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A note from the Editor-in-Chief

Welcome to the 2022 Ghana School of Law student journal. The editorial team and its assistants have worked hard to produce the highest quality of legal publication in a manner that is clear, precise and engaging. This edition of the journal is a compilation of legal articles, notes and commentaries written by law students and lawyers alike. The topics selected relate to legal issues faced by the public and legal policy issues with particular emphasis on human rights and the evaluation of key statutory documents.

This particular journal comprises of four full length articles with detailed discussions of select topics, two case notes, two legislative notes and an exciting commentary on the Retroactivity of the Constitution and the Right to Property. Our special guest contributor is His Lordship Dennis Dominic Adjei, Justice of the Court of Appeal of the Supreme Court of Ghana.

It is our immense pleasure to present to you the following:

Does the Enforcement Regime Given to Lenders by the Borrowers and Lenders Act 2020 (Act 1052) Amount To Self-Help Or A Violation Of Due Process?
This is a special contribution by Sir Dennis Dominic Adjei discussing the challenges associated with lending transactions in Ghana and the non-performance of loan obligations by borrowers.

Humanity in Prison: Restoring Prisoners' Dignity through Prison Decongestion
Our articles begin with Frederick Agaaya Adongo who seeks to demonstrate how the overcrowded state of Ghana's prisons violates the inviolable dignity of prisoners.

The Distribution of Rights in a Religiously Plural State: The case of Tyrone Marghuy and Oheneba Nkrabea

Prosper Batariwah discusses religious discrimination in educational institutions by setting out an understandable account of the meaning and relevance of religious freedom.

Philosopher (Supreme Court) Justices, Not Chronic Constitutional Chroniclers

This is an article by Prosper Andre Batinge making a case for Philosopher Justices of a new special Constitutional Court tasked with bending the 1992 Constitution in sync with the times and the needs of the country rather than ceding to the call of chronic constitutional chroniclers for a new Charter of governance for Ghana.

A Review of Ghana's Mineral Revenue Regime

Edith Asiedu-Odame draws inspiration from international best to make a case for the passage of legislation that defines the use to which mining revenues may be put and in what proportions.

Customary Succession and the Inheritance Rights of Women: The Case of Odamtten & Others v Wuta-Ofei & Ors

In the case notes section, Kwame Adusei reviews the case of Odamten v. Wuta-Ofei & Others and its application of customary succession.

Appealing Sentence after the Repeal of a Criminal Statute – A Critique of Obeng Gyebi v The Republic

Godslove E Bogobley argues that the 1992 Constitution, with limited exceptions, forbids the retroactive application of legislation.

Mandatory Alternative Dispute Resolution (ADR): A Worthwhile Approach to Resolving Land Disputes under Act 1036

In the legislative notes section, Paul Obeng Atiemo identifies some of the land related disputes provided for in the Land Act 2020 (Act 1036) for which parties are obliged to first attempt a resolution by ADR before proceeding to the law courts

Is The Victim Victimized? The Victim in the Plea Bargaining Process In Ghana

Daniel Arthur Ohene-Bekoe Emmanuella Okantey examine plea bargaining as envisaged in the Criminal and Other Offences (Procedure) (Amendment) Act, 2022 (Act 1079).

Retroactivity of the Constitution and the Right to Property: Revisiting Ellis v Attorney General

This is a commentary by Nhyira Yaa Boatemaa Amponsem revisiting the Supreme Court's approach to the right to property in Ellis v Attorney General.

Editor-In-Chief

Juliet Buntuguh

2022

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This publication was made possible by the support of the SRC President, Wonder Victor Kutor and the tireless work of the editorial team and editorial assistants.

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DOES THE ENFORCEMENT REGIME GIVEN TO LENDERS BY THE BORROWERS AND LENDERS ACT, 2020 (ACT 1052) AMOUNT TO SELF-HELP OR A VIOLATION OF DUE PROCESS?

Sir Dennis Dominic Adjei[*]

Abstract

One of the challenges associated with lending transactions in Ghana is the non-performance of loan obligations by borrowers. Earlier legislations on lender-borrower relationship have been described as pro-borrower. This is because the Legislature made conscious effort to protect borrowers from unscrupulous lenders who were quick to impose unconscionable terms on borrowers owing to the lower bargaining power of the latter. Upon default by the borrower, the lender was enjoined by these laws to seek an order of the court as pre-condition to the enforcement of the loan security. In 2020, Parliament passed the Borrowers and Lenders Act (Act 1052). Unlike previous statutes on the subject, Act 1052 allows lenders to realize the security interest in the collateral on a default by the borrower without a court order. This new system of enforcement may be described as enabling self-help and undermining due process. However, this paper argues that this system of enforcement is justified when one considers high default rate in respect of legitimate debts. The law has lessened the burden on lenders to litigate without closing the door to the borrowers to approach the court.

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1 INTRODUCTION

Over the years, legislative inroads have been made to govern the rights of borrowers and lenders in Ghana whose conduct is central to the health of the financial system. These laws have gone beyond the common law in their attempt to strike a fair balance between the rights of both borrowers and lenders in hopes of establishing a more equitable financial system. Such laws have included the Loans Recovery Act 1918 (Cap 175), Moneylenders Act 1951 (Cap 176), Mortgages Act 1972 (NRCD 54), and the Borrowers and Lenders Act 2008 (ACT 773).

The most recent legislative intervention is the Borrowers and Lenders Act 2020 (Act 1052). This piece of legislation, among others, has sought to address the country's non-performing loan challenges which has severely impacted Ghana's financial system. According to the World Bank, as of 2019 the ratio of Ghana's bank non-performing loans to total gross loans was 13.9%.[1] There is, therefore, a substantial number of borrowers who fail to honour their obligations to lenders.

Unfortunately, lenders have found the judicial remedies for the non-payment of loans ineffective for several reasons. Many borrowers engage in fraudulent activities to avoid honouring their obligations to lenders. Some borrowers fraudulently submit false land documents or conceal the fact that properties subject to mortgages are spousal properties. Further, some borrowers make judicial remedies ineffective by abusing the court process. This may be done by making illegitimate applications for loan transactions to be opened up, delaying trial and execution processes, and filing frivolous appeals. In many cases, several years would lapse before lenders recover their funds.

In response to the endemic problem of non-payment of loans, the Borrowers and Lenders Act 2020 (Act 1052) has sought to address the non-performing

[1] The World Bank, 'Bank nonperforming loans to total gross loans (%) – Ghana' International Monetary Fund Financial Soundness Indicators' <https://data.worldbank.org/indicator/FB.AST.NPER.ZS?locations=GH> accessed 1 April 2022.

loan problem by sanctioning self-help practices on the part of the lenders, without resort to courts of competent jurisdiction. This raises the question of whether the Borrowers and Lenders Act 2020 violates the due process requirement.

In discussing this question, we shall examine key legislation covering lending transactions in Ghana. The discussions shall reveal that most of the legislative inroads prior to the Borrowers and Lenders Act 2008 were either overtly pro-borrower or, taken as a whole, were prone to abuse by recalcitrant borrowers who wished to evade their just obligations. The discussions shall also reveal that to the extent that the borrower's recourse to the courts has not been curtailed, the due process requirement has sufficiently been satisfied.

2 ASSESSMENT OF LEGISLATIVE INROADS

2.1 Loan Recovery Act, 1918 (Cap 175) and the Power of Courts to Open Up Transactions on Grounds of Unconscionability

The law governing borrowing and lending transactions has been dynamic. Over a century ago, the Loans Recovery Act 1918 clothed the courts with the power to re-open lending transactions which were harsh and unconscionable or transactions which a court of equity would grant relief to make such transactions fair and reasonable.

The Loan Recovery Act 1918 modified the position of the common law which required courts to ordinarily hold parties to their bargains and not to re-open bargains.[2] Rather, the courts were empowered to re-open loan transactions and do what is just and reasonable where either the interest chargeable was excessive or the charges for expenses, enquiries, fines, bonuses, or premium renewals were excessive.[3]

[2] *Volta Aluminium Co Ltd v. Akuffo and Others* [2003-2005] 1 GLR 502 (SC).
[3] Loans Recovery Act 1918, ss 1 (1), (2)(a) &(b), (3)(a) & (b) and (4)(a) & (b).

There is little doubt that this law was designed to protect borrowers; however, the lawmaker failed to recognize that lenders may have applied high interest rates as a risk mitigating measure to ensure that they do not lose their capital because of low loan recovery rates. Further, the law did not put in place sufficient safeguard to prevent its abuse for the purpose of delaying the recovery of loans.

2.2 The Money Lenders Act, 1951 (Cap 176)

The Money Lenders Act 1951 was another pro-borrower piece of legislation. The Act was enacted to regulate persons who lend money with interest and persons who lend money

in consideration of a larger sum to be paid.[4] It regulated loans granted to persons and bodies apart from those exempted by section 29 of the Act.[5] Loans given under the Act could be secured by an asset of the borrower or a third party known as an obligor.

The law fixed the interest rates payable in categories of transactions to prevent lenders from exploiting borrowers. Some of the interest rates were based on the nature of the loans (including considerations of whether the loan was secured) and varied from fifteen percent to thirty percent. Further, even if the interest charged was within the limits prescribed by law, but the Court was of the opinion that it was excessive, the Court could re-open the transaction under section 3 of the Loan Recovery Ordinance.[6]

The Moneylenders Act 1951 could be critiqued on several grounds such as the failure to provide for disclosures by both lenders and borrowers and the paternalistic provisions authorizing courts to intervene in respect of the

[4] Moneylenders Act 1941, s 1.

[5] The loans transactions exempted by the Act include the transactions under the Co- operative Societies Act 1968 (NLCD 252), a body created by a special enactment to lend money in consonance with that enactment, body undertaking banking or insurance business under an enactment, persons or bodies exempted from the provisions of the Act by the Minister responsible, and a pawnbroker under the Pawnbrokers 1940 (Cap 189).

