights' (1994) 32(3) OHLJ < https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1668&context=ohlj > accessed 31 January 2020

opportunities based on birth and wealth.[4] Fair equality of opportunity is unachievable in an economic space, with actors seeking to maximize their outcomes. It is, therefore, the role of the law as a tool for ordering society to intervene. At this intersection of the inability of markets to protect the lowest common denominators and the state's duty to such persons, consumer protection law manifests itself.

It would seem evident that at the root of this subject of study is the protection of some class of persons, consumers. Some writers point to the boom in consumption levels in the post-World War 2 era as the beginning of galvanized efforts by consumers to promote consumerism.[5] This push would culminate in a speech by U.S. President John F Kennedy to congress on the latter's vision for consumer rights protection.[6] The push at the time was a bid to protect not only the *poor but the insecure rich as well*.[7] Such collectivization in the post-World War 2 era for the purpose of advocating for the rights of consumers was also witnessed on the streets of Accra in 1948 when the Ga Chief, Nii Kwabena Bonne II, organized a boycott of all European goods.[8] This was made necessary given the discriminatory and predatory prices Asian vendors were charging Africans.[9]

2.1 Beyond Price Concerns

While the most apparent frustration of consumers will be with high prices, consumerism concerns itself with a scope more comprehensive than the exchange of goods for money (or any other accepted form of compensation). As earlier stated, market inefficiency manifests itself in 4 ways under the neoliberal theories of economics. Of importance to consumer protection are the imbalances in market power and the asymmetry of information. With the majority of suppliers/manufacturers having accumulated considerable market power, they are in a position to determine the terms of the contracts they enter into with consumers. In addition, these manufacturers are privy to information on the product and services they produce and hold such information to the exclusion of consumers. Without the intervention of the government to correct this market inefficiency, consumers will continue to find themselves at the mercy of manufacturers. Globally, this push towards the protection of consumers informed UNCTAD's (United Nations Conference on Trade and Development)

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[4] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009.)

[5] Mathew Hilton, "Consumers and the State since the Second World War" (2007) 611(1) <https://doi.org/10.1177/0002716206298532> accessed 28th February, 2020.

[6] Ibid.

[7] Ibid.

[8] Francis Danquah, "Rural discontent and decolonization in Ghana, 1945-1951." (1994) Agricultural History 68 < https://www.jstor.org/stable/3744447?seq=1#metadata_info_tab_contents> accessed 28th February, 2020.

[9] The acronym of the Association of West African Merchants (AWAM) became a byword for cheating and profiteering for a long time in Gold Coast and post-Independence Ghana.

provision of some principles as guideposts in fashioning out a consumer protection regime.[10]

2.2 Who Qualifies To Be a Consumer

It is imperative to define who a consumer is or is not in an interrogation of consumer protection. This is important because a literal definition of the word consumer in dictionaries such as the *Oxford English Dictionary* provides that anyone who purchases goods or pays for services is a consumer. Such a definition thus ropes in all persons, both natural and juristic. The scope of such a definition is too broad as it includes even entities with market power and those on the powerful end of information asymmetry. In such a situation, the purpose of consumer protection law is not achieved. It is therefore essential to adopt a definition that is fit for our purpose.

Black's Law Dictionary defines a consumer as *a "person who buys goods or services for personal, family or household use, with no intention of resale, a natural person who uses products for personal rather than business purposes"*.[11] This definition effectively excludes business entities, usually the actors with market power and beneficiaries of asymmetric information. It limits it to purchases of goods and persons paying for services. In the US case of *Bowe v. SMC Elec. Prods*,[12] this definition by Black's Law Dictionary was quoted with approval. It was provided further that *consumers are to be distinguished from manufacturers (who produce goods) and wholesalers or retailers (who sell goods)*. The UK's Consumer Rights Act 2015 defines the word as an "*individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession*".

Nigeria's Federal Competition and Consumer Protection Act 2018 also embodies the spirit of the definition provided in Black's Law Dictionary. It further states that a consumer is *any person to whom a service is rendered.* On the other hand, South Africa's Consumer Protection Act 68 of 2008 provides a more elaborate definition of the term *consumer.*[13] While it also follows the spirit of Black's Law

[10] United Nations Conference on Trade and Development, *United Nations Guidelines for Consumer Protection*: These range from Physical Safety Promotion and Protection of Consumer's Economic Interests, Standards for Safety and Quality of Consumer Goods and Services, Distribution Facilities for Essential Consumer Goods and Services, Measures Enabling Consumers to Obtain Redress, Education and Information Programs, Promotion of Sustainable Consumption, Measures Relating to Specific Areas, International Coporation.

[11] Bryan A. Garner, *Black's Law Dictionary (9th edn, St Paul Mn)* 335

[12] 945 F. Supp. 1482, 1485 (D. Colo. 1996)

[13] ''consumer'', in respect of any particular goods or services, means — (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business; (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3); (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction

Dictionary definition, it further exempts certain categories of transactions entered into by a "consumer" from the purview of the Act. One of such exemptions is on transactions "*in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, is more than or equal to the threshold value determined by the Minister in terms of Section 6*". [14] What this does is to avoid intervening on behalf of juristic persons who have enough market power to advocate for themselves.

The sum of the definitions from various jurisdictions shows that the purpose of consumer protection remains the protection of the vexed and vulnerable.

3.0 Existing Protections for Consumers in Ghana

Whenever commodity prices go up in Ghana or telecommunication services become unstable, a conversation ensues on the *Consumer Protection Agency's* inability to respond to consumers' needs. This conversation ignores that this Agency lacks the statutory powers necessary to respond to the needs of consumers. Launched in June of 2008,[15] this is a non-governmental organization that engages in public advocacy on behalf of consumers. The task of protecting consumers of telecommunication services, utilities like water and electricity lies within the purview of state institutions like the National Communication Authority and the Public Utilities Regulatory Commission. With consumers of other classifications of goods and services, the available avenue to seek redress of a wrong is either some administrative body established under an Act of parliament or the courtroom. As such, consumers are presented with the burden of figuring out whether a statutory body exists to protect the rights, if any, attached to the good or service they have purchased. In the absence of such a body, consumers have to pore through the statute books of the country to find a law that fits their needs. Once this is successfully done, redress can be sought in the country's already burdened and congested court system.

3.1 The Shade of the Common Law and Statutes

On 6th March 1957, Ghana gained independence from the British, and later, on 1st July 1960, it became a republic, weaning itself politically, economically and legally from Great Britain. Over 60 years later, the country, however, continues to bear the markings of the legal system of Great Britain. In 1876, the Supreme

concerning the supply of those particular goods or services; and (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);

[14] Consumer Protection Act No. 68 of 2008.

[15] Kwadwo B Donkor, 'Consumer Protection Agency Formed' (*Modern Ghana,* 9 June, 2008) <https://www.modernghana.com/news/168955/consumer-protection-agency-formed.html> accessed 4 April 2020

Court Ordinance (No.4 of 1876) saw the introduction of principles of law known as the Common Law.[16] These principles formed the basis of several post-independence legislation with needed adjustments as and when the lawmaker saw fit for Ghanaian realities.[17] In a litany of such legislations, we find consumer protection laws that have guided the country's courts in settling matters before it.

Broadly speaking, the following legislation can be said to contain consumer protection laws to varying degrees:[18]

a) The Sale of Goods Act, 1962 (Act 137)
b) Hire Purchase Act, 1974 (NRCD 292)
c) Standards Authority Act,1973(NRCD 173)
d) Public Health Act, 2012 (Act 851)
e) Weights And Measures Act,1975(NRCD 326)
f) General Labeling Rule,1992(LI 1541)
g) Pharmacy Act, 1994 (Act 489)
h) Export And Import (Amendment) Act, 2000 (Act 585)
i) Export And Import Act, 1995 (Act 503)

Dowuona,[19] on the other hand, presents the range of consumer protection in a manner that can be themed as follows:

i. Framework on Product Liability and the Obligations and Remedies Stemming from it
ii. Advertising, Labelling and Marketing of Consumer Products
iii. Terms and Conditions of Consumer Contract

3.1.1 Framework on Product Liability and the Obligations and Remedies Stemming from it

At common law, manufacturers are tasked with ensuring that their products meet a desirable standard of care that does not injure the ultimate consumers. Manufacturer's liability is derived from the general principles of negligence as espoused at common law and recognized in the Ghanaian courts.[20] Dowuona notes that while two earlier decisions on product liability (Aboagye v. Kumasi Brewery Ltd and Overseas Breweries Ltd v. Acheampong) were decided in

[16] Together with equity and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the 24th day of July, 1874

[17] Victor Essien, 'Researching Ghanaian Law' (*Global Lex*, June, 2005). <https://www.nyulawglobal.org/globalex/Ghana.html> accessed 4 April 2020

[18] Irene Aborchi-Nyahe and others, 'Research Report on Consumer Protection In Ghana: A Review of Consumer Protection in the Mobile Telecommunication Sector in Ghana' (2014) Consumers International January 2014. <https://www.consumersinternational.org/media/2256/consumer-protection-in-ghana-research-report-eng.pdf> accessed 5 April 2020.

[19] Christine Dowuona-Hammond, 'Consumer Law and Policy in Ghana' (2018) JCP <https://doi.org/10.1007/s10603-018-9379-y> accessed 5 April 2020.

[20] Allasan Kotokoli v. Moro Hausa and Another [1967] GLR 298.

favour of the plaintiffs due to an easier evidentiary burden, the more recent case of Nana Tabiri Gyansah III v. Accra Brewery[21] eases the burden on the manufacturer by placing on them, the duty of showing they run a full-proof system.[22] There is a need for the protection afforded purchasers of products to move from negligence to strict liability as under the current regime, manufacturers, already with the scales of power tipped in their favour, will have it easier discharging such a burden.

Statute also provides a framework to ensure the safety of products via legislations mentioned above. Implementing product safety regulations is the statutory responsibility of administrative bodies such as the Ghana Standards Authority and the Food and Drugs Authority.

While tort law provides a framework on product liability, statute law undergirds the definition of a product. Section 81 of the Sale of Goods Act, 1962 (Act 137) defines goods (product) as movable property of every description. It includes growing crops or plants and other things attached to or forming part of the land, which are agreed to be severed before sale by or under the contract of sale. This Act then provides a litany of protections which will be addressed in a subsequent subheading.

3.1.2 Advertising, Labelling and Marketing of Consumer Products

Asymmetric information disadvantages consumers in the marketplace. Without the proper information on the goods and services consumed, consumers will be in the dark about what they spend their monies acquiring. As such, it becomes necessary to ensure that consumers have adequate information when making their consumption decisions. Dowuona[23] identifies existing legislation which governs this aspect of consumer protection. It spans from Standards Authority Act, 1973 (N.R.C.D. 173); Standards Board (Food, Drugs, and other goods) General Labeling Rules, 1992 (L.I. 1541); Weights and Measures Act, 1975 (N.R.C.D. 326); Merchandise Marks Act, 1964 (Act 253) to Part Seven of the Public Health Act, 2012 (Act 851). The Food and Drugs Authority is now the statutory authority with powers to enforce applicable laws as established under section 80 of the Public Health Act, 2012 (Act 851). Dowuona notes that despite the abundance of laws, implementation remains a challenge.[24]

[21] [1964] G.L.R. 242, [1973] 1 G.L.R. 421

[22] [22] Christine Dowuona-Hammond, 'Consumer Law and Policy in Ghana' (2018) JCP <https://doi.org/10.1007/s10603-018-9379-y> accessed 5 April 2020 7

[23] Ibid.

[24] Ibid 9.

3.1.3 Terms and Conditions of Consumer Contracts

The Sale of Goods Act, 1962 (Act 137) and the Hire Purchase Act, 1974 (NRCD 292)[25] creates implied terms, conditions and warranties in some class of consumer contracts. The protections afforded consumers under Act 137 imputes on sellers the duty to covenanting that the goods are in existence,[26] that they have title to the goods,[27] that goods are fit for purpose,[28] amongst others. Breach of these covenants either entitles the consumers to specific performance or damages. The Hire Purchase Act also protects hirers from predatory practices of owners. The protection here is mainly against onerous hiring terms. Other legislation, such as the National Communications Authority Act, 2008 (Act 769), is industry-specific and protects consumers in those industries.

4.0 Gleaning Learning Points from other Jurisdictions

In the absence of a Consumer Protection Act (there is a Consumer Protection bill being drafted),[29] the Ministry of Trade has formulated a Consumer Protection policy which forms a part of the ministry's Ghana Trade Policy.[30] This policy aims to protect "*consumers from unfair practices which adversely affect health, safety and economic interests*". The policy further prescribes the development of "*clear, transparent, comprehensive and consolidated consumer protection rules to facilitate the exercising of consumer rights*". This goal shall be the primary concern of this paragraph.

What constitutes *clear, transparent and consolidated consumer protection rules* is essentially a matter of national jurisprudence and socioeconomic realities. This paper draws from established frameworks around the world in sketching out what consumer protection ought to look like in Ghana.

The argument canvassed here favours a consummate body of laws on consumer protection against the current regime of laws found in scattered legislation. It is argued that the current legal regime presents the following set of problems:

i. Consumers are left ignorant of the protections available to them. This is especially true in a heavily informal economy[31] like that of Ghana, where a significant portion of consumers is unlettered. For formally educated

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[25] See generally, Act 137 and NRCD 292.
[26] Section 9.
[27] Section 10.
[28] Section 13.
[29] This was inaccessible at the time of publication
[30] Ministry of Trade, 'Trade Policies' (*Ministry of Trade and Industry,* 2017) < http://moti.gov.gh/tradepolicies.php> accessed 16th April, 2020.
[31] Ghana Statistical Service 'Population & housing census – summary report of final results' (2010). <http://www.statsghana.gov.gh/docfiles/2010phc/Census2010_Summary_ report_of_final_results.pdf> accessed 17 April 2020.

consumers, knowledge of the actual law is still a challenge unless the consumer in question is one with a considerable amount of legal training, knowledge of existing protections and means of enforcing them.[32]

ii. Secondly, the existing situation where protection is found in scattered legislations potentially either creates a clash between enforcing authorities or conflict of interests where one agency is simultaneously responsible for manufacturers/suppliers and consumers. It, therefore, results in consumer protection laws being treated as distinct entities being enforced by competing authorities.

4.1 Framework of Rights

The United Nations Guidelines for Consumer Protection[33] provides some guidelines on structuring a nation's Consumer Protection regime.

These guidelines do not expressly spell out specific rights of the consumer. They are expressive of goals to be achieved in any effective system of consumer protection. The actual body of rights to be enshrined in the statute is to be left to each jurisdiction's jurisprudence and socioeconomic needs.

4.1.1 India's Consumer Protection Act, 2019

In the Consumer Protection Act, 2019[34] of India, six consumer rights are enumerated as not exhaustive of the range of rights afforded to consumers in the

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[32] Naa Ayikarley Ankrah, 'Consumer protection in Ghana: Understanding the relationship between consumer awareness and policy responsiveness' (Undergraduate dissertation, Ashesi University 2013).

[33] United Nations, 'United Nations Guidelines for Consumer Protection' (2003) United Nations-Department of Economic and Social Affairs < https://unctad.org/en/Docs/poditcclpm21.en.pdf > accessed 17 April 2020

a. Physical Safety
b. Promotion and Protection of Consumer's Economic Interests
c. Standards for Safety and Quality of Consumer Goods and Services
d. Distribution Facilities for Essential Consumer Goods and Services
e. Measures Enabling Consumers to Obtain Redress
f. Education and Information Programs
g. Promotion of Sustainable Consumption
h. Measures Relating to Specific Areas such as food, water, pharmaceuticals, etc.
i. International Corporation

[34] Consumer Protection Act 2019, s9

(i) the right to be protected against the marketing of goods, products or services which are hazardous to life and property;
(ii) the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;
(iii) the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices;
(iv) the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora;
(v) the right to seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers; and
(vi) the right to consumer awareness;

jurisdiction. These rights reflect a goal of offsetting the information asymmetry between consumers and manufacturers/sellers, protecting their economic rights and creating easily accessible remedial avenues. Further reading of the Act brings limitations and definitions on the range of consumer rights provided to the fore. For instance, persons who purchase goods for resale and persons who are offered services for free are exempted from the definition of consumer under the Act.[35] The protection of these rights under the Act arises once what is defined as a Consumer Dispute[36] arises. This arises in any of the following 5 (five) instances[37]

i. Adoption of unfair or restrictive trade practices by a trader
ii. Defect in goods sold
iii. Deficiency in services
iv. Charge of excess price
v. Sale of hazardous goods

4.1.2 South Africa's Expansion of Common Law Protections

Under South Africa's Consumer Protection Act 68 of 2008, chapter 2 of the Act spells out what has been said to be "contentious fundamental consumer rights".[38]

As can be seen from the rights enumerated,[39] the protection provided is similar to those provided under India's legislation except the right of equality in the consumer market, right to privacy, right to choose, and the supplier's accountability to consumers. Indeed, it seems to be the case that the common law's regime of protection under Ghanaian law does not afford these rights. Some further elaboration is therefore required on the above.

4.1.2.1 **Right of Equality in the consumer market:**[40] as a country with a long history of racial and economic inequality, post-apartheid South Africa is very

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[35] Ibid s7 s42.

[36] Ibid s8 a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint.

[37] Gurjeet Singh, *The Law of Consumer Protection in India: Justice Within Reach* (Deep & Deep Publications 1996).

[38]Wenette Jacobs, Philip N. Stoop and René van Niekerk 'Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13(3) Potchefstroom Electronic Law Journal.
< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1752916> accessed 2nd February, 2020.

[39] I. The right of equality in the consumer market
II. The consumer's right to privacy
III. The consumer's right to choose
IV. The right to disclosure and information
V. The right to fair and responsible marketing
VI. The right to fair and honest dealing
VII. The right to fair, just and reasonable terms and conditions
VIII. The right to fair value, good quality and safety
IX. The supplier's accountability to consumers

[40] Consumer Protection Act No. 68 of 2008, Part A

sensitive to the need to bridge all identity gaps in the country. A right of equality in the consumer market means non-discrimination in all economic activities. That translates to a "gender, sexuality, religious (and other identities)" blind approach to marketing, access, priority, supply, pricing, among other activities by the distributor, seller or manufacturer.[41] This presents an extension of the existing protections for consumers in Ghana.

While Article 17(2) of the 1992 Constitution of Ghana provides equality before the law for all, this is not typically thought of as an area for consumer protection. While this might be because consumers have simply not "tested the law", enshrining a right of equality in the consumer market will mean an easier means of seeking redress other than the triggering of Article 33(5) in the High Courts, as will be discussed later.