[6] Moneylenders Act 1951, s 11.

agreed interest rates to be paid. Indeed, a debtor who intended to frustrate a creditor from enjoying the fruits of his labour could apply to the Court to open-up the transaction under the Loan Recovery Act on grounds of unconscionability of the agreed interest on the loan. The law failed to address the delay in obtaining judgment and enforcing same, considering that a court action was necessary to enforce the rights of lenders.

2.3 The Mortgages Act 1972 (NRCD 54) and its Enforcement Deficiencies

The Mortgages Act 1972 is also a law which directly impacts the rights of lenders and borrowers. A mortgage is a contract in which immovable property is used as a charge to secure repayment of the principal amount granted, interest on it, and other obligations in consonance with the terms of the contract.

However, under the Mortgages Act 1972, the lender has no right to take control and possession over property without recourse to the court system. Under this law, the mortgagee must commence an action in court to enforce his rights, except where the mortgagor permits the mortgagee to peacefully take possession, manage the property in respect of the income from it, and account to the mortgagor.

The remedies available to a mortgagee where the mortgagor fails to pay the loan contained in the mortgage deed are to sue the mortgagor or the obligor on the personal covenant. The mortgagee may apply to the Court to appoint a receiver to manage the property and realize the proceeds or the income from it or shall give thirty days' notice in writing to the mortgagee to peacefully take possession of the mortgaged property, or where peaceful possession cannot be guaranteed the mortgagee may sue to recover possession.[7] A mortgagee may also apply for judicial sale and when granted, the property

[7] Mortgages Act 1972, ss 15,16 and 17*; Republic v High Court, Accra; Ex parte Chinto* [1992-93] GBR 144 (SC).

shall be sold by public auction unless the mortgagor agree to private sale and same is approved by the court. However, a court shall grant a judicial sale only after all the conditions precedent have been fulfilled unless the court has given opportunity to the mortgagor or obligor or both to perform their part of the contract.[8]

The law was also deficient in its failure to exempt the mortgagee from liability arising from his conduct in dealing with the mortgagor's property. A mortgagee who takes possession of the property for the purpose of managing it is liable if he fails to be diligent to realize the sum of money due him from the mortgaged property. Where the mortgagee occupies part or the whole of the building, he is required to pay occupational rent which must be fair market value. Also, the mortgagee is liable for damage caused to the property through his omission, negligence or wilfully conduct. And finally, the mortgagor is not entitled to compensation for personally managing the property.

Mortgagees normally fail to register their mortgage instruments which the law requires to be in writing. Instruments affecting land including mortgages are of no effect until they are registered.[9] Further, an instrument affecting land must be duly stamped otherwise it must not be accepted for registration.[10] A mortgagee who sues on an unregistered mortgage will be confronted with a defence that the mortgage instrument is not stamped or registered or both and a claim cannot be made on it. In that sense, a mortgage transaction lawfully entered into between a mortgagee and mortgagor cannot be enforced by reason of absence of registration.

2.4 The Repealed Borrowers and Lenders Act 2008 (Act 773)

The Borrowers and Lenders Act 2008 which came into force on 23rd December 2008 was enacted to cure the mischief in the existing laws by giving powers

[8] Mortgages Act 1972, s 18.
[9] Land Act 2020 (Act 1036), s 227.
[10] Ibid s 165.

to lenders to enforce some of their rights without resorting to court. It further sought to address notoriously bad practices in credit transactions and promote enforcement jurisdiction outside the remits of the courts. The Borrowers and Lenders Act 2008 has been repealed by section 88 of the Borrowers and Lenders Act 2020 (Act 1052).

The powers given to lenders to enforce their rights under credit transactions without the court or the intervention of the court at the appropriate circumstances was also found to have several challenges. The repealed Act introduced two basic modes for enforcing the rights of the lender where the borrower had defaulted in paying the loan, the interest on it and other agreed charges or expenses. As a prelude to any of these modes, the lender was obliged to serve thirty-day notice in writing on the borrower to indicate his intention to enforce his rights under the agreement. The mode of service of the thirty days' notice was liberal and could be served by hand delivery, courier service,

registered mail or any form of service to be used by the lender in consultation with the borrower.[11]

The repealed Act clothed lenders with capacity to exercise right of possession of the mortgaged property whenever there was a default by the mortgagor on the mortgaged agreement without resorting to court. Where peaceful possession was possible, the lender could peacefully evict the mortgagor or obligor and the mortgagor and take possession of the mortgaged property.

In a case where peaceful eviction was not feasible, the lender could file an application to the court for a warrant to be issued even though no action had been filed and judgment delivered. Where the court was satisfied that the borrower had failed to perform his part of the contract, it could issue a warrant to evict the borrower from the property. A warrant issued by the court was enforced with the assistance of the police. A person who obstructed

[11] Borrowers and Lenders Act 2008, s 32.

the police from assisting a lender to enforce a warrant to evict a borrower committed an offence.

The repealed Act introduced a pre-agreement disclosure, and established a collateral registry, and flexible and expeditious procedure for registration to reduce the bottlenecks in the other loan transactions. Registration could be done in less than an hour unlike mortgages which takes a longer time and, in some cases, may exceed six months.

3 OVERVIEW OF THE BORROWERS AND LENDERS ACT 2020 (ACT 1052)

The Borrowers and Lenders Act 2020 was enacted, among other things, to regulate transactions between borrowers and lenders, provide for the establishment of a Collateral Registry, and to provide for registration and enforcement of security interest in collateral.

A credit agreement under the Act must be in writing and must identify the lender, borrower, the collateral, and the secured obligation.[12] A security interest in a property does not transfer title in the property from the borrower to the lender and title to the property remains in the borrower. A security interest which is an immovable property must be specific to avoid any ambiguity and its location, size and geographical co-ordinates shall be specified.[13]

The Act establishes Collateral Registry at the Bank of Ghana to, inter alia, register security interests, keep and maintain a Register for securities, and maintain a platform for searches to be conducted on security interest. The Bank of Ghana appoints a Registrar to maintain the Registry.[14]

A lender is prevented from taking a decision to vary the terms of the agreement to the disadvantage of the borrower, penalize the borrower for any breach of the agreement or take a decision to hasten the termination or

[12] Borrowers and Lenders Act 2020, ss 5 and 6.
[13] Ibid s 8(4).
[14] Ibid ss 19 and 20.

enforcement of a credit agreement. To ensure transparency and consistency in credit transactions, a lender is required to fix an interest rate that is calculated annually to avoid compound interest which is used to exploit borrowers. Furthermore, where a credit transaction has a penal provision for repayment of principal amount or the interest or both the principal amount and the interest on it, the penal rate shall be applied to the delayed payment only and not the total outstanding amount.[15]

The parties shall have a pre-agreement disclosure to state the principal amount, the interest on it, the mode of disbursing the principal amount, the total amount involved in the proposed agreement, proposed payment schedule, the basis for award of cost where the borrower breaches the agreement, and the insurance for the loan to ensure that a lender does not change any of the above-mentioned items for his benefit. Any payment not expressly stated in the pre- agreement disclosure shall not be introduced into a credit transaction. An administrative levy of one thousand five hundred penalty units shall be awarded against a lender who acts contrary to the pre-agreement disclosure by Bank of Ghana. A borrower who suffers loss as a result of a change made to a pre-agreement disclosure may sue the lender for damages.[16]

A lender who seeks to enforce payment of amount due under a credit agreement on a default by the borrower must give a notice in writing and demand for the payment of same by the borrower within thirty days from the date of receipt of the notice. The notice must demand for the payment to be made immediately. The notice may be delivered to the borrower by hand personally, through courier, registered mail or other means contained in the credit agreement.

[15] Ibid s 355.
[16] Ibid s 57.

4 REMEDIES AVAILABLE TO THE LENDER ON DEFAULT

The remedies available to the lender are that he may sue in court on a covenant under the credit agreement or realize the security interest in the collateral where the credit agreement is registered under the Act or where the collateral is a document of title, the lender may proceed against the document of title, or the subject matter covered by the title.[17]

A lender who decides to realize a security interest duly registered at the Collateral Registry without a court order shall register a notice of intention to realize same with the Registry. Where the Registrar is satisfied that all the requirements under the law have been satisfied, he shall issue realization process by issuing a certificate of Memorandum of No Objection. A certificate of Memorandum of No Objection when issued shall remain in force until the collateral is sold or the collateral is retained by the lender, or the debt owing has been fully settled and the collateral has been redeemed.[18]

A lender who takes possession of the property to realize security interest without a court order may render it unusable without removal. Where the security is a car, the lender may remove the engine to make it unusable without removing it. In a case of a building, the lender may render it unusable by removing the doors.[19] Where under the agreement the lender has a right to take possession of the property, he shall enforce it and take possession of same without recourse to court.[20] A lender who takes possession and renders the collateral unusable or repossess same is not required to give notice to that effect on the borrower provided Certificate of No Objection has been issued in accordance with law.[21]

Where the lender is unable to take possession of the property peacefully, the lender must file an application on notice in a court of competent jurisdiction

[17] Ibid s 61.
[18] Ibid s 60(2).
[19] Ibid s 63(1).
[20] Ibid s 63 (2).
[21] Ibid s 63 (3).

to issue a warrant to evict the borrower from an immovable property or remove the collateral with police assistance. The borrower upon service of the application may file an affidavit in opposition within eight days upon service of the application on him. In the affidavit in opposition, he is required to state the full amount owed, whether the default has been cured and how it was cured or depose that the default has not occurred. The court shall hear the matter based on the affidavits filed and make a determination. On the other hand, where affidavit in opposition is not filed within eight days by the borrower, the court shall issue a warrant and order for police assistance.[22]

A borrower or any person who obstructs a lender from taking possession of the collateral property under the Act or fails to yield up possession without reasonable excuse when told to vacate possession commits a criminal offence.[23] A lender may collect and apply an account receivable, security, moneys either in deposit account or in hand or both or negotiable instrument used to secure the collateral where the borrower defaults on payment.[24]

The unique thing about the lender applying the collateral in satisfaction of the debt is that unless there is a contrary position in the credit agreement, the lender may notify the account debtor and demand for payment even before the borrower defaults in paying same.[25] A lender who realizes the collateral property may dispose of same through auction, public tender, private sale or as determined by the parties in the credit agreement. The lender without recourse to the court appoints an independent valuer and whose valuation report shall guide the selling price.[26] A lender who realizes the security interest in accordance with the Auction Sales Act 1989 (PNDCL 230) shall be deemed to be an execution of a judgment debt without recourse to the court.[27]

[22] Ibid ss 64 (1), (2) and (3).
[23] Ibid ss 64 (4)(a) and (b).
[24] Ibid s 65(1).
[25] Ibid s 65 (2).
[26] Ibid ss 66(1) and (2).
[27] Ibid s 64(3).