4.1.2.2 **The consumer's right to privacy:**[42] The Ghanaian Court's treatment of the right to privacy has mainly dealt with the unauthorized recording of communications between persons.[43] Under the Consumer Protection Act 68 of 2008, unwanted direct marketing constitutes a violation of the consumer's right to privacy. This affords consumers the right to terminate transactions arising out of direct marketing within a stipulated time. This ostensibly protects the consumer against duress without needing to prove it via the evidentiary requirements of the common law.[44]

4.1.2.3 **The consumer's right to choose:**[45] In upholding their sovereignty, a consumer's right to choose is vital. Under the South African law, this right protects consumers against compulsory bundling, i.e. where a consumer is compelled to purchase goods in a bundle when they have no such intention, allows the consumer to opt-out of fixed-term agreements upon its expiry subject to the fulfilment of liabilities, and preauthorization of repair or maintenance services. It also enshrines the consumer's right to cancel reservation, booking or order, grants the consumer a right to return purchased goods to the seller that are not defective within ten business days, and the right to return unsolicited goods or services. However, some elements of this right do find a reflection under Ghana's Sale of Goods Act, 1962 (Act 137).[46]

4.1.2.4 **The supplier's accountability to consumers:**[47] This is said to be the only consumer right worded in the negative (i.e. requiring action on the part of the

[41] Ibid s8
[42] Ibid Part B
[43] *Raphael Cubagee v Michael Yeboah Asare & 2 Ors*[2018] Ref.No. J6/04/2017 and Ackah v Agricultural Development Bank (Ruling) (J4/31/2015)[2016] GHASC 49 (28 July 2016)
[44] See *Cfc Construction Company (Wa) Ltd & Anor. V. Ramsom Divine Attitsogbe* [2006] C.A. NO. J4/21/2004
[45] Consumer Protection Act No. 68 of 2008, Part C
[46] Consumer's right to choose or examine goods and Consumer's rights with respect to delivery of goods.
[47] Part I.

seller/distributor and not the consumer).[48] This right primarily protects consumers in transactions that take a longer time to complete. One of such is lay-by sales. This contrasts with hire purchases where the consumer, even though making payments in instalments, gets possession of the good immediately after entering the contract. Because possession is deferred until payment is completed, this right ensures continued accountability of the supplier to the consumer of the sums paid by the latter as it is their property. This is a step beyond the protection provided under the Hire Purchase Act, 1974 (NRCD 292)

4.1.3 *Nigeria's Double Barreled Approach:*

The Federal Competition and Consumer Protection Act, 2018 (FCCPA) of Nigeria adopts a dual approach to protecting consumers in the marketplace, which is hinged on the underlying principle of consumer sovereignty. This principle is built on two elements: *the existence of a range of consumer options* and *the ability of consumers to choose effectively among these options.*[49] The first element expresses the rationale of Competition law,[50] while the second focuses on consumer protection law. As such, the Act establishes both the Federal Competition and Consumer Protection Commission (FCCPC) and the Competition and Consumer Protection Tribunal (CCPCT) and vests in both entities, the duty of developing and promoting fair, efficient and competitive markets in promoting the interests and rights of consumers in Nigeria.[51] The FCCPA enumerates a number of rights of the consumer under Part XV of the Act.[52]

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[48] Wenette Jacobs, Philip N. Stoop and René van Niekerk 'Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13(3) Potchefstroom Electronic Law Journal
< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1752916> accessed 2nd February, 2020.

[49] Neil W. Averitt and Robert H. Lande 'Consumer Sovereignty: A Unified Theory Of Antitrust And Consumer Protection Law' (1996) 65(3) Antitrust Law Journal
< http://www.jstor.org/stable/40843382 > accessed 2nd February, 2020.

[50] For more on competition law, see ibid

[51] FCCPA 2018.

[52] Niji Oni & Co, 'A Review of the Federal Competition and Consumer Protection Act 2018' (Niji Oni And Co. Legal Practioners, 2018) < https://damodlp.com/wp-content/uploads/2019/10/DamodLP-FCCPA-REVIEW.pdf > accessed 2nd February, 2020.

I. Right to information in plain and understandable language
II. Right to disclosure of prices of displayed goods and services
III. Right to cancel any advance reservation, booking or order made, subject to a reasonable charge for the cancellation.
IV. Right to return goods and received full refund in specific instances
V. Right to timely performance and completion of services agreed to be provided
VI. Right to timely notice of any unavoidable delay in the performance of the services
VII. Right to quality performance of the services
VIII. Right to the use, delivery or installation of goods that are free of defects in the performance of the services
IX. Right to the return of property in at least as good a condition as was made available by the consumer for the purpose of performing the services

4.1.4 *Synthesizing Across Jurisdictions*

It can be seen that across the three jurisdictions discussed above, a common thread of rights can be seen. The consumer's rights are framed to reflect the information asymmetry between the latter and sellers/manufacturers. Further, the ability of consumers to choose freely in a manner allowing them to assert their independence finds itself in the enumerated rights across jurisdictions. This is then supported by an entitlement to return goods in a timeous manner and healthy state.

In compiling a list of rights for comprehensive legislation on consumer protection, the above guidelines ought to be reflected. While these are primarily common law rights currently existing in contract and tort law, avenues for expansion exists, as seen above in the South African example. In enshrining a right of equality and privacy in consumer dealings, a further step is taken in recognition of how globalized and technology-oriented consumer markets are today.

4.2 Regulatory and Administrative Frameworks

As has been made evident in earlier paragraphs, there is an abundance of laws on consumer protection in Ghana and some agencies tasked with enforcement.[53] It, therefore, is not a situation of an absence of laws but a lack of a comprehensive and consolidated body of laws. This is compounded by the tedious means of enforcing rights under statutes that do not create administrative bodies for such purposes. As such, a consumer seeking to establish a manufacturer's liability for faulty goods does so by going through the time and money consuming processes of litigation. The evidentiary burden of proving negligence in product liability cases, as seen in the *Nana Tabiri Gyansah III v. Accra Brewery*[54] case, has been criticized as making consumer protection not easily accessible to the consumer via the law of torts.[55] Here, the plaintiff sued the defendant company for negligence and sought to recover damages for injuries he sustained after drinking a product of the defendant company. While the plaintiff relied on the principle of *res ipsa,* the court dismissed the suit after being satisfied that negligence could not reasonably be presumed on the part of the defendant

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X. Right to receive goods that are reasonably suitable for the purpose intended
XI. Right to receive goods that are of good quality, in good working order and free of defects
XII. Right to receive goods that are useable and durable for a reasonable period of time
Right to receive goods that comply with any applicable standards set by industry sector regulators.

[53] Standards Authority Act 1973 (NRCD 173), and the Public Health Act, 2012 (Act 851) (i.e this creates the Food and Drugs Authority) do have administrative bodies which enforce the provisions of their creating statutes.

[54] [1973] 1 G.L.R. 421

[55] Christine Dowuona-Hammond, 'Consumer Law and Policy in Ghana' (2018) JCP <https://doi.org/10.1007/s10603-018-9379-y> accessed 5 April 2020 7

company due to its *full-proof manufacturing processes*. This then suggests a departure from the Overseas's breweries case where it was the defendant's duty to show *how the contamination can get to the product in a manner other than its production processes*[56] to one where establishing the presence of a *full-proof* system is sufficient.

Enumerating specific consumer rights in legislation is therefore not enough to ensure the protection of consumers. There ought to be a body specifically tasked with enforcing the provisions of the statute in a creative manner that does not burden the consumer, often impecunious, with evidentiary burdens which are exacting in duty and hinders the search for justice.

4.2.1 Instituting an Administrative Body for Consumer Protection

Like all administrative bodies statutorily empowered to enforce the provisions of an Act, a Consumer Protection Agency/Authority ought to be created with all the necessary administrative powers and functions. This includes advising the President on measures to institute to enhance consumer protection, the power to investigate upon receiving a complaint, and generally enforcing the provisions of the Act. Such an administrative body is to be created distinct from a Consumer Protection Tribunal, which as in the Nigerian example[57], *adjudicates over conducts prohibited under the Act and exercises the jurisdiction, powers and authority conferred on it under this Act or any other enactment*. Such tribunals exercise appellate jurisdiction over the Authority/Agency and may be granted concurrent jurisdiction with the High Court.

While these elements are generally ubiquitous in most consumer protection laws, some specifics are discussed below and contextualized to the Ghanaian situation.

4.2.1.1 Supremacy over Other Legislations: Regulated industries like telecommunications and the financial markets have administrative bodies tasked with enforcing the provisions of the statutes regulating them. These authorities perform dual functions of simultaneously regulating their industries while seeking out the best interests of consumers. For instance, the National Communications Authority was established under the National Communications Authority Act, 2008, with the primary objective of regulating the provision of communication services in the country.[58] However, section 5 of the Act tasks the authority with protecting "*the interests of consumers or users of communications networks or communications services and in particular to the interests of consumers' choice, quality of service and value for money*". This creates a situation

[56] ibid
[57] FCCPA, s39
[58] NCA 2008, s2

where the regulating authority may face a conflict of interests in the discharge of its duties.[59]

The potential for such conflicts further reinforces the need for an independent consumer protection body with the sole objective of protecting consumer rights and interests. In this regard, section 104 of the FCCPA 18 provides a practical guiding point. By making the provisions of a future consumer protection Act of Parliament supreme over other existing legislation, instances of "legislative clashes" will be preempted. In the alternative, the consumer protection agency may exercise concurrent jurisdiction with other regulators but still be vested with superior powers to the other regulators.

4.2.1.2 Complaint Systems: Consumer Protection processes are triggered when a complaint is first made. *In the case of R v High Court (Fast Track Division) Ex parte, CHRAJ; Interested Party, Richard Anane*,[60] the question of what constituted a *complaint* made to the Commission on Human Rights and Administrative Justice was said to be one which was made formally by an identifiable person. While the majority decision based its interpretation on the letter of the Constitution and relevant statutory provisions, it stated that such an interpretation was necessary to prevent *an utterly unpredictable and unworkable situation* for the Commission. This is so because if the word complaint is interpreted broadly to include those made informally in a public space (i.e. the media), the Commission would be on a wild goose chase, overburdening itself in the process.

Complaints to a consumer protection body, therefore, ought to be done formally by an identifiable person. The said person, however, need not be the consumer whose right has been infringed. Public interest lawyers and consumer watch groups may initiate the complaints to cater for the section of the population which is unlettered and uninformed enough to assert their rights.

4.2.1.3 Fusing Competition Law with Consumer Protection: At the onset of the Covid-19 pandemic, consumer markets were unsettled, and some consumer goods saw meteoric price increases.[61] While market equilibrium was restored over time, making a case for the neoliberal proposition of leaving markets to the forces of demand and supply, public health considerations will mean active interference in the market is needed to regulate prices of consumer goods like

[59] During his vetting for the position of the OSP, Kissi Agyabeng, a former Chairman of the Electronic Communications Tribunal intimated that despite its role as a check on the decisions of the NCA, persons appearing before the tribunal continue to harbor misgivings about the independence of the tribunal due to the NCA being its *paymasters* and the regulator of the industry: see 3:06:30-3:60:50 https://www.youtube.com/watch?v=MAXWRtLQlYI

[60] [2007-8] SCGLR 340.

[61] 'Face shield craze: The rise and fall of the 'high in demand' commodity' (Ghanaweb, 28 July 2020) < https://www.ghanaweb.com/GhanaHomePage/business/Face-shield-craze-The-rise-and-fall-of-the-high-in-demand-commodity-1019098 > accessed 4th February, 2021.

surgical masks and face shields. Nigeria's FCCPC earned the praise of the United Nations Conference on Trade and Development (UNCTAD) for how swiftly it acted against the price gouging of hand sanitisers and surgical masks during this period.[62] Waiting on the market to restore itself might not be advisable in times of pandemics like Covid-19. Neither might it be in normal times.

Simply put, the goal of competition law is in ensuring the unhindered working of the free market.[63] It does so by working to create a market where consumer welfare is maximized. Without delving deeply into competition law (antitrust law), it suffices to mention the range of issues it concerns itself with; restraint of trade, monopolies, price gouging, mergers, among others. Existing legislations like the National Communications Authority Act, 2008 (Act 769), the Securities Exchange Commission, 2016 (Act 929), and the Protection Against Unfair Competition Act, 2000 (Act 589) contain scattered provisions on the subject of competition law. None of these, however, is explicit on price regulation.

Therefore, it is recommended that the promulgation of a consumer protection law be accompanied by competition law. Consumer sovereignty is best achieved under a framework that has both elements running concurrently. While the history of price controls in Ghana gives much to be worried about, given the brute force with which it was accompanied under some regimes and the black market it inadvertently created,[64] a proper price regulation regime can be adopted. While taking lesson points from the past, such a system should be used sparingly and guided by a committee of experts in finance, economics, consumer protection, and competition law, amongst others.

Conclusion: This article has attempted to show the gaps in the existing protections afforded consumers under the common law and statutory provisions by reviewing the seminal work of Christine Dowuona Hammond on the subject. It further explored the practice in three jurisdictions in the global south, enumerating the consumer protection rights in these countries, which will be relevant to Ghana's socio-economic situation. Further, it argued for the instituting of both a commission and tribunal for the enforcement and adjudication of consumer protection matters, respectively. Finally, an argument

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[62] 'UNCTAD hails Nigeria on Consumer Protection during Pandemic' (FCCPC, 14 May, 2020) <https://www.fccpc.gov.ng/news-events/releases/2020/05/14/unctad-hails-nigeria-on-consumer-protection-during-pandemic/ > accessed 4th February, 2021.

[63] Simbarashe Tavuyanago, 'The interface between competition law and consumer protection law: An analysis of the institutional' (2020) South African Journal of International Affairs, 27(3) <https://www.tandfonline.com/doi/full/10.1080/10220461.2020.1837231 > accessed 4th February, 2021.

[64] K. Ansa-Asare, 'Legislative History of the Legal Regime of Price Control in Ghana ' (1985) Journal of African Law 29(2) < https://www.jstor.org/stable/745362> accessed 5th February, 2021.

was made for the dual treatment of consumer and competition law for the effective achievement of consumer sovereignty.

Rescuing and Fortifying the Guardrails of Rule of Law in Ghana

Prosper Andre Batinge [*]

Abstract

Globally, the Rule of Law is receding. This global recession is palpable—and in some cases accelerated—because of the global novel coronavirus pandemic that began in late 2019. Evidence from the World Justice Project Rule of Law Index bears out the claim of a global decline in the Rule of Law. The World Justice Project started compiling statistics on the Rule of Law Index in various countries in 2008. Ghana's Rule of Law Index saw an impressive steady climb from 2010. Ghana became the lodestar of the Rule of Law in 2017-2018, climbing to the top of the Rule of Law Index of the 18 Sub-Saharan African countries captured by the World Justice Project Rule of Law Index. Then in 2019, the incipient guardrails holding the Rule of Law in Ghana proved weak and began giving way.

Tragically, few are talking about the ill health of Ghana's Rule of Law despite its steep fall in recent years. Ghana's poor performance proves that its Rule of Law's foundation is weak or is weakened. In throwing the Rule of Law into the Ghanaian public epistemic forum, its legal forum specifically, this article posits and advances the following theses.

(1) The Rule of Law, more than any of the liberal political ideals, is indispensable to ensuring a flourishing life in the country.
(2) The state of Ghana's Rule of Law, once the toast of Sub-Saharan Africa, is fading, showing signs of further decadence.
(3) The protective guardrails around the Rule of Law in Ghana need to be fortified because the Rule of Law is the holy grail of Ghana's development.

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1.0 Once the Toast of Sub-Saharan Africa, the State of Ghana's Rule of Law, Is Fading, Showing Signs of Further Decadence.

The World Justice Project ("WJP") Rule of Law Index ("Index") measures the Rule of Law in countries across the world annually. The WJP Index "are the products of intensive consultation and vetting with academics, practitioners, and community leaders from more than 100 countries and 17 professional disciplines."[1] "The Index is the world's most comprehensive dataset of its kind and the only to rely principally on primary data."[2] The Index scores and ranks Rule of Law performances of countries based on four universal principles of the Rule of Law. These four universal principles subsume eight sub-principles.

1.1 The Index's Four Universal Principles of the Rule of Law

While the WJP confesses that contentions surround the definition of the Rule of Law, still, it defines the rule of law as a durable system of laws, institutions, norms, and community commitment that delivers four desiderata: accountability, just laws, open Government, and accessible and impartial dispute resolution. The WJP's definition, a "thick" definition of the Rule of Law, anchors on four values that the Rule of Law seeks to promote in a political community. Under the desideratum of accountability, the Index measures how the acts and omissions of a government and private persons and institutions are answerable under the law.[3] Under the desideratum of just laws, the Index measures how just, clear, publicised, and stable the laws of a state are; as well, the Index measures how laws are applied evenly, how laws protect fundamental rights, how laws provide security for persons and their contract and property.[4] Under the desideratum of open Government, the Index measures the procedural vehicle through which laws are enacted, administered, and enforced and, as such, are fair and efficient.[5] And under the desideratum of accessible and impartial dispute resolution, the Index measures whether the judiciary of a state and other auxiliary bodies and agencies are competent, ethical, neutral, and independent, delivering justice timely; as well, the Index measures whether the judiciary and its related bodies and agencies are well resourced and reflective of the diversity of the state.[6]

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[1] World Justice Project, "Rule of Law Index 2020" <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf> accessed 15 March 2021 8.

[2] Ibid 5.
[3] Ibid 10.
[4] Ibid.
[5] Ibid.
[6] Ibid.

1.2 The Index's Eight Sub-Factors

The Index further subdivides these four universal principles, *supra*, into eight factors:[7] constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.[8]

The first factor, constraints on government powers, measures how a legal system constrains state powers.[9] It measures how the legislature, the judiciary, independent auditors and reviewers, and civil society limit the enormous power of Government as evinced, for example, in the sanctioning of official misconducts. It equally measures whether political power is transferred in accordance with the law.[10]

The second factor, the absence of corruption, measures how state actors do not direct state influence and resources for private gain.[11] Still, on Government, the third factor, open Government, measures the extent to which government data, including laws, are publicised and accessible to citizens.[12]

The promotion of fundamental rights is at the core of the Rule of Law. This places an expectation on a state to guarantee equal treatment of persons devoid of discrimination; to guarantee the right to life and security of the person; to guarantee due process of law and rights of the accused; to guarantee freedom of opinion and expression; to guarantee freedom of belief and religion; to guarantee freedom from arbitrary interference with privacy; to guarantee freedom of assembly and association, and to guarantee fundamental labour.[13] The fourth factor, fundamental rights, measures the degree to which states guarantee these rights.

The fifth factor, order and security, measures a state's success in curtailing crime and civil conflict. It measures whether aggrieved parties trust and are satisfied with the institutions through which they channel and ventilate their grievances and hence do not resort to violence in seeking redress.[14]

The sixth factor, regulatory enforcement, measures how the state applies and enforces government regulations, how administrative proceedings are fairly

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[7] "The conceptual framework of the Index includes a ninth factor on informal justice that is not included in the Index's aggregate scores and rankings [in its Reports in recent years]. Informal justice systems often play a large role in countries where formal legal institutions are weak, remote, or perceived as ineffective." Ibid 12.
[8] World Justice Project [2] 5.
[9] Ibid 11.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid.

adjudicated within a reasonable time, and whether the government expropriates private property with adequate compensation.[15]

The seventh and the eighth factors, civil justice and criminal justice, respectively, measure the procedural and substantive fairness of civil and criminal justice of a state.[16]

1.3 Ghana's Rule of Law Performance over the Years

The table below summarizes Ghana's Rule of Law performances since the Index began releasing its comprehensive annual Reports in 2010.

	2010	**2011**	**2012-2013**	**2014**	**2015**	**2016**	**2017-2018**	**2019**	**2020**
Regional Rank	2/5	2/9	2/10	2/18	2/18	2/18	1/18	6/30	6/31
Score	-	-	---	0.57	0.60	0.58	0.59	0.58	0.57
Global Rank	-	-	23/97	37/99	34/102	44/113	43/113	48/126	51/128

Ghana's Rule of Law performance was relatively steady from 2010 to 2016. Ghana maintained its second position among Sub-Saharan African countries. Where the Index made the raw score available, Ghana scored on the average over 0.58 on a scale of 0-1, where 0 (zero) is the weakest and 1 (one) is the strongest. In 2015, Ghana's score rose to 0.60, its highest ever, though Ghana maintained its second position.

But it was the 2017-2018 Report that saw Ghana outperform its regional counterparts, climbing to the top in Sub-Saharan Africa with a score of 0.59. In that same year, Ghana saw an impressive performance on the global ranking, coming 43 out of 113 countries. A lot appeared well with Ghana's Rule of Law. Or so it seemed.

Then the surprise came in 2019. Ghana obtained the number 6 spot in Sub-Saharan Africa out of 30 countries. On the surface, Ghana's score of 0.58 did not evince a substantial decline. In fact, Ghana's score in 2019 is the same as its score in 2016. The 2019 score of 0.58, which gave Ghana its number 6 position in the region, the worst, is better than the 2014 score of 0.57 that gave Ghana a second position.

[15] Ibid.
[16] Ibid.

A number of inferences may be derived from these numbers. It may well be argued that Ghana's Rule of Law performance in 2019 did not substantially change compared with previous years. This conclusion, however, should not be consoling because it means that Ghana's Rule of Law has not been improving.

Another inference from these numbers is that Ghana's Rule of Law began declining in 2019 as evinced in its fall from the number one place to the number six spot. Though this inference is not entirely unreasonable, the raw scores of Ghana in 2019 and 2020 do not bear out the claim of a decline on the surface.

A better inference is that Ghana's counterparts in the region have improved their adherence to the tenets of the Rule of Law as reflected in their improved scores and ranks. This should be concerning for every Ghanaian, especially for those who work within the legal system. Why has Ghana not been strengthening its Rule of Law? Why is Ghana's Rule of Law largely static? Why is Ghana declining in its Rule of Law rank in the region?

One should be concerned—probably worried—over Ghana's recent Rule of Law performances for this reason: In 2019, Ghana dropped to its worst position. This would have been considered an outlier. But then the following year, 2020, Ghana retained its declined number 6 position with an even poorer score of 0.57. The facts show a declining Rule of Law output in Ghana starting from 2019. One year of decline may be argued as an aberration. A second year of the same declining performance should be concerning—and is disturbing, at least for this author.

If the WJP Index is reflective of reality, and I see no reason to doubt their time-tested Reports, Ghana's sacred flame, its Rule of Law, is beginning to fade. The Covid pandemic reveals how dim Ghana's Rule of Law has become, as would be shown in the next section. If allowed to continue to dim, Ghana's Rule of Law might die off, leaving serious consequences for Ghanaians in particular and the African region in general.

2.0 The Pandemic Has Crystalised Ghana's Rule of Law Defects. The Guardrails of Ghana's Rule of Law Should Be Fortified Because the Rule of Law Is the Holy Grail of Ghana's Development.

The Covid-19 pandemic crystalised some defects of Ghana's Rule of Law. The pandemic period, which witnessed partial lockdowns and a nationwide mask mandate, registered troubling allegations of police brutalities on civilians. For example, for failing to wear a mask, the police forced a 90-year-old man to stand in the baking African sun for five hours, from 9 am to 2 pm.[17] The octogenarian

[17] "Police Made me Stand in the Sun for Five Hours for Not Wearing Face Mask—90-year-old Man" (*Ghanaweb*, January 28, 2021) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Police-

victim, Opanin Kwamena Nsonowaa, from Ashire in the Twifo Atti-Morkwa district of the Central Region, was on his way to buy items for his hospitalised wife.[18] The victim narrates his ordeal: "I was very thirsty and hungry[,] but the police never allowed me to eat and drink for about five intimidating hours …"[19] While he painfully endured the tropical heat, he "wonder[ed] what might have happened to [his] sick wife whom [he] was to present the items to."[20] Opanin Nsonowaa's cruel treatment was not an isolated incident. There were several similar reports of police brutalities on civilians across Ghana during this period. Evidently, state power in the hands of the Ghana Police is susceptible to misuse as the pandemic highlighted in this instance and several others.

Some of these police brutalities were even captured on camera, with the videos going viral. One such example "was a heartbreaking video of an elderly woman … whipped by a policeman in Accra Central, where she had gone to buy food." She was said to have violated Covid-19 protocols.[21] To be fair to the police, some civilians complicated the police work by neither wearing masks nor staying at home; few civilians even attacked them.[22] The police, in some instances, had to enforce Covid-19 protocol amid civilian hostility and threats to their lives.

But still, the tendency of the police to apply disproportionate force in addressing issues such as enforcing the mask mandate and other Covid-19 protocols appears widespread in Africa. "[I]n some countries, including South Africa, Kenya, and Nigeria, police have on occasion used extreme violence to enforce Covid-19 regulations."[23] As a result, ordinary citizens distrust the police in Ghana, as is the case in these and other African countries.[24] "The level of distrust of the police is high in many African countries."[25]

Other worrying cases were military brutalities on civilians during the pandemic period. Ghana's military involvement during the pandemic period is probably, best remembered for its unwarranted intrusion into the Ghanaian civilian space

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made-me-stand-in-the-sun-for-five-hours-for-not-wearing-face-mask-90-year-old-man-1165849> accessed 28 March 2021

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Emelia Ennin Abbey, "Policing in the Face of COVID-19" (*Graphic Online*, 28 September 2020) <https://www.graphic.com.gh/news/general-news/policing-in-the-face-of-covid-19.html> accessed 25 March 2021

[22] Ibid: "Some police officers also suffered attacks from the public. For instance, Corporal Bernice Osei Owusu had a substance sprayed in her eyes by a (passenger of a vehicle), while a female driver ran over the foot of Inspector Sullemana Jallo Abdullah at a checkpoint. Those who allegedly assaulted the police personnel were arrested and [faced] the law."

[23] "Women Traditional Leaders Could Help Make Sure the Pandemic Message Is Heard" (*The Conversation*, 28 August 2020) <https://theconversation.com/women-traditional-leaders-could-help-make-sure-the-pandemic-message-is-heard-14303> accessed 25 March 2021

[24] Ibid.

[25] Ibid.

than its role in lessening the spread of the coronavirus. Three instances of such military unjustified intrusion into public life suffice, though there were many.

One, an extended scuffle between MPs of the two main aisles in Parliament occurred on the eve of January 7, 2021, during the election of a new Speaker of Parliament. The military entered the chambers of Parliament to quiet the riotous MPs. To date, the person or persons who authorised the military into the chambers of Parliament on that occasion when MPs were unruly is unknown. Many condemned what, in their view, is the unnecessary invitation of the military into the chambers of Parliament. Civilian security in Parliament should have and could have maintained the order, they argue. The presence of the gun-carrying military in Ghana's Parliament that night made our relatively proud nation look like a banana republic, patriotic Ghanaians remark of this incident and fume in rage.

Two, concerns were also raised over the use of the military as errand boys for civilians, mostly for political appointees and pastors. For example, it has been alleged that soldiers pound fufu in the homes of political appointees.[26] Leading members of civil society groups condemned our fufu pounding military since fufu pounding bears neither directly nor indirectly on the core mandate of defending the Republic of Ghana: "The attempt to turn soldiers into errand boys of civilian appointees, private citizens and 'small boy magicians' parading as pastors should be a monumental shame to" the nation."[27]

And three, there was also widespread outcry against a photo of a soldier carrying the bag of one of the lawyers for one of the parties to the 2021 presidential election petition. Reacting angrily, critics questioned, "why a soldier should have an additional duty of carrying the bag of a private legal practitioner to court ..."[28] The critics of these instances of military presence in civil lives argue that '"Defending the territorial integrity of any country does not include body-guarding civilian appointees,'" warning that '"We have no business civilianising our soldiers. It would come back to haunt us.'"[29]

The pandemic period evinces that Ghana's police and military power is amenable to abuse. This is a defect of Ghana's Rule of Law. Another defect of the Rule of Law that this period highlighted is a stifled media.

Even before the pandemic, the perception was palpable that the Ghanaian media was under attack. Many, especially the media, aligned to the opposition political

[26] "Soldiers Pound Fufu in the Homes of Appointees—Prof Gyampo" (*Ghanaweb*, 2 February 2021) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Soldiers-pound-fufu-in-the-homes-of-appointees-Prof-Gyampo-1169464> accessed 25 March 2021

[27] Ibid.

[28] Ibid.

[29] Ibid.

parties, and many self-professed neutral media practitioners felt and expressed the view that the Government is using state power to suffocate the media and other voices of free expression in Ghana. Proponents of this view, who know the Ghanaian media terrain well, trace the beginning of this new media oppression to recent years. "Investigative journalist Manasseh Azure Awuni has said Ghana's press freedom has been under attack since 2017 ..."[30]

Manasseh further claims that freedom of opinion is so muzzled under this Government that some media practitioners are afraid to oppose it for fear of retribution. "Ghana has become hostile … that a number of journalists who agree with [Manasseh] opt to not say same publicly ..."[31] Among other examples, proponents of this viewpoint to the mass "closure of some pro-opposition radio stations," describing these closures as "appear[ing] like a target" at opposition media houses and outlines.[32] Free media and free expression are enabling tools of the Rule of Law. Even a mere perception that the voices of citizens are silenced should be a grave concern for a nation that sincerely cares about the Rule of Law.

With this strong prevailing view that the media and free expression is under attack in the country, the directive issued at the behest of Ghana's Supreme Court, directing the public to desist from criticising those Justices of Ghana's Supreme Court who heard the 2021 presidential election petition only poured more propane into the blasting inferno of a perceived oppressed media. Reactions to the directive were virtually negative. For example, some "questioned the motivation behind the Judicial Service's new move to seem to want to control how the media reports opinions of the public about its work."[33]

Opponents of the directive admit that "there should be a distinct respect for the judiciary …."[34] However, the critics argue that the Justices of the Supreme Court "should also not be hostile to the interests or criticisms that come to it from the public, or, from the media."[35] One such critic sums up what many understand

[30] "Free Speech in Ghana Has Been Under Constant Attack Since Akuffo-Addo Won 2016 Election—Manasseh" (*Ghanaweb* 1 March 2021) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Free-speech-in-Ghana-has-been-under-constant-attack-since-Akufo-Addo-won-2016-election-Manasse> accessed 27 March 2021

[31] Ibid.

[32] Ibid.

[33] "Judicial Service Order: What Kind of Threat Is That? Prof. H. K. Prempeh" (*Ghanaweb*, 28 February 2021) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Judicial-Service-order-What-kind-of-threat-is-that-Prof-H-K-Prempeh-1191736> accessed 27 March 2021

[34] Ibid.

[35] Ibid.

the directive to be: "Judges in the country … cannot gag the public from criticising their rulings and work in the court of law."[36]

To be fair to the Justices of our Supreme Court, and in fidelity to the canons of interpretation, the directive from a purposive perspective sought to discourage the public from vile and disparaging attacks, especially on the persons of our Justices. The overall import of the directive appears not to bar the public from constructively criticising our Justices. Probably, it is the tone of the directive that induced the impression in many that the Justices of our apex Court are unwelcoming of constructive criticism. And/or perhaps, no matter how the directive would have been framed, it still would have been negatively received by a populace that is firm in its belief that Ghana's media is oppressed under this regime.

Ultimately, when a large section of the Ghanaian public is already unyielding in its view that the media and free expression, especially opinions opposed to the views and actions of Government, are unwelcomed, a directive from the Supreme Court suggesting a restrain in vile, unconstructive reports of its pronouncements is likely to be seen as another sharp, piercing nail in the bleeding hands of a crucified media on the cross of media freedom and free expression and opinion.

Corruption is a problem in Ghana. Corruption has always been a problem in Ghana. Governments after governments appear to be doing worse than previous governments in Ghana's unending corruption war. Still, in recent years, reports of corruption-related scandals shocked the nerves of a nation that has grown numb to the penetrating arrows of corruption. This government is widely seen to have no appetite for the corruption fight. The public appears to believe that the most endangered civil servants are those who are fighting corruption well.

Two personalities and their corruption efforts encapsulate Ghana's corruption progress or the lack thereof: the resignation from the office of Ghana's first Special Prosecutor, Martin Amidu, and the forced leave and subsequent forced retirement from the office of the Auditor-General, Daniel Yaw Domelevo. These two held offices crucial to our corruption crusade. The two, whose anti-corruption credentials informed their appointments, were expected to rejuvenate Ghana's stale corruption fight. Instead, the two became victims of Ghana's corruption cancer. Their tragedy is telling of Ghana's entrenched corruption and even telling of Ghana's willingness to uproot corruption under this government.

[36] "You can't Gag us—Franklin Cudjoe Tells Judges, Judicial Service" (*Ghanaweb* 27 February2021) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/You-can-t-gag-us-Franklin-Cudjoe-tells-Judges-Judicial-Service-1191139> accessed 26 March 2021

The forced leave imposed on Domelevo and his subsequent forced retirement from office as head of Ghana's Audit Service first began with an exchange of epistles between the presidency and Domelevo. Undesirous of seeing Domelevo in office, the presidency wrote to him in June 2020:

> The President of the Republic, Nana Addo Dankwa Akufo-Addo, has directed Mr. Daniel Yaw Domelevo, the Auditor-General, to take his accumulated annual leave of one hundred and twenty-three (123) working days, according to records available to the Presidency, with effect from Wednesday, 1st July, 2020."[37]

The president's letter claims a legal basis of its directive:

> The President's decision to direct Mr. Domelevo to take his accumulated annual leave is based on sections 20(1) and 31 of the Labour Act, 2003 (Act 651), which apply to all workers, including public office holders such as the Auditor-General. According to the Act, a worker is entitled to annual leave with full pay, in a calendar year of continuous service, which cannot be relinquished or forgone by the worker or the employer.[38]

Domelevo's crime, per the president's understanding, is that he "has taken only nine (9) working days of his accumulated leave of one hundred and thirty-two (132) working days" since assuming office as Auditor-General on 30th December 2016.[39]

Domelevo's understanding of Ghana's labour laws on annual leave, however, substantially differs from the President's. Domelevo communicated his disagreement with the President's reading of sections 20(1) and 31 of Act 651 in his reply to the President's proceed on directive:

> My knowledge of recent labour law and practice in the country is that no worker is deemed to have accumulated any leave on account of their having failed, omitted, neglected or even refused to enjoy their right to annual leave, which the law guarantees for their benefit, not the employer.[40]

Domelevo then argued that the real reason behind the President's "proceed on leave" order was because he was fighting corruption too well:

> Previous correspondence from the Chairman of the Audit Service Board (who works at the Office of the Senior Minister) together with public

[37] Letter from Eugene Arhin, Director of Communications, Office of the President, to Daniel Yaw Domelevo, Auditor General (29 June, 2020).
[38] Ibid.
[39] Ibid.

[40] Letter from Daniel Yaw Domelevo, Auditor General to Nana Asante Bediatuo, the Secretary to the President (3 July 2020).

> pronouncement by Ministers make it clear that the Auditor-General's work is embarrassing the government.[41]

Domelevo next noted that he had not been fairly treated because other government officials who had not taken their accumulated leaves were still working:

> The office [of the President] must have been aware also that several appointees of the President, have not, since the year 2017 taken their annual leave to date. The directive therefore that I proceed on leave, oblivious of the other workers similarly circumstanced, gives the impression that the decision is not taken in good faith.[42]

Though he felt unfairly treated, Domelevo nonetheless proceeded on leave as directed. At the end of his leave, Domelevo returned to meet yet another epistle that he proceeds on retirement from office as Auditor-General:

> The attention of the President of the Republic has been drawn to records and documents made available to this Office by the Audit Service, that indicate that your date of birth is 1st June, 1960, and that in accordance with article 199(1) of the Constitution, your date of retirement as Auditor-General was 1st June, 2020 … Based on this information, the President is of the view that you have formally left office.[43]

That ended the efforts of the former Auditor-General at ensuring transparency and accountability in Ghana. Earlier, the Special Prosecutor suffered a similar fate.

When the office of the Special Prosecutor was created,[44] amid some reservations, many across the Ghanaian political and ideological walls agreed that Martin Amidu was the general to lead Ghana's newest anti-corruption regiment. Hardly had Amidu assumed office than his battles with the government, instead of corruption, swelled the public. Subsequently, Amidu informed the public that he resigned as Special Prosecutor:

> I should not ordinarily be announcing my resignation to the public myself but the traumatic experience I went through from 20th October 2020 to 2nd November 2020 when I conveyed in a thirteen (13) page letter to the conclusions and observations on the analysis of the risk of corruption and anti-corruption assessment on the Report On Agyapa Royalties Limited Transactions and Other Matters Related Thereto to the President as Chairman of the National Security Council cautions against

[41] Ibid.
[42] Ibid.
[43] Letter from Nana Bediatuo Asante, Secretary to the President, to Daniel Yaw Domelevo, Auditor General (3 March 2021).
[44] The Special Prosecutors Act, 2018, Act 959 established the office of the Special Prosecutor, charging it to lead Ghana's corruption fight.