After the sale made in accordance with section 66 of the Act by the lender without court order, the lender shall apply to the court on notice to the borrower to confirm the transfer of the legal title in favour of the purchaser who bought the property from the lender. A person who buys the security interest from the lender for value shall acquire the interest of the borrower and the court is required to confirm it in accordance with law to facilitate transfer at the appropriate offices.[28]

Admittedly, the Act appears to run contrary to due process which ordinarily requires a person whose rights have been violated to sue in a court of competent jurisdiction presided over by an impartial arbiter to hear both parties and decide according to law. Wide powers have been given to lenders, without recourse to the courts, to take possession of the property, appoint an independent valuer to inform him about the value, sell without a reserved price and transfer title of the borrower to the buyer.

It is important to note that if a borrower disputes the claim of the lender, he is not barred from taking steps to have the court determine the respective rights of the borrower and the lender. In effect, because of the high default rate in respect of legitimate debts, the law has lessened the burden on lenders to litigate without closing the door to the borrowers to approach the court.

Indeed, it is not uncommon for the law to confer rights on an aggrieved party without the obligation to commence an action in court. For example, under the Sale of Goods Act, 1962 (Act 137) an aggrieved seller may exercise a lien without first seeking a court order. A buyer aggrieved by such an action will have to commence an action to determine its lawfulness or otherwise. Also, under the Revenue Administration Act 2016 (Act 912) confers rights on the Commissioner General of the Ghana Revenue Authority to recover taxes due to the State without a court action. For example, under sections 52 and 53 of Act 912, the Commissioner-General can create a charge over an asset and recover possession of the asset without a court order.

[28] Ibid ss 66(4), (5) and (6).

In both cases, a person aggrieved by the action is entitled to approach the courts for relief. Indeed, in the relatively fewer cases which will go before the courts, borrowers will be interested in the expeditious resolution of their disputes, thereby ensuring that courts are not inundated the courts with volumes of cases considering the instances of loan default in the country.

5 CONCLUSION

It is often said that justice delayed is justice denied. But whilst borrowers may be uncomfortable with the provisions of the Borrowers and Lenders Act 2020, it must be stressed that those enforcement provisions apply when borrowers fail to honour their voluntarily assumed obligations.

Law must be dynamic and must respond to the needs of society. Over the years, many borrowers have abused the court process and denied lenders of effective judicial remedies due to the onus on lenders to litigate. By shifting this obligation to the borrower, the law has sought to strike a balance without shutting the doors of justice to the borrower.

A borrower who does not default in the payment of a loan under a credit transaction should not fear the Act as it also prevents borrowers from introducing unconscionable interest rates and other charges into credit transactions.

Lenders are not Santa Clauses or Father Christmases; thus, Borrowers must honour their voluntarily assumed obligations under credit transactions. It is apposite to conclude with a characterisation of recalcitrant borrowers with the words of Abraham Lincoln (1809-1865) thus:

'He reminds me of the man who murdered both his parents, and then, when sentence was about to be pronounced, pleaded for mercy on the grounds that he was an orphan'.[29]

[29]Abraham Lincoln Quotes. (n.d.). allauthor.com <https://allauthor.com/quotes/143124/> accessed 27th September, 2022.

HUMANITY IN PRISON: RESTORING PRISONERS' DIGNITY THROUGH PRISON DECONGESTION

Frederick Agaaya Adongo[*]

Abstract

The essence of this paper is to demonstrate that the overcrowded state of Ghana's prisons violates the inviolable dignity of prisoners. The paper offers some recommendations for addressing the problem of overcrowding so as to give effect to the inalienable dignity of prisoners. Particularly, it explores the possibility of adopting plea bargaining, non-custodial sentencing, restorative justice and uniform sentencing guidelines on the route toward an ideal prison system that is consistent with human dignity.

1 INTRODUCTION

Punishment, whatever its objective, is an integral part of the administration of criminal justice. Deeply etched in the jurisprudence of punishment is imprisonment for a period of time. In a sense, imprisonment has almost become the sentencing currency of Ghana's contemporary criminal justice system.[1] Almost every crime in our criminal law has an imprisonment dimension, even where alternative modes of punishment are prescribed.[2] In consequence thereof, there are a lot of prisoners in our country.

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[*] Bachelor of Laws (LL.B), University of Ghana, Legon (2021); BL Candidate, Ghana School of Law, Accra. I am eternally grateful to Prosper Batariwah, Timothy Selikem Donkor and Joshua Mbowura for their critical comments and suggestions on this article in its draft stage which helped in shaping its final form.

[1] Many offences in our criminal legislation such as felonies attract no other alternative mode of punishment except imprisonment. See the offences of rape and defilement under sections 97 and 101 respectively of the Criminal and Other Offences Act 1960 (Act 29).

[2] See for example the penalties for many of the road traffic offences in the Road Traffic Act 2004 (Act 683), such as the penalty for careless and inordinate driving under s 3, that for the offence of driving under influence of alcohol or drugs under s 4(1)(a) and the penalty for the offence of carrying children on a motor vehicle under s 14. All of these provide for the imposition of either a fine or imprisonment or even both, where a person is found guilty.

But a myriad of challenges plagues Ghana's prison system. I noticed some of these problems in a personal encounter when I had the opportunity of participating in a trip to the Nsawam Medium Security Prisons in 2019 under the auspices of my Criminal Law lecturer, Kissi Agyebeng. The infrastructure was pitifully inadequate, to begin with. Human beings were densely packed in the concrete walls of prison cells. Some prisoners complained bitterly about how poorly they were fed. These problems exist in other prisons in the country, too.[3] Despite these numerous problems characterizing our prisons, the nagging one requiring urgent attention is the high rate of overcrowding, since many of the problems draw their lives from it. Prison overcrowding thus constitutes the focus of this paper. It is my view that the experience that prisoners undergo in their solitary, depressing universe in overly crowded conditions constitutes a contravention of their dignity. This, therefore, necessitates the decongestion of our prisons in order to accord respect to the dignity of prisoners.

To achieve its aim, this paper is divided into seven principal parts. Part one is the foregoing introduction. In part two, the rate of overcrowding in Ghana's prisons is examined from a historical perspective to demonstrate that prison congestion is as old as Adam in our part of the world, yet no proper measures have been put in place, in the past or now, to obviate its effects. Part three briefly discusses the concept of human dignity, establishing its inalienable and non-derogable character. It demonstrates that dignity is what gives a human being a sense of completeness, and the rights of man are derived from this very dignity. Part four poses, and provides a negative answer to, the question whether imprisonment leads to the forfeiture of dignity by the imprisoned. Part five makes the compelling argument that the congestion in Ghana's prisons violates the dignity of prisoners. This is followed by part six which provides some recommendations for restoring dignity in prisons through decongestion: the adoption of plea bargaining, restorative justice,

[3] See part two of this paper for details.

non-custodial sentences and uniformity in sentencing. Part seven is the conclusion.

2 THE STATE OF GHANAIAN PRISONS NOW AND IN HISTORY

Overcrowding in prisons in Ghana is not a recent phenomenon. It has always been with us since the introduction of formal prisons by the colonial government. A little historical background is necessary in order to illustrate this. For the present purpose, I shall limit myself to the period beginning with the First Republic to present. Again, it is not within the scope of this paper to provide specific details about the state of each prison facility in the country. A general overview of prisons in some selected years is thus the focus of the ensuing discussion.

Having said that, it is worth noting that, by 1961 the ratio of prisoners to the capacity of prisons was about 125%, which increased to 164% in 1964, and rose to 200% in 1977.[4] This ratio reached a colossal peak of 277% in 1986, falling to 203% by 1989 and 198.5% in 1990.[5] It went up to 208.5% in 1991 and dropped to 201% in 1992.[6] The factors accounting for the seeming decrease in the overcrowding rate, though insignificant, between 1989 and 1992 after its highest peak in 1986, is the general amnesty granted by government to a number prisoners within the period under consideration.[7] Consequently, the ratio of prisoners to prisons capacity soared up again to 211% by the third week of January 1994.[8] Information available with the World Prison Brief reveals that by 2002, the ratio of prisoners to prisons capacity fell to about 115% and rose to 129% and 142% in 2006 and 2008 respectively.[9] It rose a little

[4]Joseph Appiahene-Gyamfi, 'Alternatives to Imprisonment in Ghana: A Focus on Ghana's Criminal Justice System' (BA thesis, Simon Fraser University 1995) 108.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid 109.
[9] Available at https://www.prisonstudies.org/country/ghana Accessed 1st March, 2022.

to 146% in 2014 and declined negligibly to 145% in 2018.[10] As at September 2019, it was reported that prison overcrowding was over 55%, representing a prisoner to prisons capacity ratio of 155%, with 15,461 inmates as opposed to a nationwide prison capacity of 9,945 inmates.[11] As at June 24, 2021, the prisons had taken 32.65% more than their total capacity, representing 132.65% ratio of prisoners to total capacity of prisons.[12]

From the data above, an unmistakable pattern emerges. It becomes clear that whereas there are variations as regards the rate of overcrowding in the years under review, the unifying thread that can be found in all the years is that prison over-population has remained part of our prison system over the years. Clearly, a number of problems would and do arise from the overcrowding in our prisons. Principal among them is the health hazard it poses to inmates. The damp and humid nature of our prisons, coupled with this dense overcrowding, accounts for the spread of a number of diseases, including flu, diarrhoea, headaches, rashes, fever, cold, cough, unbearable stench, tuberculosis, among others.[13]

With this brief historical tour of the state of our prisons, it is relevant to consider whether, and to what extent, the overcrowding in prisons amounts to a violation of dignity. Before then, an attempt shall be made to underscore what the concept of dignity entails and whether dignity is legitimately forfeited by the imprisoned.