> not bringing my resignation as the Special Prosecutor" to the notice of the public.[45]

Amidu's letter explained further:

> The reaction I received for daring to produce the Agyapa Royalties Limited Transactions anti-corruption report convinces me beyond any reasonable doubt that I was not intended to exercise any independence as the Special Prosecutor in the prevention, investigation, prosecution, and recovery of assets of corruption. My position as the Special Prosecutor has consequently become clearly untenable.[46]

Besides his claim that the office of Special Prosecutor lacks independence, Amidu also reveals that he felt threatened:

> The events of 12th November 2020 removed the only protection I had from the threats and plans directed at me for undertaking the Agyapa Royalties Limited Transactions anti-corruption assessment report and dictates that I resign as the Special Prosecutor immediately.[47]

In addition to frowning upon corruption, the Rule of Law advocates the separation of power among the executive, legislature, and judiciary. The Rule of Law particularly strives to restrain the excessive exercise of executive power. In recent years, the executive has been accused of curtailing the province of Ghana's legislature and judiciary. The attempt of the executive to cap the 2021 budget of both the legislature and the judiciary exemplifies an executive with the tendency of limiting the influence of the other two branches of government.[48] The Speaker of Parliament, Alban Bagbin, succeeded in having the limitation on the budget of Parliament reversed by threatening to block the approval of the 2021 Budget.[49]

The Secretary to the President earlier wrote to the lawmakers informing them that GH¢77 million and GH¢119 are proposed to be slashed in the budget estimates of the Judiciary and the Legislature, respectively.[50] Amid the pushback to the executive's intention of curtailing the financial jurisdiction of the other two

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[45] Letter from Martin Amidu Announcing His Resignation from Office as Special Prosecutor to the Public (16 November 2020).

[46] Ibid.

[47] Ibid.

[48] "Bagbin Wins as Akufo-Addo Withdraws Decision to Cap Parliamentary Budget" (*Ghanaweb*, March 25 2021). <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Bagbin-wins-as-Akufo-Addo-withdraws-decision-to-cap-Parliamentary-budget-1214569> accessed March 25, 2021.

[49] Ibid.

[50] "Parliament, Judiciary Budget Cap: Akufo-Addo Never Sanctioned Letter from Secretary—Majority Leader" (*Ghanaweb*, March 25 2021) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Parliament-Judiciary-budget-cap-Akufo-Addo-never-sanctioned-letter-from-secretary-Majority-Leader > accessed March 25, 2021.

branches of government, it was explained that the president did not ask his secretary to issue the order.[51]

It is telling that the Secretary to the President, with neither the president's notice nor his approval, wrote to Parliament informing the lawmakers of a proposed reduction in their annual budget. Sadly, it is even more telling and suggestive of the state of Ghana's Rule of Law that no public reprimand has been issued to the Secretary to the President after his unusual and, probably, unlawful communication to Parliament if indeed he issued the letter without authorization.

Surely, Ghana should not wait until its Rule of Law is in the reds and off the rails before addressing this worrying trend. Herein lies the thrust of this Article: that a receding Rule of Law in the last two years in a row requires refreshing our memories of its enduring importance; for we appear to have forgotten the indispensable role of the Rule of Law to the actualization of our individual and collective aspirations as a people who share a common political community.

3.0 The Rule of Law, more than any of the Liberal Political Ideals, Is Indispensable to Ensuring a Flourishing Life in the States. Hence its Perpetual Importance Needs to Be Kept Constantly in Mind.

Professor Richard Fallon professes that "the rule of law … possess relatively timeless importance."[52] The Rule of Law is so obviously beneficial to society that it is often tempting to overlook, or even forget, this importance. "The Rule of Law is manifestly so preferable to any other system so far created for organizing society that I see no need to justify it by further argument."[53] But the near-universal deconsolidation of the Rule of Law in recent years, globally and locally, necessitates a review of the timeless importance of this nuanced concept, an importance that appears to be fading, especially in our Ghanaian national memory and focus.

Good political governance is pivotal to attaining the aspirations of a state. The Rule of Law is the condition precedent to good governance: "I have come to realise that … the law is the best method of governing society ... The law is the engine of a civil society, and we lawyers are the engineers."[54] Relatedly, proper political discussions and processes, the pulse of a democratic culture, depend on

[51] Ibid: "Osei Kyei-Mensah-Bonsu, the Majority Leader of Parliament[,] says President Nana Addo Dankwa Akufo-Addo never instructed his secretary, Nana Bediatuo Asante, to write a letter to Parliament communicating a decision to cap the budgetary allocation for Parliament and the Judiciary."

[52] Richard H. Fallon, Jr., "Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age" (2018) 96 Tex. L. Rev. 487

[53] Francis Neate, "The Meaning and Importance of the Rule of Law" in Francis Neate (ed), *The Rule of Law: Perspectives from Around the Globe* (LexisNexis 2009) 56.

[54] Ibid 55.

the Rule of Law. "Without the Rule of Law, there could be no … free political discussion, no political process … The political process involves free political debate and discussion. It is the Rule of Law which underpins and guarantees that process."[55]

The Rule of Law is thus the compass that bends towards good, legitimate government and governance. Likewise, the Rule of Law is the compass that ticks away from bad, illegitimate government and governance. While cognizant of the enduring contests around the meaning of the Rule of Law and even alert to the more polarizing debate over how to measure Rule of Law performances, the majority of Rule of Law authors such as Brian Z. Tamanaha are firm in holding that "'A government that abides by the rule of law is seen as good and worthy of respect'—the rule of law … is held as the measure by which the legitimacy of a state, government or constitution should be judged."[56] The Rule of Law guarantees good governance because it promotes values that promote good governance, such as democracy, political stability, and mutual trust. It is "a fundamental prerequisite for democracy, stability, prosperity[,] and mutual trust …'"[57]

In arguing that the Rule of Law promotes good governance, Rule of Law scholars and practitioners often point to the correlation between the Rule of Law and desirable political processes of a state. "[T]here is a clear correlation between the country's liberal political tradition on the one hand and its quality of the rule of law as well as its state of economy on the other hand."[58] The near-universal endorsement of the Rule of Law hinges on the core belief that the Rule of Law is integral to the good of the state and the flourishing of its people. "While their advocacy is resolutely normative," Rule of Law "reformers maintain that their prescriptions are supported by scholarly research demonstrating that the establishment and maintenance of appropriate legal and political institutions improve aggregate well-being."[59]

For contemporary evidence of the correlation between the Rule of Law and the political processes and the economy, Poland, Hungary, and Greece are cited. Weak Rule of Law is the cause of the political and economic woes of these European countries.[60] Their lack of Rule of Law continuity explains their bad

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[55] Ibid 60.

[56] Mirko Canevaro, "The Rule of Law as the Measure of Political Legitimacy in the Greek City States" (2017) Hague J Rule of Law 211-236, 212.

[57] Jennifer Rankin, "MEPs Back Plans to Cut Funds for EU States Who Weaken Rule of Law" *Guardian* (London, 17 January 2019) < https://www.theguardian.com/world/2019/jan/17/meps-back-rule-of-law-plans-freeze-funds-to-corrupt-eu-states > accessed 28 March 2021

[58] Matej Avbelj, "Rule of Law and the Economic Crisis in a Pluralist European Union" (2016) Hague J Rule Law 8: 191-203, 200

[59] Rodriguez et al., "The Rule of Law Unplugged" (2010) 59 Emory L.J. 1455, 1456

[60] Avbelj [59] 200.

governments, which translates into their poor economic output.[61] Thus, Rule of Law reformers, scholars, promoters, advisers and enthusiasts "insist that the rule of law … is an unalloyed good, promoting and safeguarding values that are intrinsically desirable, such as economic development and social progress."[62]

The Rule of Law facilitates good governance in part because it is the vehicle through which civil society organizes and drives its agenda. "The Rule of Law is the only mechanism so far devised to provide *impartial control of the use of power by the state* … explain[ing] why the Rule of Law is pre-eminently the best available system for organizing civilized society."[63] Civil society organizations constrain state power by eliminating abuse from the exercise of official power and discretion.

Besides being the guardrail of good governance, the Rule of Law propels economic growth. "In recent decades, the rule of law has been highlighted as the solution to … economic underdevelopment ..."[64] It is generally contented with reasonable evidence that the Rule of Law correlates with the economy as it does with good governance. The Rule of Law "is necessarily in a positive correlation with the economic growth and the overall economic prosperity of any country."[65]

The belief that the Rule of Law catalyzes economic growth is not merely rhetorical; this belief courts costly pragmatic projects. "A well-functioning economy is thus in an absolute need of an established rule of law. This conventional wisdom has not only been turned into a mantra but has informed, indeed [fueled] a number of costly global programs investing into the rule of law to foster the economic growth."[66] Such dedication of justified resources to Rule of Law causes is lacking in Ghana lately, probably, explaining the beginning of Ghana's Rule of Law as demonstrated in part **2** *supra*.

Along with enlivening good governance and the economy, the Rule of Law ensures social cohesion by unveiling avenues through which grievances and disputes are channelled and ventilated and adjudicated.[67] The Rule of Law plays a crucial role in dispute settlement: "The UN Millennium Declaration makes references to the importance of the rule of law, linking it to compliance and dispute settlement …"[68] When disputes are properly ventilated and adjudicated,

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[61] Ibid.
[62] Rodriguez et al. [60] 1456.
[63] Francis Neate, "The Rule of Law—A Commentary on the IBA Council's Resolution of September 2005" in Francis Neate (ed), *The Rule of Law: Perspectives from Around the Globe* (LexisNexis 2009) 9.
[64] Jørgen Møller, "Medieval Origins of the Rule of Law: The Gregorian Reforms as Critical Juncture?" (2017) Hague J Rule of Law 9: 265-282.
[65] Avbelj [59] 192.
[66] Ibid.
[67] See, Stephen Holmes, "Lineages of the Rule of Law," in José María Maraval and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge Uni. Press, 2003) 37
[68] Noora Arajarvi, "The Rule of Law in the 2030 Agenda" (2018) Hague J Rule of Law 10: 187-217, 191

the result is a cohesive and stable state, an ambience fertile for good governance and its accompanying economic growth and national development.

A cohesive society, one that springs from the Rule of Law, is formidable against external aggression. "A society that manages, in this way, to channel internal hatreds inside public institutions will be more cohesive in the face of external foes."[69] Grievances and disputes are internally channelled when the elite "renounce[s] its immunity and expose[s] itself to legal challenges. This is how power politics, if the elite is sufficiently prudent, can incubate the rule of law."[70] Hence, no one is seen to be above the law; equality before the law is a key desideratum of the Rule of Law.

For the "thick" proponents of the Rule of Law, assurance of human rights is a *sine qua non* of the Rule of Law. A state cannot guarantee its populace of their human rights without the Rule of Law. "We have a shared responsibility to embark on a path to inclusive and shared prosperity in a peaceful and resilient world where human rights and the rule of law are upheld."[71]

In addition to the above, the Rule of Law is key to sustainable development: "The rule of law is key in achieving sustainable development."[72] The Rule of Law is the thread that anchors development to peace and security, respect for human rights, and good governance.[73]

Continental blocks such as the European Union have realized the enduring utility of the Rule of Law to development and are beginning to put the Rule of Law in the fore in their efforts at actualizing the aspirations of their member states. Hence adherence to the Rule of Law is a pre-requisite to bona fide membership: "The European parliament has backed plans to cut EU funds to member states that undermine the rule of law or allow corruption to fester," Brussels knows that this is "a move that could raise tensions with the governments in Hungary and Poland, which are accused of weakening judicial independence."[74] The EU now realizes that "'Without the rule of law, the European Union loses its credibility in the eyes of the citizens and the eyes of the world.'"[75]

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[69] Holmes [68] 37.

[70] Ibid.

[71] Synthesis Report of the Secretary-General on the Post-2015 Sustainable Development Agenda, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet" (December 2014), A/69/700, p 4 para 3.

[72] Arajarvi [69] 188.

[73] Ibid.

[74] Jennifer Rankin, "MEPs Back Plans to Cut Funds for EU States Who Weaken Rule of Law" *Guardian* (London, 17 January 2019) < https://www.theguardian.com/world/2019/jan/17/meps-back-rule-of-law-plans-freeze-funds-to-corrupt-eu-states > accessed 28 March 2021.

[75] Ibid.

The African Union is beginning to catch up in this respect. The Constitutive Act of the African Union roots the founding and operation of the AU in some principles and values, including protecting human and peoples' rights, advancing democratic institutions and culture, promoting good governance, and, of course, fidelity to the Rule of Law. "At least in terms of the tone, this represents an improvement relative to the Charter of the now-defunct Organization of African Unity, which barely made any reference to the rule of law."[76]

International organizations had long recognized the role of the Rule of Law in development even before continental bodies such as the EU and the AU did. For example, the North Atlantic Treaty Organization (NATO) does not have binding membership criteria.[77] But an aspiring member country is required to prepare a Membership Action Plan (MAP) before it is admitted to NATO.[78] The MAP compels a "candidate country [to] commits itself to the rule of law ..."[79]

As well, membership of the UN is increasingly anchored on the Rule of Law: Member States of the UN "make repeated references to it in different contexts and have highlighted its importance as a guiding principle of the UN's work in several high-level meetings and instruments … with emphasis on the rule of law and development."[80]

For lawyers and the legal community, the Rule of Law is their greatest resource; without it, they have no trade. "As lawyers, the Rule of Law is our most precious resource. And unlike other commodities, the more we share it, the more we have."[81]

The Rule of Law is more than a resource for lawyers. The Rule of Law is the oxygen for lawyers and the legal profession. "For lawyers throughout the world, the Rule of Law is our compass, our gravity. It ensures predictability, stability, and fairness. Without it, we cannot function."[82] Beyond the legal field, the Rule of Law is the fuel for businesses and business transactions. For the Rule of Law "ensures predictability, stability, and fairness. Without it, … Business cannot strive. Society cannot grow."[83]

The Rule of Law is a sacred flame that lights society: "For it means that we are not, as we are sometimes seen, mere custodians of a body of arid prescriptive

[76] Joseph M. Isanga, "Rule of Law and African Development" (2016) 42 N. C. J. Int'l L. 729, 741
[77] Pekka Hallberg, "The Rule of Law" Helsinki (Edita Prima Oy, 2004)
[78] Ibid 69.
[79] Ibid.
[80] Arajarvi [69] 191.
[81] Karen Mathis, "Rule of Law Opening Remarks" in Francis Neate (ed), *The Rule of Law: Perspectives from Around the Globe* (LexisNexis 2009) 21
[82] Ibid 22.
[83] Ibid.

rules but are, with others, the guardians of an all but sacred flame which animates and enlightens the society in which we live."[84]

4.0 Conclusion

Ghana's Rule of Law is showing signs of deep cracks. The fundamentals of the Rule of Law as instantiated in a tempered or constrained executive power, a restrain exercise of police and military power, a rational exercise of state discretion, a free and robust media, functional independent institutions such as the offices of the Auditor-General and the Special Prosecutor, absence of corruption, separation of power and the equality of every citizen before the law have proven fragile as manifest in Ghana's latest Rule of Law scores and ranks that the WJP released. The Covid-19 pandemic crystalised Ghana's Rule of Law defects.

Though Ghana's fading Rule of Law follows a global trend of a receding Rule of Law, Ghana's blunt Rule of Law should be sharpened. Because the Rule of Law is the holy grail of development, the actualization of our individual and collective aspirations as a people with a shared state is headed for disappointment if our Rule of Law is off the rails. We seem to have forgotten the unparalleled place of the Rule of Law in national development. This Article refreshes our national memory of the singular role of the Rule of Law in attaining a flourishing life in our shared political community while illuminating some of the defects of Ghana's sliding Rule of Law that the Covid-19 pandemic highlighted. These defects need fixing. Now!

[84] Tom Bingham, "The Rule of Law – The Sixth Sir David Williams Lecture" Cambridge (16 November 2006) 259

The Best Investment on Earth Is Earth: Unearthing Act 1036

Irene Ali Dery*

*My own recipe for world peace is a bit of land for everyone…… **Glady Taber**, the land, our land belongs to the future. We need to collectively get to the point where we see land as a community to which we belong to, then and only then will we begin to use it with love and respect.*

For the best investment on earth is Earth.

1.0 INTRODUCTION

Imagine being invited into a family meeting and the first scene you witness is an exchange of blows. The reason? It is either the family head has sold family land without the family's consent, or the youngest in the family has sold his interest to the latest Chinese man in exchange for a few sticks of cigarettes.

Every typical Ghanaian family has at least once in a lifetime been saddled with a land dispute. Land is not only considered important for agrarian purposes, but it is also a standard for measuring wealth in many societies.[1] It is an invaluable asset that appreciates over time but rarely depreciates. It forms a significant source of wealth (from 50% to 75%) for every country, city/town, village, clan, or family[2] and Ghana is no exception. This explains why land-related disputes constitute about 59% out of the total cases in court, with a rate of settlement as low as 10%.[3]

The increase in demand for land has been the cause of the myriad of problems facing land administration in Ghana. Discussions on land reforms in Ghana were initiated in 1994 and led to a national workshop in April 1997. The workshop's outcome was the formulation of the National Land Policy document, which the Government approved on January 21, 1999, for implementation.

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[1] Dominic Tuobesaane Paaga, Dandeebo G, 'Customary land tenure and its implications for land disputes in Ghana: Cases from Wa, Wechau and Lambussie' (2013) 3(18) International Journal of Humanities and Social Science < http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1037.3980&rep=rep1&type=pdf> accessed 25 March 2021.

[2] Human Security Center, *Human security report 2005: war and peace in the 21st century* (OUP 2005)/

[3] Ebenezer Gyamera, 'Land conflict in Ghana, causes, effects and resolutions' (2017) 6(1) Journal of Agricultural Economics, Extension and Rural Development 664.

The National Land Policy (NLP) essentially articulates the government's strategy on land management and administration. The policy sought to address some fundamental problems associated with land management in the country.[4] To develop an effective institutional capacity and capability, there was a proposal to review and consolidate all land legislations into a comprehensive legal code and provide transparent guidelines and procedures to give effect to the National Land Policy and facilitate land administration delivery. This is the rationale behind the passage of the Lands Act 2020 (Act 1036).

After over two decades of consultations, parliamentary deliberations, and meetings with stakeholders, the new **Land Act 2020, (Act 1036)** has finally been passed into law. The Act's coming into force substantially affects the rules that govern land acquisition and ownership in Ghana. Most importantly, the law introduces new rules on spousal property rights and affirms the constitutional dictate against discrimination in the distribution of spousal property.

As introduced in the long title of the law, Act 1036 seeks to "c*onsolidate revise, harmonize, and consolidate laws on land to ensure sustainable land administration and management, effective and efficient land tenure and to provide for related matters."* Consequently, about thirteen statutes that governed land administration in Ghana have been repealed.[5]

What does this mean to landowners, legal practitioners, chiefs and family heads who own land(s) or our governmental institutions whose mandate is land administration?

This article aims to examine some of the provisions in the Land Act 2020 which affect spousal property rights and uphold the constitutional dictate of non-discrimination of women in the acquisition of properties in Ghana; the introduction of electronic transactions, customary land, secretariats; and offences.

This article will also delve into the intricacies of the land administration system as well as the new provisions in the Act (part 2) and what the future holds for a country that is great at enacting new laws but fails to put the necessary measures to implement them (part in parts 3 and 4).

2.0 The Land Act 2020 (Act 1036)

[4] Ministry of lands and Forestry, National Land Policy 1999, paragraph 7 of the Preamble
[5] Lands Act 2020 (Act 1036), s 282.

The introduction of Act 1036 is a significant addition to the stream of laws we have as a country. The journey to revise and consolidate land laws in Ghana started in 2003 with the Land Administration Policy (LAP).[6]

There is a deliberate attempt in the new land Act to address the defects in the land administration system in Ghana. The Land Act 2020 (Act 1036) (hereinafter called **("The Act")** has introduced a number of reforms in land administration in Ghana. For the first time, there is some clarity of the nature of interest in land recognised in Ghana.

Act 1036 begins with Part one, dedicated to the land tenure types and the categories of interest recognized in Ghana. Part One of the law sets out clearly the nature of interest or rights that a person can acquire in land in Ghana. It explains the allodial title, customary law freehold, common law freehold, usufructuary interest, leasehold interest, and customary tenancy.[7]

A close study of the new piece of legislation also reveals how distinct parts have been dedicated to land administration and management and the codification of punitive measures for persons and public officials who act contrary to the Law.

2.1 Recognition and Registration of Allodial Interest

Over the years, the allodial interest in land has been recognized as the highest interest in customary law. Most often, a corporate body such as a stool or a family will own this interest.[8] As Ollenu puts it, this right is acquired either by being the first to cultivate the land or by succession from the first owning group.[9]

Stool/skin ownership means corporate ownership and not ownership under the personal fiat of an individual. The 1992 Constitution of Ghana defines a stool to include a skin and the person or body of persons having control over skin land.[10] Allodial owners hold their interest under customary law. They are not subject to any restrictions on their user rights or any obligations, except for those imposed by the laws of Ghana.[11] It is thus very satisfactory that the allodial interest, the highest and ultimate interest in land, has for the first time been sufficiently defined under statute.

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[6] Government of Ghana, 2003. 'Project Appraisal Document, Land Administration Project' (Ministry of Lands and Forestry, Accra) <https://www.landesa.org/wp-content/uploads/2016-Best-Practices-Case-Ghana.pdf > accessed 15 April 2021

[7] Land Act 2020 (Act 1026) Part One.

[8] Kwame Gyan, *A textbook on Customary Land Law of Ghana.*

[9] Nii Amaa Ollenu, *Principles of Customary Land Law in Ghana* (Sweet and Maxwell, London 1962).

[10] 1992 Constitution of Ghana, Article 295

[11] Ibid

Section 2 of the Lands Act, 2020 provides that;

Allodial title is

a. *the highest or ultimate interest in Land.*
b. *Held by the State or a stool or skin or clan of family or an individual;*
   And may have been acquired through compulsory acquisition, conquest, pioneer discovery and settlement, gift, purchase or agreement

Having ascertained what the allodial interest entails in land in Ghana, the law further enjoins such title holders to register their interest.[12]

Section 83(1)(a) of Act 1036 thus provides:

A person, stool, skin or clan or family qualifies to register land in the name of that person, or stool or skin or clan or family if that person or stool or skin, or clan or family

a. *Is the allodial owner.*

The law further distinguishes the nature of interest in land as regards usufruct[13] and the common law freehold.[14] These terms were previously used interchangeably in the description of interests in land.

2.2 Prohibition of discriminatory practices

Another unique element introduced in Act 1036 is the enforcement of the constitutional dictate of non-discrimination[15] , particularly targeted at women in acquiring lands.

> Article 17(1)(2)(3) of the constitution 1992, titled *Equality and Freedom from Discrimination,* provides that:
>
> (1) All persons shall be equal before the law.
> (2) A person shall not be discriminated against on grounds of gender, race, color, ethnic origin, religion, creed or social or economic status.
> (3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, color, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

[12] Lands Act 2020 (Act 1036) Section 81
[13] Lands Act 2020, (Act 1036) Section 5
[14] Lands Act 2020, Act 1036, Section 4
[15] 1992 Constitution of Ghana Article 17, Clause 1,2,3

In some parts of Ghana, it is a custom (traditional) that women do not enjoy equal rights to land ownership except through their husbands, brothers and sons. Customary practices which seek to deny women's right to equal access to land is discriminatory in the light of the provisions of the 1992 constitution.

With the coming into force of Act 1036, customary practices which prevent women from accessing or exercising rights over land are now unlawful and void. Section 11 of Act 1036 prohibits explicitly or voids decisions or customary practices in respect of land which discriminates on the grounds of gender, occupation, social or economic status, disability or religion.

2.3 *Spousal Rights under Act 1036*

The Act also has provisions that regulate spousal rights to land and landed property. According to the Committee on Lands and Forestry of Parliament, which considered the Bill prior to its passage into law, the purpose of regulating the spousal right to landed property under the Bill (now law) was to provide "*remedial measures to guard against instances where the right or interest in the land [jointly] acquired during marriage is disposed of or used for transactions without the consent of the other spouse.*"[16]

The relevant provisions on this subject are Sections 38(3) & (4) and 47 of the Act, and same are reproduced as follows:

> **Section 38- Parties to a conveyance**
>
> (3) In a conveyance for valuable consideration of an interest in land that is jointly acquired during the marriage, the spouses shall be deemed to be parties to the conveyance unless a contrary intention is expressed in the conveyance.
>
> (4) Where contrary to subsection (3) a conveyance is made to one spouse, that spouse shall be presumed to be holding the land or interest in the land in trust for the spouses, unless a contrary intention is expressed in the conveyance."
>
> **Restrictions on transfer of land by spouses**
>
> 47. Except as provided in subsections (3) and (4) of section 38, in the absence of written agreement by the spouses in a marriage, a spouse shall not, in respect of land, right or interest in land acquired for valuable consideration during the marriage;

[16] Benjamin Tachie Antiedu, 'The New Land Act: Implications For Property Rights Of Spouses' (Modern Ghana) Published On February 28, 2021, <Https://Www.Modernghana.Com/News/1064721/The-New-Land-Act-Implications-For-Property-Rights.Html> accessed 30 March 2021.

> (a) sell, exchange, transfer, mortgage or lease the land, right or interest in the land,
>
> (b) enter into a contract for sale, exchange, transfer, mortgage or lease the land, right or interest in the land, or
>
> (c) give away the land, right or interest in the land in the land inter vivos or
>
> (d) enter into any other transaction in relation to the land, right or interest in the land without the written consent of the other spouse, which shall not be unnecessarily withheld.

A close study of the above provisions reveals that not all property owned by a married person(s) is jointly owned. The general assertion that every property owned by a married person is joint property is not consistent with the true position of the law. Property acquired by a person before marriage remains the sole property of that person before, during and after the marriage. This property does not form part of the joint property of the spouses.

Also, immovable property received by a spouse as a gift or by virtue of a will shall be an independent landed property of that spouse. Such landed property shall not form part of the joint properties of the spouses in the marriage.

Another implication is that if a spouse attempts to acquire land for him or herself during the subsistence of a marriage but fails to express that intention in the transfer document, both parties shall be deemed to be parties to the transfer. The property so acquired shall form part of the joint properties of the spouses.

It is important to note that a spouse cannot unilaterally sell, exchange, mortgage, or lease land or landed property or enter into a contract to dispose of or encumber the same without the other spouse's written consent.

2.4 Act 1036 and the Activities of Land Guards

The social menace of land guards is dealt with under section 12 of the Act. The law frowns on conduct that denies or threatens lawful owners of the land the right to access or develop their lands.

The Criminal and other Offences Act 1960, Act 29, justifies the use of force for the defence of property or for overcoming an obstruction to the exercise of a legal right.[17] The force to be exerted in this instance must be reasonable and proportionate to the harm being contemplated. The existence of this provision in

[17] Act 29, s 39.

the law should have been enough basis to punish land guards who almost always have absolutely no interest in the land they claim to be protecting and are never hesitant to seriously inflict wounds on any person who finds himself on such lands.

To curb this, Act 1036 provides that any person who has no interest in land but extorts money from persons who have interest in land or prevents someone who intends to build on land or uses violence to prevent someone who has an interest in land from possession or having access to the land commits an offence and is liable to a summary conviction to a term of imprisonment of not less than five years and not more than 15 years. Here there is no option of a fine. This is to serve as a stronger deterrent. A person who also uses or through another person uses force, violence or intimidation to prevent or obstruct a lawful owner of land from developing the land commits an offence and is liable on conviction to a term of imprisonment of not less than ten years and not more than fifteen years.

2.5 Mandatory Arbitration Clauses

Another remarkable introduction in the new land Act is the mandatory requirement for parties in a land transaction to attempt arbitration in accordance with the Alternative Dispute Resolution Act, 2010 ("Act 798") before an action involving land registration can be commenced in court.

It follows then that an aggrieved party in a land transaction cannot at first instance commence legal action in the law courts unless he has exhausted the processes provided under the Alternative Dispute Resolution Act, 2010 (Act 798). This requirement of the law exists in Sections 91(4), Section 98(1) and Section 115 of Act 1036.[18]

These sections make it mandatory for litigants in land disputes to necessarily resort to arbitration before commencing legal action in any court of competent jurisdiction. In the long term, these provisions will reduce the number of land-related disputes before the law courts and hasten their resolution.

2.6 Customary Land Secretariats (CLSs)

[18] **Section 91(4),** "A court shall not entertain an action concerning a dispute as to the boundaries of a parcel within a registration district until the process of settlement provided in this section has been exhausted"; **Section 98(1),**"An action concerning any land or interest in land in a registration district shall not be commenced in any court until the procedures for resolution of disputes under the Alternative Dispute Resolution Act, 2010 (Act 798) have been exhausted"; **Section 115,** "(1) Where there are two or more claimants of any interest in land situated in a title registration district and the Land Registrar is unable to arrive at an agreement among the claimants, the Land Registrar shall direct the claimants to seek resolution of the dispute under the Alternative (2) A court shall not entertain an action in respect of conflicting claims until the process for resolution referred to in this section has been exhausted.

The introduction of the CLSs in the Act is another novel provision in Act 1036. Customary land secretariats (CLSs) are land administration offices that support traditional authorities in managing customary lands.[19]

The Customary Land Secretariat is an initiative that is integral for the efficient and effective resolution of land disputes at the customary level through the Customary ADR mechanisms and represents accountable local structures for land administration.[20]

In light of the above, the Act contains several provisions on customary land management. These provisions establish Customary Land Secretariats, their functions, structure, powers and source of funds.[21]

Despite the above beneficial additions to the law, the provisions do not provide sufficient detail to guide the development and sustainability of CLSs. Additional information could have been included on CLSs to clarify the process and procedures for its establishment and how their functions relate to collaboration and coordination with land sector agencies.

Again, land Registrars are now mandated by the new Act to compile a list of all registered interests or rights in land from the previous month and submit it to the Director of the Land Registration Division.[22]

This must be done within ten (10) days after the last day of each month. Within fourteen (14) days of receipt, the Director of the Land Registration Division is to compile a general list posted on the Lands Commission's website.[23]

The Act also places Chiefs, Tindaanas, Clan Heads, Family Heads, or any authority in charge of managing stool or skin, clan or family lands in a place of trust and holds them accountable as fiduciaries.[24] As fiduciaries, these "managers" must be transparent, open, fair, and impartial in making decisions that affect the land(s) they manage. They are also subject to disciplinary sanctions if they fail to comply with their fiduciary duties.[25]

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[19] Government of Ghana, 2003. 'Project Appraisal Document, Land Administration Project' (Ministry of Lands and Forestry, Accra) <https://www.landesa.org/wp-content/uploads/2016-Best-Practices-Case-Ghana.pdf > accessed 15 April 2021

[20] Anthony Arko-Adjei, 'Titling Customary Lands -Emerging challenges facing the Land Administration Society in the New Millennium: Case from Ghana' (ITC Lustrum Conference on Spatial Information for Civil Society -Capacity building for the international geo-information society, ITC, Enschede, the Netherlands, 14-16 December 2005)

[21] Lands Act, 2020 (Act 1036), Sections 14 to 18.

[22] Ibid s 204(1).

[23] Ibid s 204(2)

[24] Ibid s 13(2)

[25] Ibid s 13(4)

2.7 Electronic Transactions

The Act has also remarkably introduced an electronic conveyancing system to speed up the transfer of interest in land, conveyancing, registration of interest and makes it more accessible.

It is interesting to note that before the passage of Act 1036, the Electronic Transaction Act, which exists to facilitate electronic communications and related transactions, did not cover contracts for the sale or conveyance of immovable property or any interest therein.[26] Presently, land or interests in land can be transferred by an electronic information system by virtue of Section 73 of Act 1036. However, it is worth noting that this system will only be available to qualified legal practitioners whose access will be determined by the Lands Commission after assessing whether they possess the equipment and facilities to provide the conveyancing services.

Sections 74 to 79 of the Act spell out structures, qualifications for electronic conveyancing, conditions for access and provisions relating to the non-transferability of access and the mandatory content of an electronic conveyance.

Under these new additions to the land sector regime, a new framework will be established, which will make it possible to transfer and create or register interests in land by electronic means. It is envisaged that electronic conveyancing will be the dominant method of conducting the business processes of the land sector within a comparatively short time.

It is noteworthy that the provisions on electronic registration and conveyancing currently contained in the Act provide an insufficient legal framework for the significant transition to digital land administration services. There is a need to develop a legal framework for registration and conveyancing that covers both the submission of electronic documents and authentication.

2.8 *Offences*

According to the Ghana Anti - Corruption Report, corruption is rampant in land administration, presenting businesses with high operational risks. Almost four (4) in every ten (10) companies expect to give gifts and make unofficial payments to officials to obtain a construction permit. A former Director of Public and Vested Land Management Division at the Lands Commission, Kofi Owusu-Poku, disclosed that all over the country, especially in the Greater Accra Region, there is pervasive indiscipline in the Lands sector. People get away with a lot of lawlessness. And it has

[26] Electronic Transactions Act, 2008 (Act 772) Section 4(e)

continued for a very long time. Fortunately, these reforms come at an opportune time to offer a remedy.[27]

To curb this, the new Act has introduced punitive measures to ensure that public officers and persons engaged in fraudulent acts within the land sector agencies are punished.

Part three of the Land Act centres on conducts that amount to offences.

> **Section 277 of Act 1036 provides that**
>
> A penalty of a fine of not less than 1,000 to 2,000 penalty units or to a term of imprisonment of not less than 2 years and not more than 5 years or to both, shall be imposed on any public officer found guilty of:
>
> a. fraudulently falsifying land records,
> b. fraudulently issuing any document or makes or procures the registration of any document or instrument or erases or alters a document kept in or issued by the Lands Commission
> c. fraudulently removing from the land commission any land register or part of any land register or any document or part of any document filed with the lands commission
> d. fraudulently defaces, obliterates or mutilates any land register or other document kept in the lands commission
> e. fraudulently makes any unauthorized entry or alteration to be made in any land register or any other document kept in the lands Commission
> f. fraudulently deletes, alters, obliterates or damages electronic records of the Lands Commission
> **g.** unlawfully accessing, downloading, transferring, copying or engaging in any other act that compromises the integrity of the Lands Commission. [28]

Furthermore, a fine of not less than 7,500 to 15,000 penalty units or to a term of imprisonment of not less than 2 years and not more than 5 years or to both shall be imposed on any person(s) who purport to make a grant of land to which that person has no title or has no authority to grant or makes conflicting grants in the same of a piece of land to the same person.[29]

3.0 Observations Made In the Act 1036

[27] Link to online story: https://www.myjoyonline.com/news/national/lands-commission-has-begun-digital-documentation-of-land-title-deeds-owusu-poku/ Pubblished on April 10,2021
[28] Lands Act, 2020 (Act 1036), Section 277(1)
[29] ibid s 277(2)

After a study of the various sections in the Land Act 2020, the author has made the underneath observations:

1. The devotion of an entire section to explaining the various interests in land recognised in Ghana is commendable.[30] It is also important that a Legislative instrument be passed to clarify the general customary legal position on usufructuary rights holder's interest vis-à-vis a sale of the land by the allodial titleholder.
   It is observed that section 184(8) vests authority in the Land Registrar to refuse to register a caveat if he deems it unnecessary or there is a good reason for the refusal. However, the section does not provide guidance as to what amounts to "good reason" for which the land registrar may refuse to register a caveat. It is submitted that the provision should be revised to include guidance as to the appropriate grounds for a refusal to register a caveat.

2. Act 1036 fails to provide any guidance on the roles and responsibilities of state agencies concerning customary lands or clarify the relationships between customary land authorities and the state actors. This lack of clarity in the law may cause adverse effects on the areas of land administration that require close collaboration of both customary authorities and state actors.

4.0 Conclusion

From the above analysis on the land Act, 2020, it is evident that it has introduced major reforms to the existing law that governed land administration in Ghana.

To address the key issues, ensure the sustainability of the reforms and to provide direction for efficient management and use of land, the following recommendations are proposed:

A crucial aspect of any law is to clearly demarcate the functions of the state institutions responsible for implementing the law and adequate measures to promote the availability of land administration services at the most decentralized level and public posting/publication of all processes in English and local languages.

It is also important to administratively limit the discretion of public officials by including requirements that allow affected parties to be given notice and an opportunity to contest the decisions of public officials.

[30] ibid Part one,

Notwithstanding the novel introductions made by the Land Act, 2020, it is hoped that a Legislative Instrument (L.I.) to give effect to the Act's provisions would be enacted soon to clarify and make practical the various aspects of the law.

Our land is more valuable than your money. It will last forever. It will not even perish by the flames of fire. As long as the sun shines and the waters flow, this land will be here to give life to men and animals."

- Chief of the Blackfeet.

Klomega (No.2) V. Attorney-General, Ghana Ports and Harbours Authority and Others: *A Missed Opportunity to Strengthen Public Financial Management*

Nicholas Opoku*

1.0 Introduction

1.1 The facts of the case

The plaintiff, Felix Klomega, a Ghanaian citizen, instituted proceedings in the Supreme Court, pursuant to articles 2(1) and 130 of the 1992 Constitution ('the Constitution'), challenging the constitutional validity of a concession agreement and an associated shareholders agreement for the design, construction and, subsequently, the maintenance, operation and management of the Container Terminal at the Tema Port, for 20 years.