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[10] Ibid.

[11] Ghana 2020 Human Rights Report, 3.

[12] Justice Agbenorsi, 'Overcrowding Impedes Prisoner Rights; Facilities House 30% Above Capacity' *Graphic* (Accra, June 26, 2021) https://www.graphic.com.gh/news/general-news/overcrowding-impedes-prisoner-rights-facilities-house-30-above-capacity.html Accessed 3 March, 2022.

[13] Appiahene-Gyamfi (n 4) 121-122; Nenyo Abla Kwasitsu, 'Sentencing Persons Convicted of Minor Offences in Ghana: Reducing Judicial Over-Reliance on Imprisonment' (LLM Thesis, Dalhousie University Halifax 2019) 95-96.

3 THE CONCEPT OF HUMAN DIGNITY

There is so much discussion about dignity in the literatures of law and philosophy.[14] Yet, the normative complexity of the concept of dignity has left its meaning less clear. This tragic reality, however, does not preclude us from undertaking at least a cursory descriptive attempt at understanding dignity. On that account, an attempt shall be made herein to sketch out a clear picture of the concept of dignity, even if a concise definition is inadmissible.

Having said that, the concept of human dignity may be construed as deeply rooted in the Stoic, classical or humanist philosophy in which 'man', in the words of Protagoras, the pre-Socratic Greek philosopher, 'is the measure of all things'.[15] It may also be grounded in the Judeo-Christian conception of man being in the image and likeness of God; and based on the belief that there is something intrinsically valuable in God, man, being His child and in His image, is an end in itself, possessing something intrinsically valuable, too.[16] Its basis may also be in Kantian philosophy of man in which man necessarily possesses an incalculable 'inner worth'.[17] It may well be treated as being based upon the claim by Pico della Mirandola, an influential philosopher of the Renaissance, that the human being is 'the most fortunate of beings and therefore worthy of all admiration, ... a condition to be envied not only by beasts but even by the stars and the intelligences dwelling beyond this world'.[18]

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[14] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2012); Scott Cuttler Shershow, *Deconstructing Dignity: A Critique of the Right to Die Debate* (The University of Chicago Press 2014); George Kateb, *Human Dignity* (Harvard University Press 2011).

[15] C.M Gillespie, 'The Truth of Protagoras' (1910) Mind, New Series, Volume 19, Issue 76, 470.

[16] Kwame Gyekye, 'Person and Community in African Thought' in Kwasi Wiredu and Kwame Gyekye (eds), *Person and Community, Ghanaian Philosophical studies, vol I* (The Council for Research in Values and Philosophy 1992) 114.

[17] Scott Cuttler Shershow, *Deconstructing Dignity: A Critique of the Right to Die Debate* (The University of Chicago Press 2014) 32.

[18] Francesco Borghesi et al (ed), *Pico della Mirandola*, *Oration on the Dignity of Man* (Cambridge University Press 2012) para 6.

In an attempt to describe dignity, Alan Gerwith, an American philosopher, postulates that the term 'dignity' is used in an empirical sense to mean 'a kind of gravity or decorum or self-respect' and an 'inherent' sense whereby it demonstrates 'a kind of intrinsic worth that belongs equally to all human beings as such'.[19] It is the inherent sense of dignity in the postulation of Gerwith that is of significance to the present discourse. That being the case, dignity is thus present in the same measure in the most pious of human beings as in the impure ones because it is inherent in every human as a living being. Human dignity is thus understood as an existentialist essential reality deeply ingrained in the human nature and incidental to the personhood of an individual.[20] Thus, the question of what dignity is, is necessarily linked to what it is to be a person.[21] Respect for human dignity can therefore be said to be the recognition and acceptance that every human possesses some special value that is intrinsic, inherent and incidental to his personhood. Given that it is intangible yet so vital and inseparable from the human being, I am disposed to view dignity as a disembodied 'human' which engulfs the biological human, giving the latter a sense of completeness, and the two together make a person. It is not a meritorious virtue that one derives for doing some good. Dignity can safely be considered, in a sense, as a privilege for merely being human.

The concept of dignity is one of unparalleled significance such that it constitutes the foundation upon which is erected the concept of human rights.[22] And so, many, if not all, of the international human rights treaties, are rooted in the inalienable dignity of man. Notable among them are the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The UDHR for instance is

[19] Shershow (n 17) 30.
[20] St. Thomas Aquinas, *Summa Theologica* (Benziger Bros edn, 1947) 211. St. Thomas Aquinas remarked that 'the definition of person is given as "hypostasis distinct by reason of dignity."'
[21] Jeff Malpas and Norelle Lickiss, *Perspectives on Human Dignity: A Conversation* (Springer, 2007) 19.
[22] Kateb (n 14**Error! Bookmark not defined.**) 1; Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press 2010) 63.

based on the ''recognition of the inherent dignity''[23] of all members of the human family with the understanding that, ''all human beings are born free and equal in dignity and rights''.[24]

That dignity is the basis of rights was not lost on the framers of the 1992 Constitution. So, they devoted a whole chapter, Chapter Five thereof, to fundamental human rights. Along with this, they provided for the Directive Principles of State Policy under Chapter Six of the Constitution which have been declared by the Supreme Court to be prima facie justiciable rights.[25] That notwithstanding, the framers noticed that the rights and freedoms listed in the Constitution are not exhaustive of the rights that our courts can and should enforce.[26] They therefore provided to the effect that other rights not expressly mentioned which have gained international acceptance, and are 'intended to secure the freedom and dignity of man' are enforceable.[27] Basic logic would have us understand that the fact that these non-declared rights can only be enforced if they secure the dignity and freedom of man presupposes, and indeed it is the case, that these rights, and even the declared rights, are rooted in the dignity and freedom of man. If that were not so, dignity and freedom would not be regarded as the indices for determining the admissibility of other rights.

4 OVERCROWDING IN GHANAIAN PRISONS: A DENT ON PRISONERS' DIGNITY

Given that dignity in non-derogable even in respect of the impure or criminal, all systems of imprisonment must ensure that the imprisoned do not have to undergo any kind of treatment which excites pronounced contempt of their

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), preamble.

[24] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 1.

[25] *New Patriotic Party v Attorney General* [1993-94] 2 GLR 35 (SC); *New Patriotic Party v Attorney General* [1997-98] 1 GLR 378 (SC); *Ghana Lotto Operators Association v National Lottery Authority* 2007-2008] SCGLR 1088 (SC).

[26] 1992 Constitution, art 33(5).

[27] *New Patriotic Party v Attorney General* [1993-94] 2 GLR 35 (Francois JSC); *New Patriotic Party v Ghana Broadcasting Corporation* [1993-94] 2 GLR 354 (Francois JSC); *Adjei Ampofo v Attorney General* [1996-97] SCGLR 729, (Sophia Akuffo JSC).

dignity and eternal worth. The Supreme Court of the United States remarked in the case of *United States ex rel. Miller v Twomey*[28] that 'the restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual'.[29] This marked a radical departure from the erroneous view once held that the prisoner is a mere slave who could be toyed with and discarded. But in our jurisdiction, the evident spectre in our prisons as demonstrated in part two misrepresent imprisonment as a suction device for ridding the individual of his inalienable dignity and the mere thought of incarceration necessarily poses potential damage to dignity.

In that connection, ensuring the appropriateness of punishment remains an integral part of the reinforcement of human dignity.[30] It is the duty of the State to treat prisoners in a manner that aligns with respect to their dignity and intrinsic worth.[31] Indeed, it is a central feature of the Prison Service that prisoners be treated in a humane manner in every respect.[32] To respect the dignity of prisoners, they must be kept in conditions that will enable them to keep themselves clean and carry out their bodily functions with some degree of privacy and without undue challenges.[33] It is highly doubtful whether an overly crowded environment will enable prisoners to live in decent and dignified conditions.

With this in mind, it is now not only expedient but compelling to consider whether overcrowding in prisons amounts to an assault on the dignity of prisoners. I am necessarily disposed to answer this question in the affirmative.

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[28] 479 F. 2d 701.
[29] Ibid 713.
[30] BF Skinner, *Beyond Freedom and Dignity* (Pengiun Books Ltd 1973) 58.
[31] *Overton v Bazzetta* 539 US (2003) 126, 138
[32] Prisons Service Act 1972 (NRCD 46), s 1(3) on the parameters to measure the performance of the functions of the Prisons Service. See also, Andrew Coyle, *Humanity in Prison: Questions of Definition and Audit* (International Centre for Prison Studies 2003) 10.
[33] Coyle (n 32) 36; Kateb (n 14) 20.

To consider what amounts to a breach of dignity, for the present purposes, I shall limit myself to article 15(2) of the 1992 Constitution which states:

> No person shall, whether or not he is arrested, restricted or detained, be subjected to a) torture or other cruel, inhuman or degrading treatment or punishment; b) any other condition that detracts or is likely to detract from his dignity and worth as a human being.

From a contextual reading of Article 15(2), it stands to reason that the Constitution contemplates that for anything to amount to a violation of a person's dignity, it must either be in the form of 'torture or other cruel, inhuman or degrading treatment or *punishment'* or alternatively 'any other condition that detracts or is likely to detract from his dignity and worth as a human being'.

Without intending to undertake a detailed search for the signification of each word used in the constitutional provision in question, it must be noted that the word 'torture' 'has come to mean anything unpleasant', including 'crowded prison conditions'.[34] Thus, where torture or any form of cruel or inhuman treatment is meted out to any person as though he were inferior to his fellow humans, the content of dignity is emptied. This is abhorred by the 1992 Constitution. Accordingly, it is wrong and violative of human dignity to inflict needless suffering on a person, including prisoners, 'not only for the pain that it causes but also for the failure to recognize a shared humanity that it demonstrates'.[35]

Again, it should be incandescently clear that the use of the phrase 'any other condition' in article 15(2) must of necessity include the living conditions of prisoners. The word 'condition' itself according to the 8th Edition of the Black's Law Dictionary, includes 'a state of being; an essential quality or status'. Thus, any state of being, including living conditions in our prisons, which has the

[34] John H Langbein, 'Torture and Plea Bargaining' (1978-1979) 46 University of Chicago Law Review 3.
[35] Ibid 23.

tendency of detracting or actually does detract from an individual's worth violates that individual's dignity. And something detracts from a person's worth if it lowers him before the eyes of right-thinking members of society by, for example, subjecting him to anything that no one can reasonably put up with. Subjecting a person to imprisonment in the circumstances sketched out in part two detract from a person's worth, as no person could reasonably be expected to live in such overly crowded conditions with the recounted dire consequences.

These considerations lead to the inescapable conclusion that the squalid wretchedness of our prisons, evidenced by overcrowding as well as its attendant consequences which include physical discomfort and the spread of diseases, is antithetical to the dignity of the imprisoned. More so, being in a state where one cannot even stay in some reasonably comfortable state has the possibility of causing prisoners to doubt their very humanity and whether they have dignity. And when extreme suffering forces the idea of human dignity out of the victim's (prisoner's) mind, a great assault is inflicted on his dignity.[36] That said, if we operate with the earlier metaphor alluded to that, dignity is 'a disembodied "human" then an assault is inflicted on the dignity of a person, though he lives, he remains but a mere biological entity, bereft of this "disembodied human", and therefore not a complete person.

There is therefore the need to devise ways of ridding our prison atmosphere of the dense overcrowding which, by and large, has been demonstrated to be ripping gaping wounds and leaving permanent scars on the dignity of prisoners. It is to this that the next part of this paper turns.

4.1 Guidelines to a Constructive Prison System

In order not to reduce the foregoing discussion to a theatrical jest, it is compelling to explore some solutions that can help arrest the dreadful menace

[36] Kateb (n 14) 20.

of prison congestion and the widespread violation of dignity resulting therefrom.

Proceeding from there, building more prisons may be thought to be the most viable alternative towards decongesting prisons. This possible solution to the problem, though appearing laudable, is overly simplistic and has flown out of the course of modernity.

It must be pointed out that building more prisons in order to help in the decongestion process will make the state incur more cost not only in building prisons but also in taking care of the basic needs of prisoners, including feeding and health needs.[37] Building more prisons as a solution to the problem would mean, too, that as the population increases, there will continuously be the need to build more prisons, because over time (perhaps soon after constructing more prison facilities) the prison population would far outrace the capacity of prisons.[38] My fear is not without basis. The Nsawam Medium Security Prisons was constructed in 1961, with the expectation that it would help arrest the overcrowding in prisons which hitherto existed, but it was overcrowded soon after it was operationalized.[39] And so, there is the need to examine viable alternatives that can lead to the ideal prison system where congestion and its consequent effects would be consigned to the archives of history.

To be able to suggest meaningful solutions to the problem, it is imperative to draw inspiration from trends in contemporary criminal justice administration. Thoughts in contemporary criminal justice jurisprudence reveal that plea bargaining, victim-offender mediation, non-custodial sentencing and the application of uniform sentencing guidelines have become the order of the day. There is therefore the need for a radical reordering of our

[37] DK Afreh, 'The Prisons and Sentencing Policies' (1996-2000) 20 Rev Ghana L 141, 153. See section 35 of the Prisons Service Act 1972 which requires that prisoners be provided with sufficient and balanced diets, clothing, medicines etc. Thus, the more the prisoners, the greater the expense the State is put to.
[38] Kwasitsu (n 13) 94-95.
[39] Appiahene-Gyamfi (n 4) 108.

criminal justice system in order to bring it into conformity with these contemporary trends.

4.2 Plea Bargaining

Plea bargaining is often referred to by a variety of names, including 'plea deals', 'plea discussions' and 'plea negotiations'.[40] Whatever its designation, plea bargaining, in its most basic and comprehensive sense, is understood as a process in the justice delivery system whereby an accused person voluntarily parts with his constitutional rights in a criminal trial in exchange for a benefit, by discussing the evidence in a criminal prosecution with the prosecutor.[41] These rights which are waived by the accused include, but not limited to, the right to remain silent, the right to call witnesses, the right to jury trial and his right to be presumed innocent until the prosecution proves his guilt beyond reasonable doubt.[42] The concessionary benefits that may be enjoyed by the accused person who voluntarily relinquishes his right to stand trial include, among others, a reduction of the charge, withdrawal of charges, the imposition of minimum sentences where there is any, imposition of a fine as opposed to incarceration, etc.[43]

History reveals that the development of plea bargaining was necessitated by the fact, not only that it was wanted by prosecutors, but that it was needed by judges to enable them attend to the growing civil cases on their dockets.[44] In contemporary times, plea bargaining has assumed the centre of the stage of many criminal justice systems the world over. This is evidenced in national legal systems such as France, Germany, India, Japan, Nigeria, Canada, Russia,

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[40] Zina Lu Burke Scott, 'An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada' (2018) 81 Saskatchewan Law Review 53, 54.
[41] Ibid 54-55.
[42] Ibrahim Danjuma and Gan Ching Chuan, 'The Extent of Voluntariness in Plea Bargaining for Economic and Financial Crimes in Nigeria' 23 (3) 2015 IIUMLJ 485, 487.
[43] Scott (n 40) 55.
[44] William J Stuntz, 'Plea Bargaining and Criminal Law's Disappearing Shadow' (2004) 117 (8) Harvard Law Review 2548, 2560-2561.

and South Africa, and even international criminal tribunals.[45] It has gained such widespread acceptance that not only is it applied in these jurisdictions, but the vast majority of criminal cases in these jurisdictions are resolved through plea bargain.[46]

Moving on, the fact that plea bargaining is not entirely alien to Ghanaian law must not escape our attention. Ghana's criminal procedural law provides scantily for the application of something in the very nature of a plea bargain. The law makes it possible for an accused person to plead not guilty to a charge proffered against him and plead rather guilty to a lesser crime of which he has not been charged.[47] This may entitle the accused to be discharged by the court of the charge that was in fact proffered against him, with the consent of the prosecutor.[48]

Again, the very fact that the Attorney General has power to enter *nolle prosequi*[49] and withdrawal[50] gives credence to the possibility of a plea bargain. The Attorney General may either enter *nolle prosequi* in respect of an ongoing trial and re-charge the accused with a lesser offence or drop charges altogether. He may also withdraw some particular charges and proceed to try the accused person of some lesser offence through some negotiation between the accused and the Attorney General. This is made possible by the fact that the Attorney General's power to enter *nolle prosequi* and by no means excluding withdrawal has been held to be purely discretionary, subject to no judicial enquiry.[51]

The law also makes it possible for an accused person who is charged with causing financial loss, harm or damage to the state to admit guilt and express

[45] Jenia I Turner, 'Plea Bargaining' (2017) 3 Reforming Criminal Justice 73, 75.
[46] Scott (n 40) 76.
[47] Act 30, s 239(2).
[48] Act 30, s 239(3).
[49] Act 30, s 54.
[50] Act 30, s 59.
[51] *Gregory Afoko v Attorney General* [2020] 155 GMJ 1 (SC).

willingness to offer compensation or reparation in lieu of a sentence, if the court is satisfied with the proposed compensation or reparation.[52]

It is imperative to point out that, the idea of plea bargaining has evoked some legitimate discontent and scepticism from some legal scholars. It has been argued that it will be a mockery of the ideals of justice to allow an accused to plead guilty to a lesser offence not charged in order to be acquitted of the charged offence, thus attracting a lesser sentence which is far incommensurate with the actual offence charged.[53] It has thus been suggested that an accused person's guilty plea to a lesser offence not charged should exonerate him from the offence charged, only if there is no prima facie sufficient evidence to support conviction on the offence charged.[54] That notwithstanding, plea bargaining remains relevant in furtherance of the cause of justice despite the legitimate fears expressed.

Consequently, the Office of the Special Prosecutor Act 2017 (Act 959), for the first time in our history, made express mention of plea bargaining. Act 959 makes it possible for a person charged with or under investigation for corruption or corruption related offences to voluntarily admit the offence and offer to make restitution; or to admit the offence and disclose information that may lead to the arrest and possible conviction of some other person engaged in corruption or corruption related matters.[55]

More recently, the Criminal and Other Offences (Procedure) (Amendment) Act 2022 (Act 1079) was enacted, making provision for plea bargaining in the administration of criminal justice. This is a welcome development, and its purpose would be better served if there is some widespread publicity about it, to make accused persons abreast of its content. Trial courts and prosecuting officers are also enjoined to be constantly proactive in invoking this law in the administration of criminal justice, otherwise its purpose would be defeated.