The Ghana Ports and Harbours Authority ('GPHA') granted the concession to Meridian Port Services Limited ('MPS'). MPS is a Ghanaian company, being a joint venture between Meridian Port Holdings Limited ('MPH') and the GPHA, with MPH being the majority shareholder. MPH is an English company, a joint venture between leading container terminal operators APM Terminals and Bolloré Africa Logistics. The GPHA is a statutory corporation established by the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160). The Attorney General was named as a defendant to the suit, along with GPHA, MPS and MPH.

1.2 The issues in the case

Article 181(5) of the Constitution requires that any 'international business or economic transaction' to which the government is a party must be approved by Parliament.

The plaintiff, Klomega, argued that the word 'government' (as used in article 181) included a state entity such as GPHA. Therefore, the concession agreement and shareholders' agreement initiated and entered into by GPHA should be declared void for want of parliamentary authorisation or approval.

The defendants argued that the GPHA could not be included within the definition of 'government' because (i) the GPHA had been set up as a separate legal entity, distinct from the central government under PNDCL 160; (ii) the GPHA's operations are commercial in nature. Therefore, it would be absurd to cripple its activities by requiring Parliamentary approval of its commercial deals;

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and (iii) that statutory corporations such as the GPHA have legal and operational autonomy, and their financial transactions and international business or economic transactions should not be regarded as ones to which government is a party.

If, contrary to the arguments of the defendants, GPHA was deemed to be within the definition of 'government', the court was asked by the plaintiff to determine whether the concession agreement and the shareholders' agreement were, in any event, 'international business or economic transactions' for the purposes of Article 181(5) of the Constitution.

1.3 The Supreme Court's decision

On 19 July 2013, the Supreme Court, in a unanimous decision, dismissed the plaintiff's action. On the principal issue as to whether the GPHA falls within the meaning of 'government', the Court held that in the context of article 181(5) and the facts of the case, the 2nd defendant (GPHA) is not to be regarded as coming within the meaning of 'government'. The Court reasoned that to subject the international business transactions of statutory corporations with commercial functions to the Parliamentary approval process prescribed in article 181(5) would probably increase the weight of Parliament's responsibilities in this regard to an unsustainable level. Accordingly, the court held that it is reasonable to infer that the framers of the Constitution did not intend such a result. In the court's view, 'government' should mean, ordinarily, the central government and not operationally autonomous government agencies. As such, the word 'government' as used in the context of article 181(5) should be interpreted purposively to exclude statutory corporations such as the GPHA.

The Supreme Court did, however, state that its decision did not lay down an absolute rule. For instance, article 181(5) may still apply to the particular facts of a case if the central government was found to have made a specific statutory corporation its alter ego.

In this paper, I reflect on this Supreme Court decision and its implications for public financial management and accountability. First, I highlight the origins of article 181(5) to demonstrate the importance of parliamentary scrutiny and approval of transactions initiated by or entered into by the Government of Ghana ('GoG'). Secondly, I discuss what constitutes an international business transaction. Thirdly, I discuss the circumstances under which the State could be held liable for the contractual obligations arising from a transaction initiated by or entered into by a State corporation or a State-owned enterprise ('SOE') to demonstrate why the Court's reasoning in ***Klomega*** is unsustainable. I conclude with a call on the Supreme Court to review its decision at the earliest opportunity

and for Parliament to step up to its constitutional obligation of passing legislation to regulate the scrutiny and approval of 'article 181(5)' transactions.

2.0 The origins and policy rationale of article 181

Article 181 of the Constitution is in the following terms:

> (1) Parliament may, by a resolution supported by the votes of a majority of all the members of Parliament, authorise the Government to enter into an agreement for the granting of a loan out of any public fund or public account.
>
> (2) An agreement entered into under clause (1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of Parliament.
>
> (3) No loan shall be raised by the Government on behalf of itself or any other public institution or authority otherwise than by or under the authority of an Act of Parliament.
>
> (4) An Act of Parliament enacted in accordance with clause (3) of this article shall provide—(a) That the terms and conditions of a loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament; and (b) That any moneys received in respect of that loan shall be paid into the Consolidated Fund and form part of that Fund or into some other public fund of Ghana either existing or created for the purposes of the loan.
>
> (5) **This article shall, with the necessary modifications by Parliament**, apply to an international business or economic transaction to which the Government is a party as it applies to a loan. [Emphasis added]

To fully appreciate the framers of the 1992 Constitution's thinking on this article, it is vital to refer to its origin: article 133 of the 1969 Constitution. Article 133 of the 1969 Constitution dealt exclusively with loans without any reference to international business or economic transactions. The rationale for this provision was expressed in the ***'The Proposals of the Constitutional Commission for a Constitution for Ghana (1968)*** (hereinafter referred to as 'the 1968 Proposals') thus:

> One of the most revealing consequences of the coup d'etat of the 24th February was the realisation by the people of Ghana of the huge debt which the country owed. Apart from the fact that our economy had been made bankrupt we owed money well over NC800, 000,000. We need not go into the details; we all know the various agreements which the National Liberation Council has had to undertake in order to have a rescheduling of our external debts. This calls for specific provisions in the Constitution to deal with the question of loans, and we propose that

> Government should not enter into an agreement for the granting of a loan out of any public fund or public account unless the National Assembly has approved, by the votes of not less than two-thirds of all the members of the Assembly, the granting of the loan.'[1]
>
> 'We further propose that the agreement entered into in respect of the loan should be laid before the National Assembly and should not become effective or operative unless it has been approved by an ordinary resolution of the National Assembly in the case of a loan granted to an authority in the country, but where the agreement is in respect of a loan granted to an authority outside this country then the agreement should only come into force after a resolution in favour of the granting of the loan has been passed by the National Assembly, supported by the votes of not less than two-thirds of all the members of the National Assembly.'[2]
>
> 'We are strongly of the view that the above proposals relating to the granting of loans should apply with equal force to the raising of loans. The only addition we wish to make is that the Government should not have power to raise a loan on behalf of itself or any public institution or authority except by or under the authority of an Act of Parliament. That Act of Parliament should incorporate our above proposals regarding resolutions of the National Assembly mutatis mutandis.[3]

As the Supreme Court noted in ***Attorney-General v. Faroe Atlantic Co. Ltd,***[4] "it is clear that the purpose of the framers of the original provision was to ensure transparency, openness and Parliamentary consent in relation to debt obligations contracted by the State. These original provisions of the 1969 Constitution were maintained unchanged in the 1979 Constitution as article 144. It is in the 1992 Constitution that this long-standing provision on the giving and raising of loans is modified to include another category of contract, namely 'an international business or economic transaction to which the Government is a party'".

3.0 What constitutes an international business or economic transaction?

The Constitution does not provide any interpretation of the term 'international business transaction'. However, the Constitution places an obligation on Parliament to pass legislation to clarify what constitutes an international business transaction to which government is a party and to which article 181(5) is applicable. Parliament is yet to fulfil this obligation. In the absence of such legislation, the Supreme Court has attempted to clarify what amounts to an

[1] Ghana Constitutional Commission, *The Proposals of the Constitutional Commission for a Constitution for Ghana* (State Publishing Corporation 1968) para 589
[2] Ghana Constitutional Commission, *The Proposals of the Constitutional Commission for a Constitution for Ghana* (State Publishing Corporation 1968) para 590
[3] Ghana Constitutional Commission, *The Proposals of the Constitutional Commission for a Constitution for Ghana* (State Publishing Corporation 1968)para 591.
[4] [2003-2005] 2 GLR 580.

international business transaction. The court speaking through Sophia Akuffo JSC in ***Faroe*** observed thus

> …Article 181(5) specifically deals with international business or economic transactions, rather than loans. When one contracting party agrees to supply and the other party agrees to purchase and pay for the thing supplied, is there not a business transaction? I believe there is. And if the supplier is a non-Ghanaian entity and the party of the other part is the Government of Ghana, it is an international business transaction.

This implies that the term 'international business transaction' covers transactions or agreements concluded by the GoG with a foreign government, a foreign company, a firm or transnational corporation or an international institution or an agency of a foreign government.[5] Examples of such are bilateral investment promotion and protection agreements, a joint venture between GoG and foreign companies, and debt rescheduling with international financial institutions.[6] So long as GoG is a party to a transaction in which the other contracting party is a foreign entity, such a transaction must be scrutinised and approved by parliament to be enforceable. In ***Faroe***, the Supreme Court held that a Power Purchase Agreement between Faroe Atlantic Co. Ltd and GoG (acting through the Ministry of Mines and Energy) entered into in 1998 without parliamentary approval, contrary to article 181(5), was unconstitutional and, as a result, unenforceable. The Court refused the enforcement of damages awarded Faroe Atlantic Co. Ltd by the trial court because an unconstitutional agreement is not binding on the Republic, even though the trial court had held GoG to be in breach of it.

4.0 Circumstances under which the State could be held liable for transactions entered into by State-Owned Enterprises ('SOEs')

The Supreme Court in ***Klomega*** appears to have adopted a three-tier 'test' in its determination of whether or not a State-Owned Enterprise ('SOE') or public corporation falls within the meaning of the word 'government' as used in article 181(5). The test being:

i. if the SOE has a separate legal personality, it does not fall within the purview of article 181(5);
ii. if the SOE's transactions are subject to ministerial oversight, then the ministerial oversight is adequate. Therefore, the transaction does not fall within article 181(5); and

[5] Constitutional Review Commission, *Report of the Constitutional Review Commission*, para 279.
[6] Emmanuel Yaw Benneh, 'Comments on External Loan Agreements, International Business Transactions and the Treaty-Making Power under the Fourth Republican Constitution of Ghana' (1996-1999) UGLJ 79.

iii. it is impracticable to subject every transaction entered into by an SOE to parliamentary approval. As such, not every transaction entered into by an SOE should be subjected to parliamentary approval.

4.1 Relationship between Government and SOEs

There is hardly any widely accepted definition of an SOE. However, most SOEs have specific key characteristics; namely,

i. the SOE has a separate legal personality;
ii. it is at least partially controlled by a government unit; and
iii. it engages largely in commercial or economic activities.[7]

Therefore, it is common to find statutes establishing SOEs conferring separate legal personality status on them by default. For instance, the GPHA (2nd Defendant in Klomega) is established as a body corporate having perpetual succession and can sue and be sued in its name. According to the establishment statute (PNDCL 160), GHPA, in the performance of its functions, may acquire movable or immovable property, dispose of such property and enter into a contract of any other transaction.[8]

Despite their separate legal personality, SOEs often perform functions that are public in nature. In many countries, SOEs provide basic services such as water, electricity, and transportation to people. Some SOEs also perform regulatory functions. The GPHA, for instance, is empowered by its establishment statute to 'plan, build, develop, manage, maintain, operate and control ports in Ghana'. In doing so, it is mandated to, amongst others, 'regulate the use of any port and of the port facilities'; 'license small ships to lie, ply for hire or otherwise be used within a port upon such terms and conditions as the Authority [GPHA] may deem fit'; 'appoint, license and regulate stevedores, master porters to operate in the container terminals'.[9] The GPHA is also empowered to '…by legislative instrument make regulations for the maintenance, control and management of any port….'[10] In addition to these regulatory functions, some SOEs are also funded by the State and are subject to some level of government control. For instance, in the case of GPHA, its funding sources include budget allocations and loans from GoG.[11] The State may also acquire property for GPHA under the State Property and Contracts Act, 1960 (C.A.6) and the State Lands Act, 1962 (Act

[7] International Monetary Fund, *'State-Owned Enterprises: The Other Government'* (IMF 2020) 1
[8] Ghana Ports and Harbours Authority Act 1986 (PNDCL 160) s 2.
[9] ibid s 5.
[10] ibid s 24.
[11] ibid s 11.

125).[12] In terms of control, the President appoints the Director-General and members of the GPHA's governing Board.[13] The GPHA Board is required to comply with directives given by the President in its operations.[14] All these characteristics of the GPHA demonstrate that despite its separate legal personality, the GPHA is essentially an extension of government, even though it may not appear to be carrying out a direct government function in carrying out its commercial operations.

4.2 Why an SOE's corporate veil may be lifted?

There are instances where a court could disregard the separate legal status of an SOE in order to hold the State liable for the contractual obligations or actions of an SOE. In the case of ***First National City Bank v. Banco Para El Comercio Exterior de Cuba I (Citibank)***[15] *(herein referred to as 'Bancec')*, the United States Supreme Court considered whether an American bank might counterclaim against a Cuban government trading company for the value of the American bank's assets expropriated by the Cuban central government. The dispute in Citibank arose out of Citibank's conversion of funds belonging to Banco Para El Comercio Exterior de Cuba ('Bancec'). However, the resolution of the dispute centred on the relationship between Bancec and the Cuban central government.

Despite Cuban legislation establishing the trading company as an autonomous juridical entity, the Supreme Court treated the trading company as an alter ego of the Cuban central government. It held that while there exists a strong presumption that government instrumentalities have a separate legal identity (along with limited liability) from their 'parent' governments, this presumption can be overcome in certain situations—for example, 'where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, one may be held liable for the actions of the other.' In addition, the court emphasised that the doctrine of corporate entity would be disregarded where its recognition would lead to fraud or injustice. Thus, in ***Bancec,*** the US Supreme Court established a disjunctive test for when the separate identities of sovereign and instrumentality should be disregarded, i.e. when there is ***'extensive[] control,'*** and recognising the separate identities would lead to 'fraud or injustice'.

Recently in the case of ***Rubin v. Islamic Republic of Iran,***[16] the US Supreme Court expanded the '*Bancec test'*. The plaintiffs in ***Rubin*** held a judgment against the Islamic Republic of Iran and attempted to attach and execute against certain Iranian artefacts on loan to the University of Chicago. In addressing whether that

[12] ibid s 2.
[13] Ibid.
[14] Ibid.
[15] [1983] 103 S. Ct. 2591.
[16] [2018] 138 S. Ct. 816, 823.

attachment was proper (it was not), the Supreme Court established a multi-factor test to aid its analysis:

> *(1) the level of economic control by the government;*
>
> *(2) whether the entity's profits go to the government;*
>
> *(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; and*
>
> *(4) whether the government is the real beneficiary of the entity's conduct.*

This multi-factor test established by the US Supreme Court in ***Bancec*** and ***Rubin*** is useful in our analysis of ***Klomega.***

In the case of ***Klomega***, the GPHA by its establishment statute has a separate legal personality. Therefore, there is a presumption that GPHA operates independently from the central government. However, as the US Supreme Court made it clear in ***Bancec*** and ***Rubin,*** there are some extraordinary circumstances—including where the central government exerts dominion over a state corporation or SOE so extensive as to be beyond normal supervisory control—that require that we ignore the formal separateness of the two entities (central government and SOE).

The establishment statute and the operations of the GPHA warrant that in considering whether to subject its international business transactions to parliamentary scrutiny and approval, the court sets aside GPHA's corporate veil because it is essentially an extension of government. Budget allocations and loans from GoG are a vital source of funding for the GPHA. The GPHA cannot maintain a foreign exchange account into which it may keep part of its revenue except with the approval of the Finance Minister.[17] The Auditor-General, whose mandate is to audit and report on all public accounts of Ghana, audits the account books and records of the GPHA.[18]

Further, its establishment statute allows GoG to acquire property for GPHA under the State Property and Contracts Act, 1960 (C.A.6) and the State Lands Act, 1962 (Act 125). The President appoints the Director-General and members of the GPHA's Board. The GPHA Board is by law required to comply with directives given by the President in its operations. At the end of every financial year, the GPHA Board is under obligation to submit a report on the activities of the GPHA to the Minister of Transport, who in turn submits a copy of the report to the President.[19]

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[17] Ghana Ports and Harbours Authority Act 1986 (PNDCL 160) s 13.
[18] Article 187(2), 1992 Constitution; ibid s 15.
[19] Ibid s 16.

In addition, the Minister of Transport may 'from time to time' request the GPHA Board to furnish him with such reports.[20] It is also worth mentioning that all SOEs are obligated to submit their audited financial statements to the Finance Minister 'not later than four months after the end of each financial year'.[21]

All these factors demonstrate that GoG's dominion over GPHA is extensive and goes beyond normal supervisory control. Therefore, in giving effect to article 181(5) of the Constitution, it is sound to reason that an entity like the GPHA falls within the meaning of 'government' for the purposes of subjecting its international business transactions to parliamentary scrutiny and approval.

4.2.1 Substituting parliamentary scrutiny for ministerial supervision

The Supreme Court in ***Klomega*** reasoned that

> where an agency has a separate legal personality distinct from central government, it usually comes under sectoral ministerial supervision. The Board of the corporation and the appropriate Ministry should then exercise oversight over its international business or economic agreements. That oversight should be exercised within the context of the procurement laws of this country.

Ministerial supervision cannot be a substitute for parliamentary oversight. Substituting parliamentary oversight for ministerial (executive) supervision is counterproductive given the fundamental purpose of article 181, which is to ensure transparency and openness. Further, the fact of ministerial supervision itself clearly shows the controlling hand of GoG; even more, reason to subject the international business transactions of SOEs to parliamentary scrutiny.

4.2.2 Sidestepping the constitution to avoid overburdening Parliament

The Supreme Court in ***Klomega*** also reasoned that 'Parliament would be sucked into unnecessary minutiae if it were to have the function of approving the international business or economic agreements of statutory corporations.' The court's 'purposive' interpretation of article 181(5) cures no mischief. It essentially amounts to sidestepping the Constitution in the name of practicality. This interpretation compromises 'democratic transparency for commercial expediency'.[22] The decision creates room for the central government to circumvent accountability mechanisms established by the constitution by entering into international business transactions with varied financial implications, using SOEs as conduits.

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[20] Ibid

[21] Public Financial Management Act 2016 (Act 921) s 95

[22] Nana Dr. Samuel Kwadwo Boaten Asante, 'Proposed Amendment of Article 181 of the Constitution' (1996) 3(4) IEA 2

Further, this interpretation is contrary to the court's own jurisprudence. In ***Faroe,*** the court speaking through Sophia Akuffo JSC, held that

> [t]he Constitution is the supreme law of the land and article 1(1) makes it clear that '…the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.' As the supreme law of the land, the Constitution is applicable at all times and all acts and things, particularly those done for and on behalf of the Republic of Ghana, must always be tested against its provisions. In the course of judicial proceedings, it is incumbent upon every Judge to keep its provisions in mind to assure compliance, not only by the parties before it, but also by the court itself.

In carrying out its sacred duty of interpreting the constitution, the court cannot be seen to pick and choose when and how an express constitutional instruction—in this case, article 181(5)—should apply.