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[52] Courts Act 1993 (Act 459), s 35.
[53] *Pobee alias Arko v The Republic* [1981] GLR 743 (HC).
[54] Ibid.
[55] Act 959, s 35.

4.3 Restorative Justice

It is not a hidden fact that the criminal jurisprudence regards crimes as offences against the State and not individual victims. A victim of a civil wrong can seek redress of his rights on his own behalf. In the event of a crime, it is the State, through the Attorney-General or a person authorized by him, who prosecutes the offender.[56] The end of any criminal conviction is usually imprisonment of the offender or the payment of a fine by him to the state. This is done with little to no regard to the peculiar needs, psychological, emotional, financial and otherwise, of the victim. But it is relevant that in the administration of criminal justice kind regard is paid to the needs and interests of the victim, rather than the State.[57] In some instances, the relationship between an offender and the victim may be such that there is the need to maintain cordial relationships between them. This purpose may not be served by conventional criminal justice approaches. This would mean that a justice delivery system where the offender repents, makes reparation and proportionate amends to the victim, thereby repairing the broken relationship between the parties is necessary.[58]

In many developed criminal justice systems, the conventional method of court-room trial of all criminal cases is gradually fading into oblivion in cases not suitable for trial and the subsequent incarceration of the offenders. It is thought that imprisonment in some instances is not appropriate for certain kinds of offences and thus only has the effect of compounding the menace of prison congestion.[59] This has led to the adoption of the idea of restorative justice, which evolved from the 'aboriginal people in Canada and the Native Americans in the United States', where persons who are affected by a criminal conduct 'participate in a facilitated negotiation to address crimes in the

[56] 1992 Constitution, art 88(3).

[57] Prudence Batinge, 'Victim-Offender Mediation and the Criminal Justice System' (7 February 2019) <https://ghanalawhub.com/victim-offender-mediation-and-the-criminal-justice-system/> Accessed 2 February 2022

[58] Christopher Bennett, 'Satisfying the Needs and Interests of Victims' in Gerry Johnstone and Daniel W. Van Nes (eds), *Handbook of Restorative Justice* (William Publishing 2007) 251-256.

[59] Batinge (n 57).

community'.[60] In this regard, tied to a uniform narrative of restorative justice are victim–offender interaction, the offering of reparation by the offender to the victim of an offence and the collective making of decisions on how best to address the offence and serve the interest of justice.[61]

In practical terms, restorative justice has functioned fairly well in some African jurisdictions. This demonstrates that it is worth adopting, subject to modifications that suit our peculiar circumstances. The *Gacaca* justice delivery system which is akin to restorative justice, a mechanism which was popularized in post-genocide Rwanda, is instructive in this stead. After the popular Rwandan genocide, a number of persons were tried for several degrees of crimes committed during the genocide. Many were convicted and sentenced to long periods of detention in prison, thereby overwhelming the prisons.[62] This informed the adoption of the *Gacaca* system (a traditional Rwandan practice where respected members of the community acted as 'judges' in resolving a dispute) for dealing with certain categories of offences which were committed during the genocide.[63] The *Gacaca* system therefore involved community participation in dealing with the crimes committed, visiting sanctions in the form of compensation for damaged or stolen property on the offender or his family or clan, as opposed to imprisonment.[64] This way, 'the seriousness of a transgression was recognized, while at the same time, there was space for reintegration of the transgressor'.[65]

It is fair to say, therefore, that not only will restorative justice play a central role in prison decongestion, but it will help in the accomplishment of other desirable objectives such as enabling victims of crimes to experience justice

[60] J Marshall, '(I Can't Get No) Satisfaction: Using Restorative Justice to Satisfy Victims' Rights' (2013) 15 Cardozo Journal of Conflict Resolution 582.
[61] Bennett (n 58) 247.
[62] Karan Lahiri, 'Rwanda's "Gacaca" Courts A Possible Model for Local Justice in International Crime?' (2009) 9 International Criminal Law Review 321, 324.
[63] Ibid 325.
[64] Ibid 325.
[65] Ibid.

more meaningfully and aid in the healing of their psychological wounds.[66] It will also ensure the reintegration of offenders into society as law-abiding citizens and significantly reduce the resources expended in the maintenance of prisons and prisoners, among a host of other objectives.[67] Restorative justice is thus a more constructive and progressive response to criminal wrongdoing in society than conventional criminal prosecution of all wrongs.[68] This is because restorative justice is a reparative concept which heals and repairs the harm caused by the crime, and that is better than imposing what the law thinks is an equivalent harm on the offender, which often fails to provide an enduring sense of justice[69] and further leads to prison congestion.

In our own jurisdiction, the current legal framework lends credence to the application of victim-offender mediation. Where a person is undergoing trial for an offence other than a felony which is not aggravated in degree, he may be discharged of the offence after facilitating and encouraging the amicable settlement of the offence on such terms as to compensation or otherwise as the court may approve.[70] The court may, during case management conference or at any stage of the trial of a person for a criminal offence, refer the matter to mediation for settlement where it appears to the court that the matter is one that can be best settled through mediation.[71] Whereas these provisions are in existence in our laws, they are seldom invoked. In that stead, it is imperative not only to enact a comprehensive legislation on victim offender mediation, but also to sensitize the judiciary on the urgent need to recommend mediation in the resolution of criminal disputes, in appropriate cases.

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[66] Gerry Johnstone and Daniel W Van Nes, 'The Meaning of Restorative Justice' in Gerry Johnstone and Daniel W Van Nes (eds), *Handbook of Restorative Justice* (William Publishing 2007) 5.
[67] Ibid.
[68] Ibid 6.
[69] Ibid 12, 18.
[70] Courts Act 1993 (Act 459), s 73.
[71] Alternative Dispute Resolution Act 2010 (Act 798), s 64(1); Practice Direction (Disclosures and Case Management in Criminal Proceedings) 2018, para 4(2).

4.4 Non-Custodial Sentencing

Globally, there has been a swing of the pendulum towards the implementation of non-custodial sentencing regimes, because incarceration should and ought to be imposed only when it is absolutely necessary. This is based on the recognition that since imprisonment is 'a serious limitation on the fundamental human rights of those affected by it and a severe deprivation for most of those incarcerated, there is now a broad formal acceptance that it should be used with restraint'.[72] Imprisonment, far from the fact that it leads to prison congestion, has generally been viewed as having several negative impacts, and seldom does it achieve any improvement in the prisoner or his social situation.[73]

Whereas Ghanaian law on non-custodial sentencing is seemingly scanty, there are ample legal authorities suggesting that our legal system does not bar the imposition of non-custodial sentences. The imposition of the payment of fines, compensation, liability to police supervision and recognizances with or without sureties have been recognized alongside imprisonment, detention and the infliction of the death penalty as modes of punishment.[74]

In spite of this, our principal criminal legislation, the Criminal and Other Offences Act, 1960 (Act 29) and other crime-creating legislation, lean generally towards custodial punishments, even where it is manifestly absurd to impose such sentences in the circumstances. This posture leaves judges no other choice but to impose imprisonment. Also, even where non-custodial sentences such as fines are provided as the punishments for particular crimes, there is often an imprisonment dimension attached. It is common to find in our criminal laws clauses such as 'liable on summary conviction to a *fine* not exceeding five hundred penalty units or to a term of *imprisonment* not

[72] Afreh (37) 152.
[73] Richard Kuuire, 'Non-Custodial Sentences and Alternatives to Imprisonment' (1996-2000) 20 Review of Ghana Law 301, 303.
[74] Act 30, ss 294 and 299(1).

exceeding two years or to *both* the fine and the imprisonment'.[75] These instances give judges the untrammelled discretion to choose between custodial and non-custodial sentences, or even both. Unfortunately, the unmistakable pattern of judicial attitude is that many judges appear to discriminate between the two, favouring the custodial in the vast majority of cases.[76] This leads to the sending of more and more people to prison, thus compounding the rates of overcrowding.

There is therefore the need for a robust system of sentencing whereby non-custodial sentences will be awarded in most instances, reserving imprisonment for the most serious of offences, in order that we may comply with our international obligations.[77] To achieve this, we need to channel efforts, energies and resources into developing a strong system of alternative punishments regime, providing for the payment of fines, restitution, probation, community service, periodic detention, recovery of stolen articles and property, conditional discharge, confiscation of property, verbal sanction such as admonition etc, where appropriate.[78] For this objective to be achieved, Act 29 and other crime-creating laws need restructuring. The crimes created thereunder need to be reframed, providing for only non-custodial sentences where appropriate, so that imprisonment would be reserved for very serious offences and the most appropriate of cases.[79]

4.5 Uniformity in Sentencing

Uniformity in sentencing is a desirable practice that should characterize every system of justice delivery. It will be unfair to sentence two different offenders to vastly different terms of punishment where it is clear that the circumstances

[75] See the penalty for the offence of using a vehicle in a dangerous condition in the Road Traffic Act, 2004 (Act 683), s 80(2); Emphasis mine.
[76] Kwasitsu (n14) 71.
[77] See the Ouagadougou Declaration on Accelerating Prisons and Penal Reform in Africa of November, 2003 which bids African countries to devise alternative modes of sentencing as opposed to imprisonment, towards the reduction of prison populations.
[78] Appiahene-Gyamfi (n 4) 139-160; Afreh (n 37) 154-159; Kuuire (n 73) 310-312.
[79] The need for such reform was recognized by Dotse JSC in his dissenting opinion in the case of *Samuel Agoe Mills Robertson v The Republic* [2014] GHASC 169.

and manner in which each of them committed the offence are materially identical. Unfortunately, the eclectic approach to sentencing which gives the judge a huge discretion to prescribe the sentence for a particular crime has produced considerable inconsistency in sentencing.[80] This 'inconsistent, disparaging and varied sentences on convicted persons' 'was bemoaned by Dotse JSC in his dissenting opinion in the case of *Isaac Amaniampong alias Fiifi v The Republic*.[81] On that account, it is relevant to establish rules detailing how sentencing is to be carried out by the courts.

Thankfully, the Ghana Sentencing Guidelines were inaugurated and launched to guide judges and magistrates in the administration of justice as far as sentencing is concerned.[82] These guidelines require judges and magistrates to consider a range of factors such as the nature of the offence and the aggravating and mitigating circumstances, if any, in passing sentences. One of the principal objectives of the guidelines, according to Chief Justice Georgina Wood, is to help reduce prison overcrowding by avoiding excessive sentences.[83] Unfortunately, however, these guidelines seem not to have gained the needed status in the sentencing process. Judges appear not to pay close heed to the rules in these guidelines in the passing of sentences.

It is incumbent on the State, therefore, to educate all judges and magistrates on the need to apply these guidelines in the exercise of their sentencing discretion. If this is done and the guidelines are applied correctly, uniformity in sentencing will be promoted, leading inexorably to a decongestion of prisons as well as other benefits.

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[80] Afreh (n 37) 150.
[81] [2014] GHASC 163.
[82] Musah Yahaya Jafaru, 'Guidelines on sentencing launched' *Graphic* (Accra, 20 February, 2015) <https://www.graphic.com.gh/news/general-news/guidelines-on-sentencing-launched.html> Accessed 8 February, 2022.
[83] Ibid.

5 CONCLUSION

In the final analysis, we must uplift the face of our prison system by ascending the next rung of the ladder towards decongesting our prisons. This is necessary not merely to comply with international norms and best practice, as important as that coincidentally happens to be. It must be done because the prevailing situation in our prisons is antithetical to human dignity, the foundation on which the superstructure of human rights is erected. To allow prisoners have their inalienable dignity cremated in the flames of poor systems of imprisonment is against everything that our Constitution stands for! Out of the abundance of caution, it must be noted that the clarion call for prison decongestion in this paper is not merely an exercise by way of intellectual analysis, but a call for action with immediacy. As the famous French poet and dramatist, Victor Hugo, said a long time ago, 'there is nothing more powerful than an idea whose time has come'. The idea whose time has come in contemporary Ghana is the decongestion of our prisons and the reinstatement of the dignity of prisoners. I therefore urge the relevant stakeholders to see to it that the proposed journey to the ideal prison system is made with deliberate, jet-like speed through the constructive use of law and policy, the most potent weapons available in the circumstances.

THE DISTRIBUTION OF RIGHTS IN A RELIGIOUSLY PLURAL STATE: THE CASE OF TYRONE MARGHUY AND OHENEBA NKRABEA

Prosper Batariwah*

ABSTRACT

Ghanaians are unanimous on the liberating power of reggae music but hugely polarized on the question of respecting the religious freedom of Rastafarians. The recent clamour around the decision of Achimota School to refuse admission to two teenage Rastafari boys and the subsequent judicial reversal of that decision by the High Court have exposed these sharply contradicting views held by Ghanaians. This article engages the issue of religious discrimination in educational institutions by setting out an understandable account of the meaning and relevance of religious freedom. It also surveys Ghana's legal system to establish the basis for religious freedom and the instrumentalization of law to prevent or control religious intolerance and discrimination in educational institutions. It further considers the decision of the High Court and its relative contribution to the development of religious freedom generally and religious discrimination in educational institutions in particular.

1 INTRODUCTION

It is a commonly held view that rights are intersectional and the development of a criterion to resolve conflicting rights claims is as vital as the substantive rights themselves.[1] The overt expression of sharply differing sentiments on the scope and applicability of particular rights in any state is often a sign of a failure of negotiations in an extra-legal environment and the courts of law are ultimately drafted to propose a truce that will facilitate the enjoyment of rights, for however short a time. This was Ghana's predicament in the first

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[1] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001)

half of 2021 with queer rights, religious rights and educational rights clashing headlong in media, private and public spaces. The debate is huge and this paper does not propose to deal with the whole gamut of rights negotiation generally. It proposes to explore only that between religious rights and educational rights.

In March 2021, two young Rastafari teenagers, Tyrone Marghuy and Oheneba Nkrabea were refused admission into one of Ghana's prominent co-ed institutions, Achimota School.[2] The keeping of dreadlocks is considered an essential tenet of Rastafarianism which these boys had elected to follow. The administrators of the school however refused to admit them because of their dreadlocks on the basis that there was a school rule which prevented students from keeping dreadlocks.[3] Efforts by the Ghana Education Service and the Ministry of Education to resolve the impasse between these teenagers and their parents on one hand and the authorities at Achimota School on the other failed.[4] To rub salt into the precariousness of the situation, the Parent-Teacher Association released a statement supporting the position of the school administrators.

It goes without saying that this tussle engendered a lively public debate. Throughout the period, the arguments for Achimota School were essentially three. First, it was a rule since time immemorial. Since rules were rules, they had to be obeyed. Second, the rules were made for the purposes of hygiene and discipline. Third, there was the view that admitting these teenagers while

[2] This is not the first time debates have raged about the place of religion in educational institutions. See Christopher Y Nyinevi and Edmund N Amasah, 'The Separation of Church and State under Ghana's Fourth Republic' (2015) 8(4) Journal of Politics and Law 283.

[3] Achimota School's Revised Rules and Regulations (August 2020), section H (General Appearance), provides among other things, 'Students must keep their hair low, simple and natural. (Students' hair should not go through any chemical process). The scalp must not show'.

[4] In response to the directive of the Ghana Education Service to admit the teenagers, the Old students of Achimota took strong exception and released a statement setting out their position; Myjoyonline, 'Rescind directive to Achimota School, allow authorities to handle 'dreadlocks saga' – Old Students tell GES' (*Myjoyonline*, 22 March 2021)
< https://www.myjoyonline.com/rescind-directive-to-achimota-school-allow-authorities-to-handle-dreadlocks-saga-old-students-tell-ges/> accessed July 2021.

they possessed their dreadlocks would permit of an exemption that would later open the floodgates to all kinds of unnecessary requests for exemptions leading to administrative inefficiency. On the other hand, the arguments for the teenagers were on the basis of human rights – religious and educational rights. These debates culminated in a lawsuit *Tyron Iras Marghuy (Suing by his father and next friend Tereo Kwame Marghuy) v Board of Governors, Achimota School and The Attorney General*[5] with High Court ruling in favour of the teenagers.

In light of express constitutional provisions guaranteeing rights and putting beyond doubt the existence of rights such as religious and education rights, it is intriguing that an event such as this would generate such large-scale public engagement. The debate was in a greater sense sterile and stemmed from a public misunderstanding of the nature of rights, especially religious rights.[6] Thus, the debate is really not about the existence of rights but the scope and politics of rights recognition and enforcement particularly the need to care for minority religions in a constitutional democracy. This is the biggest task for every democracy. As succinctly put by O'Brien, an academic:

> The accommodation afforded to religious differences within the legal systems of the common law world is as much a political as a legal concern. As such it is part of a much wider debate about the nature of democratic government within a pluralist society. The concern is that in so far as democracy is dominated by a

[5] (High Court, 31 May 2021).

[6] For example, the statement released by the Parent-Teacher Association stated, among other things: "…This age-old rule has prevented unnecessary attention and time wasting with 'non-school' hairdos. Any exceptions to this rule on religious grounds would open the floodgates for all types of hairstyles and breed indiscipline. Furthermore, we believe Article 14(1)(e) of the 1992 Constitution of Ghana which states: 'Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law-
(e) for the purpose of the education or welfare of a person who has not attained the age of eighteen years" gives the school right to set rules in furtherance of education.
We, therefore, stand with the headmistress and welcome into our fold, parents who are ready to abide by the rules and regulations of Achimota school." It is doubtful whether the language of personal liberty in the 1992 Constitution extends to hair.

> majoritarian concept it may not be compatible with pluralism. Majoritarianism is predicated on the assumption that the will of the majority is absolute and is the final authority when defining the limits of individual rights and freedoms and how they are best respected and enforced. A pluralist conception of society, by contrast, requires that the rights of minorities must, on occasion, be allowed to take precedence over the wishes of the majority in order to encourage diversity, whether religious, racial or sexual, to flourish. The challenge for modem democracies is, therefore, to reconcile the demands imposed by majoritarianism within a pluralist framework.[7]

The general purpose of this article is to explore the way in which the legal system balances the enjoyment of religious freedom by minorities with majoritarian expectations especially where these expectations are counter rights or other public interest goods worth safeguarding. In a more specific way, it addresses the issue of discrimination against children in educational institutions on the basis of religion. In order to establish the fruitfulness of addressing the issue of religious discrimination against students in schools, it is extremely vital that the religious freedom itself is a good worth protecting. In this regard, we must ask and answer the questions. What is religious freedom? What is the scope of religious freedom? Why religious freedom? The first part of this article is dedicating to answering these three questions. The second part presents an overview of Ghana's legal framework on religious rights generally. The third part addresses the conflict between religious freedom and educational rights while the fourth offers some insight into the relevance of the *Marghuy case*. The paper concludes with some suggestions and comments.

[7] Derek O'Brien, 'Chant Down Babylon: Freedom of Religion and the Rastafarian Challenge to Majoritarianism' (2002) 18 Journal of Law and Religion 219, 219.

2 THE NATURE AND JUSTIFICATIONS FOR RELIGIOUS FREEDOM

2.1 What is religious freedom? And what is its scope?

The broad term "freedom of religion" or "freedom of religion or belief" or "religious freedom" has brought with it the additional difficulty of setting out a necessary and sufficient definition that would ensure that it is beneficial to ordinary people. An overexpansive definition could result in the inclusion of beliefs that simply make a mockery of religion. In the same breath, an under-inclusive definition can rule out legitimate beliefs. It is in this wisdom that legal instruments, be there international or municipal, have avoided the provision of an express definition.