5.0 Conclusion and Way forward

The State has frequently been forced to defend costly suits in international arbitration, risking or paying huge judgment awards for alleged breaches of some of these agreements. The opacity surrounding the negotiation of these agreements, their fairness and or value for money are justifiable grounds for concern. Parliament's failure to subject these agreements to diligent and independent scrutiny has been identified as a significant gap. Unfortunately, the Supreme Court has failed to provide a solution as its decision in ***Klomega*** has further compounded the problem. As I have shown in this paper, the Court's reasoning for failing to treat the GPHA (an SOE) as an extension of government within the context of article 181(5) is unsustainable. In a number of decisions such as ***Klomega*** and ***Faroe,*** the Court continues to call on Parliament to express clearly in statute the scope of its intervention with regard to such agreements. However, Parliament's lack of intervention does not dispense with the need to clarify article 181(5) in a way that meets the history of the provision and the objectives for which they were included in the 1992 Constitution. Even as we interpret this provision to align with evolving business practices and demands of commercial contracting, it is crucial that those objectives are preserved. The concerns necessitating the inclusion of this constitutional provision have not changed just because business practices have evolved. In fact, one could argue that the risks have gotten worse.

That said, because the Supreme Court has flubbed its lines; and worse, is whittling down the scope of Parliament's obligation under article 181(5), under a paternalistic pretext of saving Parliament from doing excessive work, there is the need for Parliament to be awake to its role and to step up. In doing so, Parliament must clarify the types of international commercial agreements which must be subjected to parliamentary scrutiny and approval. For instance,

Parliament can expressly state in a statute that any international commercial transaction above a certain threshold (monetary value) should be subjected to comprehensive parliamentary review. The review of transactions above the stated threshold must not be conducted under the routine 'certificate of emergency' to allow for more diligent scrutiny.

Human Rights and Its Enemies: Tyrone Marghuy v. Achimota School

Abdul Aziz Gomda*

1.0 Introduction

Human rights are the foundation of every democratic society and have become the single most important index in assessing democratic credentials among the comity of nations. Human rights are primary, and governments are expected to uphold them with minimal room for derogation. This is anchored on the basic principles of universality, inalienability, interdependence and indivisibility of the bundle of rights known as human rights.

The indivisibility of human rights means that no single right ought to be treated as more important or less important than the others. The United Nations framework of human rights considers the principle of indivisibility as the binding agent that holds all human rights together. The 1968 proclamation of Tehran supports this position, one of the pioneering international instruments to highlight the importance of the principle of indivisibility provides that "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."[1]

In Ghana, the position of human rights largely reflects what has been provided under the international framework and is guaranteed under the constitution. Undoubtedly, principles such as the inalienability, inviolability and universality of human rights are part of our jurisprudence. For some, cultural and social considerations that shape what is considered public policy has or ought to balance the true expression of the indivisibility of human rights in Ghana. Public policy defines public interest, and to that extent, the constitution provides for the enjoyment of human rights to be subject to public interest.[2] With this view, there is a real possibility of sentiments standing in the way of constitutionally guaranteed rights.

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[1] Proclamation of Teheran, International Conference on Human Rights (adopted 13 May 1968) 13, U.N. Doc. A/CONF.32/41 (1968).

[2] 1992 Constitution of the Republic of Ghana, art 12(2).

The recent decision of the High Court (Human Rights Division) in *Tyrone Marghuy v Achimota School*[3] advances the idea of the indivisibility of human rights. This case note seeks to highlight the importance of the decision and how that can be the harbinger for recognising other rights that have hitherto been undermined under the guise of public interest and public policy. Ultimately, the goal is to make an argument for the recognition of other minority rights guided by the bold and progressive torch lit by the court in its judgment. Part two of the note details the facts and holding of the case as well as the constitutional framework within which the case was decided. Part three entails a discussion on the implications of the case for the future of Ghana's human rights jurisprudence, while part 4 concludes on the subject matter.

2.0 Facts, Holdings and Principles

Ghana's commitment to human rights is not limited to the framework under chapter 5 of the constitution.[4] To this end, there is what is described as an omnibus provision under article 33(5) that recognizes rights considered to be inherent in a democracy that may not have been expressly stated in the constitution of Ghana. With the said provision, it is expected that courts dealing with human rights issues look beyond the confines of the constitution into an arena that recognizes the dignity of all humans and abhors all forms of limitations in the enjoyment of human rights. The Supreme Court in the case of *Mensah v Mensah*[5] had this to say on the implication of Article 33(5);

> There is this proviso also in article 33 (5) which enjoins the courts in Ghana to look at other rights not specifically mentioned but which are considered to be part and parcel of an emerging democratic state intended to secure the freedom and dignity of man, and this includes the opposite, woman.

In securing fundamental rights and freedoms, Ghanaian courts must be guided by all the principles that underpin human rights. This includes the principle of indivisibility of human rights.

2.1 *Facts of the Case*

In the **Marhguy case,** the main contention was whether the applicant could enjoy his right to religion and manifest same while seeking to enjoy his right to education. For the respondents, the applicant had to let go of his religious beliefs if he wished to assert his guaranteed right to education under the constitution.

[3] SUIT NO. HR/0055/2021 MAY 31, 2021.
[4] Chapter 5 of the 1992 constitution deals with fundamental human rights and freedoms
[5] [2012] 1 SCGLR 391

This was clearly a conflict between civil and political rights on the one hand and economic, social and cultural rights on the other hand.

Tyrone Marhguy, seventeen (17) years of age, suing per his next friend, brought an action at the High Court for the enforcement of his human rights under article 33 of the constitution.[6] Tyrone contended that keeping his hair in its natural dreadlocked state was an expression and manifestation of his religious faith guaranteed under the 1992 constitution.[7] Consequently, it was his claim that the respondent school's refusal to admit him unless he gets rid of the dreadlocks was a violation of that right. He further contended that his right to education under articles 25[8] and 28[9] were violated as a result of the refusal to admit him.

For the second respondent school, granting the Applicant's application would have amounted to elevating the Applicant and his religion, beliefs, or creed to a different category from the other students who belong to other faiths. They further argued that these students abide by all the school rules and regulations without reference to the dictates of their religions. As such, permitting the applicant to keep his hair in a manner that flouts school rules is tantamount to discrimination of the other students and, to that extent, unlawful.

2.2 Decision of the Court

The High Court rightly rejected the discrimination argument canvassed by the second respondent. In its reasoning, the court explained that in so far as the blanket application of the rules will undermine the enjoyment of the applicant's right to religion, it cannot be justified. To that extent, a positive discrimination may be entertained. This reasoning is consistent with the observation of the Supreme Court in *Nartey v Gati*,[10] which the court rightly cited. In that case, the Supreme Court per Date-Baah JSC explained that where there is an allegation of discrimination, the crucial issue to be considered is whether the particular distinction is justifiable, by reference to an object that is sought to be served by a specific statute, constitutional provision or some other rule of law. Clearly, allowing the applicant to maintain his dreadlocks serves the object of manifesting his religion guaranteed under the constitution.

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[6] Article 33 (1) Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available that person may apply to the High Court for redress.

[7] Article 21(c)

[8] Article 25(1)(b) All persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right— secondary education in its different forms, including technical and vocational education, shall be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education

[9] No child shall be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs

[10] (2010) SCGLR 745

In giving judgment in favour of the applicant, the court largely employed the public interest doctrine to determine whether there exists a justification for any alleged violation. The constitution supports the public interest doctrine under article 12.[11] Consequently, there was no evidence or basis to hold that a restriction on the applicant's right to religion was in the public interest. Indeed, the importance of human rights requires that a conceptualization of public interest must not be rendered loose in a manner that will easily allow for derogation of human rights. This, therefore, poses legitimate questions like; what is public interest? To what extent must this stand in the way of human rights?

2.3 The Underlying Question of Public Interest

The constitution under article 295[12] attempts a definition of what is public interest. Indeed, notwithstanding the definition provided under the constitution, controversy abounds as to the scope of public interest in Ghana. The Supreme Court has attempted to address this controversy in *Republic v. Yebbi and Avalifo*.[13] However, it is submitted that the interpretation the Supreme Court put forward only sought to explain that the scope as provided under article 295 was not limited and could accommodate an expansion. No emphatic pronouncements were made as to what defines the confines of public interest in Ghana. It is surprising that almost three decades after the coming into force of the constitution, there is still no doctrinal clarity on what constitutes public interest and how that may limit the enjoyment of guaranteed fundamental human rights and freedoms.

In the case of *Republic v. Edward Wiredu; Ex Parte Amidu,*[14] the court per Ansah JA as he then was, in an attempt to justify the dismissal of the application brought by the applicant under Article 33 of the Constitution, 1992 alleging the contravention of this fundamental human rights and freedoms guaranteeing equality before the law, freedom from discrimination, right to fairness and fair hearing and administrative justice made these observations:

> Fundamental human rights, necessary as they are for the enjoyment of the citizen, must be handled with extreme caution. It is clear and must be protected. The protection and enjoyment must however be within legally recognized bounds, and the person who styles himself as aggrieved must show beyond doubt that his rights have indeed been infringed. In determining whether or not the rights are infringed the court must undergo a painstaking examination of all the facts disclosed and put at

[11] Article 12(2) every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.

[12] "public interest" includes any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana

[13] [2000] SCGLR 149

[14] [2001-2002] 1 GLR 272

> its disposal. This is the time to eschew fear, for the judge can ill-afford to be described as a timorous soul. Fundamental human rights is not a one way affair, with all roads leading only to the citizen. The other avenue must also be looked at and considered carefully to meet the national interest. The court is in a very good position to determine what is good in the national or public interest, that is why there are so many restrictions in the enjoyment of those rights even under our own Constitution, 1992. It must be ensured that whiles the citizen enjoys his rights and freedoms, he does not do so in a manner that will grind the whole governmental machinery to a halt. That is a good ingredient to a dish of anarchy, chaos and disharmony in the nation, a dish which nobody will like to be served with, let alone taking a morsel thereof to sample

In the words of the learned judge, fundamental human rights must at all times be in sync with the national (public) interest. He further asserts that the courts are in a very good position to determine what is good in the public interest. It is respectfully submitted that such exposition is problematic due to the court's failure to provide a definitive guideline on what goes into public interest as a barrier to the enforcement of human rights.

2.3.1 The Vexed Question of Public Interest

Perhaps, the Ghanaian courts may resort to theories propounded by legal theorists and give judicial effect to them. Legal theorists, especially in the fold of human rights, have laid down competing versions of the extent rights confer protections to humans and how these protections relate to the public interest.[15] These can be categorized into stronger and weaker versions.

The stronger version holds that rights are such that it is morally wrong to contemplate any person or authority the possibility of breaching it.[16] In this context, they are promoted to the greatest extent and over any other interests. The weaker version, advanced by Raz,[17] conceptualizes rights as important but subject to certain underlying interests. The effect is that other considerations may outweigh them. This theory is consistent with the position in Ghana as captured under article 12 of the constitution. The relationship between these two concepts remains undefined. This is particularly so because of the lack of clarity on the concept of public interest.

Consequently, the vagueness of the concept of public policy clouds our understanding of the nature of the relationship and the extent to which judicial pronouncements may intervene in determining which concept is to prevail when

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[15] Aileen McHarg, 'Reconciling human rights and the public interest: conceptual problems and doctrinal uncertainty in the jurisprudence of the European Court of Human Rights' [1999] Mod. L. Rev 671.
[16] See Jeremy Waldron *Theories of Rights* (1984)
[17] Joseph Raz *morality of freedom* (Clarendon Press 1986)

there is conflict. To address this, Aileen McHarg[18] queries what procedure must be put in place to determine when public interest must be prioritized over rights. To resolve and address the conundrum surrounding the relationship between rights and public interest, he suggests that "one must consider not only which rights model is preferable, but also whether it is compatible with a defensible conception of the public interest."[19]

Indeed, the High Court lacks jurisdiction to interpret the constitution even in exercising its exclusive jurisdiction in the enforcement of human rights.[20] However, where there is the need to interpret the constitution in the course of a matter before it, it is provided that the Supreme Court's exclusive interpretation jurisdiction may be invoked by way of reference to the Supreme Court.[21] With the novelty of the case and the implication that might have on future cases, it is submitted that the High Court, in this case, should have referred to the Supreme Court for the interpretation of 'Public interest' as a competing interest in the enforcement of human rights. As many commentators have lamented, the High Court, though a superior court, lacks the capacity to make far-reaching pronouncements on questions of law. At a time where there has been an outcry on minority rights and infringements on religious rights, one would expect a definite pronouncement on what constitutes public interest worthy of its purpose to justify any limitation on fundamental human rights guaranteed under the constitution.

3.0 Implication for Future

Francois JA, as he then was, in his assessment for the award of damages for breach of promise to marry in the case of *Afrifa v. Class-Peter*, famously stated that; "The law…evolves slowly, always behind modern thought. It cannot be rushed."[22] By contrast, Justice Cardozo, an advocate of the sociological school of jurisprudence, considers law as an instrument of social control and rejects the notion that law is eternal, unchanging and immutable in its nature and application.[23] Relying on the latter, it is evident the court opted to lead the part of progressiveness rather than conservatism. This observation does not stem from explicit pronouncements made in the Judgment of the court. It is situated within the context of Ghana's socio-cultural fabric that hitherto and largely influenced by Judeo-Christian beliefs considered dreadlock hair as repugnant and unwholesome.

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[18] Aileen McHarg, 'Reconciling human rights and the public interest: conceptual problems and doctrinal uncertainty in the jurisprudence of the European Court of Human Rights' [1999] Mod. L. Rev 671.
[19] Ibid
[20] The 1992 Constitution of the Republic of Ghana, art 33(1).
[21] The 1992 Constitution of the Republic of Ghana, art 130.
[22] [1975] 1 GLR 359-366 @ page 366.
[23] See Margaret E. Hall, *Selected Writings, of Benjamin Nathan Cardozo* (New York: Fallon. 1947).

The court's judgment is undeniably profound, not necessarily on the basis of legal precedence but on the social consciousness of Ghanaians. Clearly, there is increased confidence that, with these kinds of decisions, there is perhaps a glimmer of hope that Ghanaian courts are not reluctant to lay the foundation of social change in a manner that promotes inclusion and equity. This notion is grounded in the history of judicial intervention, where there has been legislative inertia despite explicit constitutional directives to lead the charge on social change.[24]

However, it is submitted that the outcome of this case may not carry so much weight as it does not possess the traction to lay judicial foundations in our jurisprudence. In effect, it is submitted that, despite the profundity in the case's outcome, it barely impacts the foundation of Ghana's legal system. The pronouncements on the law made in this case were not as significant as public commentary made it seem. Additionally, the forum provided no significant currency to have this case change the course of our jurisprudence. On the other hand, its potential as leading the cause for future actions for the enforcement of minority rights remains unquestionable.

In related commentary, some commentators have argued that the court's judgment has the potential of opening a Pandora's Box for every religious group to bring a claim for the recognition to practice and manifest their religion in a rather restricted academic environment. This argument reflects the conflict between cultural relativism and the universalism theory of human rights.[25] For the most part, the argument that the court's judgment opens a Pandora's Box is targeted at traditional Ghanaian religion that fundamentally is aligned with culture. Cultural rights are a sub-category of human rights and, by extension, are covered by the universality principle and condones no derogation.[26] Despite this recognition, this is often confronted with the deliberate or subtle attempt to stifle cultural diversity by dominant groups over minorities through the machinery of their political capital in the state architecture.[27]

As seen in the commentary in the aftermath of the case and other happenings in other institutions, such attempts appear to be an attempt by the majority to police what is considered acceptable in the public space. Such arguments do not have a

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[24] In Mensah v Mensah [2012] 1 SCGLR 391, the Supreme Court departed radically, from the doctrine of substantial contribution to an era of jurisprudence of equality that sent a huge signal to parliament, that where they fail in their constitutional mandate, the courts will be willing to intervene to ensure justice and fairness.

[25] See William S Logan, 'Closing Pandora's Box: human rights conundrums in cultural heritage protection' in *Cultural heritage and human rights* (Springer, New York, 2007)

[26] See Academy of European Law, *Cultural Rights as Human Rights*. (2005) <http://www.iue.it/AEL/Projects/CulturalRights.shtml> accessed 12 July 2021

[27] Robert Albro, Joanne Bauer, *Human Rights Dialogue: An International Forum for Debating Human Rights* (Spring 2005).

basis in law and clearly frowns on the constitutionally guaranteed rights for all.[28] It is submitted that our courts have the power to make sweeping pronouncements to recognize every right irrespective of the number of individuals who stand to benefit. Indeed, democracy is not simply the rule of the dominant electoral group but respect for minority rights.

As demonstrated earlier, where the legislature fails to act, and in this case, the executive, the courts must be willing to gallantly intervene through the power of judicial review to ensure the democratic values of the respect of every human right is not subject to the social and political group no matter how influential they may be. The foundation of every strong democracy lies in promoting the values of human rights and their attendant principles. The pursuit of these principles for the common good must not be substituted with paranoia. After all, it is in recognition of the unit that the whole finds its strength. Ghana's constitutional framework and development ought not to be limited to the dictates of the majority.

4.0 Conclusion

Since the coming into force of the 1992 constitution, rights have emerged that hitherto did not assume the recognition they have today. The framers of the constitution were not oblivious of this possibility. It was in this light that article 33(5) of the constitution came into being.[29] The same has been the case in every serious and emerging democracy. Despite the existence and recognition of these rights, state actors and non-state actors alike, have in one way or the other in pursuit of parochialism, undermined or threatened to undermine these universally accepted rights. Where this arises, judicial authority remains the only power to intervene and give light to these rights. The effect of such interventions has a duality of purpose. First, it provides immediate remedies for the restoration and enforcement of the undermined rights. On the other hand, the decisions giving way to these interventions serve as the jurisprudential underpinnings of developing the principles of human rights.

Against this backdrop, the judiciary must assert its authority as the conscience of our democracy and the guardian of our constitution to at all times without any fear or favour defend the rights provided therein and elsewhere without the fear of public backlash. The Court in *Tyrone Marghuy v Achimota School*[30] distinguished itself in that regard.

[28] Article 14 of the constitution provides that "a person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status".
[29] The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.
[30] SUIT NO. HR/0055/2021 MAY 31, 2021.

Surrogacy At Home and Abroad: Traversing a Billion-Dollar Industry

Keziah H. Engmann*

1.0 Introduction

In the Bible, Sarah, wife of Abraham, after years of not conceiving, presented her Egyptian maid Hagar to her husband for that purpose.[1] To all intents and purposes, this arrangement was a surrogacy. In the twenty-first century, as both men and women increasingly put off childbirth in pursuit of other goals, surrogacy is on the rise to make up for a growing number of women or couples who cannot or choose not to have their children naturally. With advancements in embryology, surrogacy is taking on new dimensions, expanding the array of solutions to difficulties in childbirth. By 2025, this industry is estimated to be worth $27.5bn.[2] Although the form of surrogacy practised in the old testament story involving Abraham and Sarah cannot be said to be unheard of in Ghana or African societies, modern surrogacy involving advancements in embryology presents serious challenges for a society like Ghana where childbirth undeniably has other social implications beyond mere procreation such as social status, purity of bloodlines for succession among other things. It also means it is time for such a discussion.

There are no globally accepted legal standards on surrogacy. The social value of surrogacy itself is not without controversy. While some argue it ought to be viewed as an altruistic act consisting of one woman gifting to another, others like Andrea Dworkin contend that it reinforces a patriarchal view of women as commodities and often leads to the exploitation of their bodies.[3] In Ghana, the absence of legislation on this issue coupled with a dearth of judicial decisions has made the subject an unregulated free zone. The lack of consensus on norms and standards has left this area shrouded in a lot of uncertainty. As is often the case with grey areas, many questions arise. This commentary attempts to briefly explore the current state of surrogacy, both in Ghana and worldwide. Part 2 focuses on the meaning and legality of surrogacy; Part 3 frames the legal dilemma arising out of surrogacies at the international level, while part 4 addresses the brewing controversies surrounding the topic and its operation in Ghana. Finally,

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[1] Genesis 16:1&2.

[2] "Surrogacy Market revenue to cross $27.5 billion by 2025: Global Market Insights, Inc." available at: https://www.globenewswire.com/news-release/2019/12/16/1960684/0/en/Surrogacy-Market-revenue-to-cross-27-5-billion-by-2025-Global-Market-Insights-Inc.html last accessed <5th August 2021>.

[3] Andrea Dworkin, *Right Wing Women* (TarcherPerigee 1983).

part 5 discusses possible remedies parties in a surrogacy contract may be entitled to and a few recommendations.

2.0 What is Surrogacy?

Surrogacy describes the situation where a woman carries and gives birth to a child on behalf of another woman, typically for the benefit of a couple often called the intended parents or the commissioning parents.[4] There are two main types: traditional surrogacy and gestational surrogacy. Traditional surrogacy occurs where the surrogate mother's egg is used, making her the genetic mother. In gestational surrogacy, on the other hand, the egg is provided by the intended mother or by any willing donor.[5] The egg is then fertilised through in vitro fertilisation (IVF) and then placed inside the surrogate mother.[6] In the case of *Farnell & Anor and Chanbua*,[7] popularly known as the "*Baby Gammy*" case, surrogacy was described as the renting of a woman's body.[8]

2.1 Is Surrogacy Legal?

The simple answer to the above question is *it depends*. In countries such as France, Italy, Germany and Spain, the practice is expressly prohibited. In contrast, it is lawful in jurisdictions such as UK, Ireland, Belgium and Denmark[9] on the condition that the surrogate is paid a nominal fee only, as opposed to a commercial fee, to cover reasonable expenses incurred. These latter countries thus prefer altruistic as opposed to commercial surrogacy, a view targeted at dissuading the development of a global market for the exploitation of women's bodies for the benefit of paying third parties.

Commercial surrogacy is nonetheless permissible in countries such as Russia, India, Ukraine and some US States.[10] While sixteen countries ban all forms of surrogacy, ten countries allow non-commercial altruistic surrogacy and eight countries explicitly allow for both types of surrogacy.[11] Estimates from "Families Through Surrogacy",[12] an international NGO, revealed that a surrogate in the USA could be paid as much as $100,000. The rise of the practice into a highly lucrative enterprise is thus hardly surprising.

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[4] Liubov Ben-Nun, *SURROGATE MOTHERHOOD-Hagar and Sarah* (1ST edn, B.N. Publications House 2014).
[5] Ibid.
[6] Helier Cheung, 'Surrogate babies: Where can you have them, and is it legal?' *BBC News* (London, 6 August 2014) <https://www.bbc.com/news/world-28679020> accessed 31st March 2021.
[7] [2016] FCWA 17.
[8] Ibid.
[9] Helier Cheung, 'Surrogate babies: Where can you have them, and is it legal?' *BBC News* (London, 6 August 2014) <https://www.bbc.com/news/world-28679020> accessed 31st March 2021.
[10] Ibid.
[11] Seema Mohapatra, *Adopting an International Convention on Surrogacy – A Lesson from Intercountry Adoption* (Barry University, 2015).
[12] Ibid.

Nevertheless, despite attempts to promote cost-efficient altruistic surrogacy, proxy births remain expensive. Currently, they constitute a multibillion-dollar industry in full force, aided by the enormous advancements made in assisted conception. In view of the prevailing costs, however, it clearly remains largely exclusively available to the rich. The average Ghanaian bothered with affording their daily needs would find inconceivable the idea of spending a fortune on "renting a body for a child," no matter how desperately they want it.

3.0 Issues Arising

Commercial surrogacy is a controversial web fraught with many issues. A key one is the lack of a coherent and universal policy framework aimed at having standards applicable in all countries. Moreover, the recent popularity of overseas commercial surrogacy, where people move to other countries seeking surrogacy agreements because the practice is illegal in their home states, has brought to the fore issues of nationality and stateless babies.[13] This presents pressing international human rights challenges as Article 15 of the Universal Declaration of Human Rights unequivocally guarantees the right of every person to a nationality.[14]

Furthermore, nationality has been said to provide the legal connection between an individual and a State, which serves as a basis for certain rights, including the State's duty to grant diplomatic protection and representation of the individual on the international level.[15] This was illustrated in the famous *Barcelona Traction case*,[16] where Belgium brought an action against Spain at the International Court of Justice on behalf of Belgian shareholders in a Canadian corporation operating in Spain, on the grounds that the action of the corporation had unfairly caused injury to the Belgian shareholders.

Yet, varying nationality laws mean that children born by surrogate mothers in countries other than that of the birth parents may be declared stateless, particularly where the laws of the birth country does not recognize the birth mother or surrogate as the legal parent and the laws of the commissioning parents also does not recognize them as the parents of the child.

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[13] Emma Batha, 'International surrogacy traps babies in stateless limbo' *Thomas Reuters Foundation* (September 18, 2014) < https://www.reuters.com/article/us-foundation-statelessness-surrogacy-idUSKBN0HD19T20140918 > accessed 31st March 2021.

[14] 1948 Universal Declaration of Human Rights, art 15.

[15] Office of the United Nations High Commissioner For Refugees Geneva; Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness First published in June 1996; revised in January 1999 at pg. 4 available https://www.refworld.org/pdfid/3ae6b3350.pdf#:~:text=1954%20Convention%20provides%20the%20tools%20for%20assisting%20those,legal%20instrument%20for%20avoiding%20and%20reducing%2C%20wherever%20possible%2C

[16] Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) I.C.J. 1970 I.C.J. 3.

A typical instance is in a conflict of laws situation where for example, State X, in which an individual is born via a surrogate, grants nationality by descent (jus sanguinis) while State Y, in which the intended parents hold nationality, grants nationality by birth (jus soli). Since the commissioning parents (intended parents) are not nationals of State X, the child will not be recognized as a national since he has no relative by descent there. In like manner, since the child was not born on State Y soil, he will not be recognized as a national in that country either, resulting in the statelessness of the child.

4.0 Surrogacy in Ghana

In Ghana, in the absence of express legislation pronouncing surrogacy as an offence and criminalizing same, it would appear the practice is legal. This is in accord with the combined effect of articles 19(5) and 19(11) of the 1992 Constitution of Ghana, which provide that a person cannot be convicted for an act unless it was a crime at the time it took place and further, that a person can only be punished for a crime if it is defined and carries a penalty for non-compliance under the law.

As early as 2015, an online documentary[17] revealed that surrogacy was steadily gaining ground in Ghana, with the continued proliferation of fertility clinics in major cities like Kumasi and Accra. Surrogacy requires in vitro fertilization (IVF), and this is not cheap. According to a beneficiary of the IVF procedure,[18] the price ranges between GH 8,000 and GH 20,000, an estimation outside the financial bracket of many Ghanaians.

In Ghana, two of the rules most closely related to children are the Children's Act, 1998 (Act 560) as amended by the Children's (Amendment) Act, 2016 (Act 937) and the Adoption Rules, 2003 (C.I. 42)[19] adopted pursuant to section 86 of Act 560. None of these has any mention of surrogacy or the rights acquired by children or parties involved in this practice. While C.I. 42 contains elaborate provisions including but not limited to rules governing the hearing of applications made for the grant of adoption orders, it makes no mention of surrogacy.

Nonetheless, although surrogacy itself may not be illegal, it is noteworthy that acts generally linked to established crimes done in the name of surrogacy would

[17] 'NewDay - Special Feature on The Surrogacy Industry' (Youtube, 16 February, 2015) <https://www.youtube.com/watch?v=8k0V92kubzI> accessed 29 March 2021

[18] 'Documentary: Putting A 'Price' On Getting Pregnant; IVF, Its Procedures and Success Rate'(Youtube, 1 July 2020) <https://www.youtube.com/watch?v=D5bd5yf7PdM > accessed 29 March 2021

[19] C.I. 42

be punishable under the law. An example is the kidnapping of a group of women to use them as surrogate mothers. Kidnapping is an offence[20] under the Criminal Offences Act, 1960 (Act 29), and that act will thus rightfully be punishable, albeit done in pursuance of an otherwise legal act.

4.1 *Middle Men*

As exists in domains such as real estate, the assisted reproductive technologies community has middlemen whose primary responsibility is to serve as intermediaries between commissioning parents and prospective surrogate mothers. In situations where the surrogate is provided accommodation to enhance monitoring during the pregnancy, these agents take charge of the housing and care of the surrogate mother.

An example of such an agency is the Association of Childless Couples of Ghana (ACCOG), registered as an NGO under the auspices of the Social Welfare Department of Ghana.[21] According to the then CEO of the agency, its foundation was necessary to serve as a liaison between parties, especially since, in some cases, the commissioning parents and the surrogates never meet to avoid any future legal scuffles relating to custody.

Nonetheless, the use of agents, undeniably interested in making a profit themselves, is not without risk. In the *Baby Gammy* case, the danger associated with the use of agents was described as follows:

> "The facts also demonstrate the conflicts of interest that arise when middlemen rush to profit from the demand of a market in which the comparatively rich benefit from the preparedness of the poor to provide a service that the rich either cannot or will not perform."

In any case, Article 15[22] of the Constitution guarantees the inviolability of the dignity of all persons in Ghana, including women willing to act as surrogates, and that ought to be respected at all times.

5.0 Entitlement to a Remedy?

In the absence of an established legal framework, are there any remedies for a party in the event of a breach of an assisted birth agreement? Under the general rules of contract law, when parties mutually agree to do something, they are bound by it. A party is entitled to a remedy should the other party fail or refuse

[20] Criminal Offences Act, 1960 (Act 29), s.89

[21] 'NewDay - Special Feature on The Surrogacy Industry' (Youtube, 16 February, 2015) <https://www.youtube.com/watch?v=8k0V92kubzI> accessed 29 March 2021

[22] Constitution of Ghana, 1992

to perform the obligation he had willingly agreed to discharge under the contract. Thus, it appears a party dissatisfied by the turnout of a surrogacy agreement can commence an action in court aimed at obtaining damages from the other party to compensate for the non-performance.

Conversely, it is unclear whether the court will grant equitable reliefs such as an injunction or specific performance in such a cause of action. For instance, in the event of an anticipatory breach, where the surrogate gets cold feet and decides to opt-out at a time before the pregnancy, can a court order the contract to be specifically performed? The present writer is of the opinion that as in the case of actions for breach of promise to marry, specific performance cannot be granted.

Thus, until a regulated body of rules is enacted, the general rules on contract law would apply. However, hard questions remain. In an era where divorce rates reach a new high daily, what becomes of a child when the intended parents divorce and no longer wish to have the baby altogether when the surrogate is already well within the pregnancy. If both parents deny taking individual responsibility for the child's upbringing, is the surrogate mother bound to care for the child or is she at liberty to give it up?

5.1 The Way Forward and Conclusion

To sum up, in an ever-changing society ducked in endlessly emerging trends, human procreation will nevertheless remain a constant need, and it is in light of this that conversations on surrogacy need to be amplified. This is necessary, particularly in Ghana and Africa, where economic value is placed on children and childbirth is regarded as an extremely rewarding activity.

On the international scene, though efforts have been made towards a unified surrogacy regime, none of it has culminated in a consolidated global treaty. In its ninth meeting held in July 2021, the Experts Group on Parentage/Surrogacy met to deliberate in this regard under the auspices of The Hague Conference on Private International Law, an intergovernmental organization aimed at gradually integrating various domestic laws to resolve differences and conflict of laws among the varied legal systems. Among its key conclusions was the possibility of a global Convention on legal parentage of surrogate babies, "with the use of the State of birth as the main connecting factor."[23]

It is the hope of the author that this proposed Convention shall indeed see the light of day since the adoption of an international convention embodying

[23] Report of the Experts' Group on the Parentage / Surrogacy Project (meeting from 5 to 9 July 2021) » available at: https://assets.hcch.net/docs/a29ca035-f4d9-469f-9ff9-cd9fca1918c8.pdf last accessed <5th August 2021>

decentralized norms on the practice around the globe would be immensely helpful and instrumental, particularly in light of the recent surge in overseas commercial surrogacy.

Domestically, in the absence of any legal protection, the surrogate in Ghana, who may be illiterate and faces the risk of being burdened with an unwanted child or not being paid at all, is in an extremely vulnerable position. It is recommended that Parliament swiftly enact laws with a view to regulate surrogacy, providing standard form contracts with norms and standards governing, *inter alia*, entitlements of surrogate mothers in a surrogacy arrangement as well as the obligations and duties of the intended parents. Furthermore, it is proposed that an addition be made in the laws to reflect certain necessary implied requirements, without which the agreement cannot be clothed with validity and non-compliance with which would make defaulting parties liable to be sanctioned.

In Memoriam: His Lordship Samuel Marful-Sau (JSC)

By The Editorial Committee

For students dreading the voluminous course content of the subject of Civil Procedure at the Ghana School of Law, the phrase "*Use Marful-Sau*" is familiar and reassuring. The book, oft-referred to by students and lecturers alike, embodies the learned author's unmistakable qualities: his deep knowledge of procedural law and his simplicity as a man. *A Practical Guide to Civil Procedure in Ghana,* in its stunning simplicity and depth, is a go-to for students seeking to pass their exams and practitioners who need a quick brush-up on procedural law. The book has become indispensable in the legal space, and even the general public was introduced to it during the 2020 Presidential Election Petition, **Mahama v. Electoral Commission and another (J1/05/2021),** when lead counsel for the petitioners relied heavily on it to canvass his arguments on procedure before a national television audience.

Born in the Assin South District of the Central Region, shortly before the independence of Ghana, His Lordship would attend primary school in Assin Adubiase and middle school in Accra. Justice Marful-Sau completed his secondary school education in Breman Asikuma in 1974 and obtained an A-Level certificate at Navrongo Secondary School in 1979, a Bachelor of Laws at the University of Ghana in 1982, followed by a call to the Ghanaian bar in 1984.

He came of age at the time of the Rawlings revolution and the tides of those times shaped his career. He would work at the information bureau of the Provisional National Defence Council (PNDC), have a stint as a Special Public Prosecutor before entering private practice in 1987 until he was called to the bench in 2002.

To students of law, His Lordship Samuel Marful-Sau JSC made a hard course easier. "*What will you do?"* a popular refrain of his, was intended to present Civil Procedure in a very practical way. *Mr White* and *Mr. Black,* the two characters who always made their way into his short problem questions were not mere fictional characters. Their problems were the problems of the ordinary man who needs a legal fix to restore normalcy in their lives. *Mr. White and Mr. Black* required straight forward answers which he would sometimes require of students in his famous line, "*in not more than five sentences*". His Lordship in his classes taught with the mindset that clients in their daily activities, seeking ways to retrieve sums from business partners, for example, were not interested in the juridical underpinnings of concepts, they wanted results and he focused on how to deliver results.

Legal practitioners know His Lordship's contributions to Ghanaian jurisprudence is substantial. In the *Ghana at 50 case* **(The Republic v. Charles Wereko Brobbey & Kwadwo Okyere Mpiani Suit No. ACC 39/2010),** a highlight of his career, he would write for the Court of Appeal to clarify and crystalise the meaning and scope of the *right to a fair trial.* His impeccable analysis of the issues pertaining to the right against self-incrimination and the preservation of the common law principle of *double jeopardy* enhanced judicial respect for these tenets, ultimately strengthening constitutionalism and the rule of law.

Samuel Marful-Sau, while at the Supreme Court, continued to deliver judgments which deepened our constitutional jurisprudence. In clarifying the powers of the Attorney General to enter a *nolle prosequi,* his lordship in the case of **Gregory Afoko v. AG (WRIT NO. J1/8/2019)** affirmed its unbounded usage. The Attorney General was not required in law, to publish a Constitutional Instrument, dictating its discretionary usage of this power. Doing so, in the words of his lordship would "stifle(s) the mandate given to the defendant (Attorney General) to perform by the very Constitution and will obstruct the prosecution of criminal cases".

Further, in **The Republic v. High Court, General Jurisdiction (6) Accra Ex Parte: Attorney General [Exton Cubic Group Ltd-Interested Party**] His Lordship wrote for the court to underscore the importance of parliament's intermediate scrutiny and oversight over mineral transactions entered into by the government (the executive) and other entities. In his analysis, he would reveal that the true purpose and intent of the framers of our constitution in shaping the management of Ghana's mineral resources was ensuring that all the people, through their representatives, are heard. He would also capture the fact that the president, as well as present generations, are trustees of the mineral resources that belong to all Ghanaians, present and in the future. He wrote:

> *Every mineral found in Ghana is for the Republic as a whole and the President holds the mineral in trust for the people of Ghana, whose representatives are in Parliament. The Constitutional provision in article 268 that such mining leases shall be subject to Parliamentary ratification derive its source and wisdom from article 257(6). It was for a good reason that the framers of our Constitution provided that the people of Ghana, who are the owners of the minerals found in Ghana, had a voice in any contract or undertaking involving the grant of any such mineral, through their representatives in Parliament. The reason is that the President on whose behalf the Minister for Land and Natural Resources acts is only a trustee of the mineral.*

As a teacher, he was always patient, tolerant, and ever ready to be of help. As a jurist, he combined industry with patriotism in serving the country he loved. He embodied the judicial oath to serve "truly and faithfully" without "fear or favour,

affection or ill-will". As a man of faith, he led by example; he was a man who had earned his high station through hard work and persistence and, perhaps, understood better than most the need to treat people fairly and to respect the dignity of all. The man who famously stated "*As a Judge, I Have Evidence That God Is Real",* bequeathed to us, evidence of his brilliance, humility, and dedication to God and Country. We are forever indebted to him. May he find rest with his maker.