That is not to say "freedom of religion" does not have any substantive content. Religious freedom as a right consists of a central core and buffer rights. The central core consists of what is termed as the *forum internum* and the *forum externum*. The first refers to the right to hold a belief while the second refers to the right to manifest or practise one's belief. Around these two "rights" are wound non-discrimination, non-coercion, rights of parents and guardians to oversee the religions and moral education of their children, the corporate nature of religious communities, permissible limits on the *forum externum* and the non-derogability of the *forum internum*.[8] Religious freedom, in reality, is a *collection* of rights.

The more pertinent question, however, is the reason for religious freedom. I offer three bases for religious rights. Firstly, contemporary religious freedom emanates from history and its legacy and heritage is useful in justifying its existence. Secondly, religious freedom has normative justifications which are more difficult to discount. Thirdly, there are international legal bases for religious rights.

[8] Tore Lindholm, W Cole Durham, Jr. Bahia G Tahzib-Lie (eds) and Nazila Ghanea, *Faciliating Freedom of Religion or Belief: A Deskbook* (Springer-Science+ Business Media Dordrecht 2004) xxxvii-xxix; See also Natan Lerner, 'The Nature and Minimum Standards of Freedom of Religion or Belief' (2000) 2000 BYU L Rev 905.

2.2 Why religious freedom?

2.2.1 A brief history of religious freedom

The emergence of religious freedom as an independent right is best captured through the lenses of efforts at promoting religious tolerance rather than religious intolerance. In many ways, it is a right whose origins is based on the need to protect minorities as against majorities. Though the history recounted in this part may seem largely Eurocentric, it is not necessarily the case. The spread of religions mainly from Europe and Arabia has created cross-border standardization of religious practices and experiences hence universalizing religious experiences.

On an international level, religious intolerance began to fade with Emperor Galerius's Edict which granted toleration in 311. The Edict was soon followed by Emperor Constantine's Edict of Milan in 313. This later edict suffered all people of all religious persuasion to follow the tenets of their religion in respect of the manifestation of practices in particular. This progress was undone when Trinitarian Christianity was made the state religion of the Roman Empire in an Edict of Emperor Theodosius I in 380.[9] It goes without saying that such a declaration saw the resurgence of religious intolerance and the monopolization of state power to coerce and punish dissidents. This was particularly pronounced in the use of the principles of 'just war' to justify the pillaging and persecution of non-Christians.[10]

From this period through to the middle stages, the principle of *cuius regio, eius religio* was in operation. This, therefore, meant that the confession of the emperor was the confession of his people. Then followed the Peace Treaty of Augsburg in 1555 which, though recognizing the principle of *cuius regio, eius religio*, gave equal recognition to Catholic and Lutheran rulers and gave them

[9] Gerhard Van Der Schyff, 'The Historical Development of the Right to Freedom of Religion' (2004) 2004 Journal of South African Law 261-262.

[10] Malcolm D Evans, 'Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict' in Tore Lindholm W. Cole Durham, Jr. Bahia G. Tahzib-Lie (eds), *Faciliating Freedom of Religion or Belief: A Deskbook* (Springer Springer Science+ Business Media Dordrecht 2004) 3-4.

the option to choose which religion to adopt in their territories.[11] This was followed by the Peace Treaty of Westaphalia of 1648 which ended the forty years religious war and acknowledged the religious freedom of the state.

Krishnaswami, a sometime Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, whose work on religious freedom is still useful today, noted that the practice emerged where treaty stipulations were made in the philosophical context of law being personal and attaching to the person irrespective of the territory where the person was present.[12] For example, the agreement between Francis I of France and Suleimani I of the Ottoman Empire which sought to guarantee the individual and religious freedom of French merchants in Turkey was one of such important treaties. This treaty further entrusted adjudication to the French consul in Turkey in accordance with French law. The Treaty of Berlin of 1878 also followed this model when European powers forced the newly emerging states such as Bulgaria and Serbia to guarantee religious freedom to their nationals. [13]

After the First World War, the protection of the freedom of religion turned on the proliferation of a number of minorities protection treaties, especially after the Paris Peace Conference of 1919.[14] The first of these which served as a prototype of successive treaties was the Polish Minorities Treaty.

The League of Nations largely failed. The world had learnt hard lessons. Inarguably, the horrifying persecution of religious communities, especially Jews, and the suffering and chaos of the world wars firmed the world's commitment to promoting human rights, especially the idea of universalism. Thus, the concentration moved from states and minorities to individual persons. It is within this framework that the Universal Declaration of Human

[11] Ibid 4.
[12] UNCHR and UNECOSOC (Sub-commission) 'Study of Discrimination in The Matter of Religious Rights and Practices' (1960) UN Doc E/CN.4/Sub.2/200/Rev.1 11.
[13] Ibid.
[14] Evans (n 10) 9.

Rights of 1948 and other international agreements were concluded to afford protection to freedom of religion or belief.

In municipal legal systems, religious freedom was seen as an abstract concept whose development took a much longer time. Tolerance was often extended to few groups and later extended to all groups.[15] A short survey of states would be used to identify this trend.

In Switzerland, the development of religious freedom and belief began with the first peace of Kappel in 1529 which gave entire cantons the right to choose the religion of the entire territory.[16] This was confirmed by the second peace of Kappel in 1531. After subsequent developments however, this right was expressly provided for in 1874 under the revised federal constitution. For France, it was the French revolution that made it possible for all persons to practise their faith without let or hindrance. [17]

In Britain, the battle for religious equality was much more intricate.[18] It was not only a struggle between Protestants and Catholics, but also between Anglicans and other Protestants. After the turbulence of the Gunpowder plot of 1605 and the English Civil War, the Church of England emerged as a national church. Tolerance began to build slowly and then metamorphosed into religious freedom. This trend can be deciphered from a number of legislations, including the Catholic Emancipation Acts of 1829 and 1832 which, among other things, acknowledged the legal personality of catholic churches and charities.

In America, immigrant groups appeared to follow the trend of founding established churches, a recipe for religious intolerance.[19] Later, the American Revolution preached the free exercise of the religion of all believers as was seen in the language of the Delaware Declaration of Rights of 1776 which

[15] UNCHR and UNECOSOC (Sub-commission) (n 12) 4.
[16] Ibid.
[17] Ibid 5.
[18] Van Der Schyff (n 9) 266-267.
[19] Ibid 268.

recognized the right of men to follow and worship God according to the dictates of their consciences. The 1776 Virginia Declaration of Rights proclaimed this as a 'fundamental' and 'inalienable' truth. Freedom of religion in America was fully entrenched in the first amendment to the American Constitution which proscribes Congress from making a law to establish a religion or prevent the free exercise thereof.

2.2.2 Normative justifications for the freedom of religion or belief

The normative justifications for religious freedom appear to fall into two broad categories: the first perceives freedom of religion or belief as a component of the freedom of conscience while the second considers religious freedom as the product of culture or a public good which warrants protection and legal enhancement.[20] Smith calls these the "voluntariness claim" and the "priority claim".[21] The "voluntariness claim" asserts that religious goods must be chosen freely and willingly. The 'priority claim' on the other hand sees religious goods as more valuable than other human goods.

As an advocate for the "voluntariness claim", Smith argues that the "priority claim" may oblige the state to respect religion, but not religious freedom. The concept of choice in the 'voluntariness claim' is what creates the state's obligation to respect religious freedom. Therefore, people must be free to choose and practice the beliefs of their choice.

On the 'priority' claim, Dorfman classifies these into two theories of liberal multiculturalism and perfectionist liberalism. According to the former, culture which encompasses religion is a constituent part of people and safeguarding it is necessary to ensure a truly free and equal society. On the other hand, religions are public goods necessary for human flourishing.[22]

[20] Avilhay Dorfman, 'Freedom of Religion' (2008) 21(2) Canadian Journal of Law and Jurisprudence 285.
[21] Steven D Smith, 'Rise and Fall of Religious Freedom in Constitutional Discourse' (1991) 140 University of Pennsylvania Law Review 149, 154-155.
[22] Dorfman (n 20) 288.

Dorfman however proposes a rather complex theory of justification which combines a liberal-republican conception of freedom of religion.[23] To him, the other theories of justification are over-inclusive and do not possess his two elements of justification: the ability of the theory to be publicly acceptable and the ability of the justification to show the distinctiveness of the phenomenon which warrants its special status. He argues that the right to freedom of religion is the compensation the state gives to people for the inadmissibility of religious reasons in public discourse and in a way emphasizes political self-determination.

It is my opinion that the voluntariness claim provides a more concrete basis of religious freedom since it encompasses the priority claim. That is to say, treating religion as a component of culture or as a public good itself is a manifestation of what people hold true in their conscience. For the priority claims to exist, people need to have strong personal or community convictions about culture or the role of religion as a public good. I believe pigeonholing normative justifications weakens the reasons necessary to justify them and a single voluntariness claim with a priority claim provides a strong basis for state protection.

Religious freedom could not have emerged in a vacuum. Its emergence and development from history needs to be supplemented with normative justifications to justify its existence. History may be forgotten, but the strength of normative justifications is often much more difficult to uproot.

2.2.3 The international bases of religious freedom

It must be reiterated that World War II reminded humanity of what harm it could do to itself. This reminder was the pillar on which the modern human rights architecture was built. There are two main instruments that expressly make provision for religious freedom. These are the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant

[23] Ibid 297-304.

for Political, Civil and Cultural Rights (ICCPR). The ICCPR for example provides as follows:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

In addition to these international legal instruments, there are other interpretative guides to navigating religious freedom. These include General Comment 22 issued by the United Nations Human Rights Committee.[24]

Many modern Constitutions make provisions for religious freedom and it is my view that these provisions are influenced by one or more of the three bases outlined in this part. Ghana's provisions, it appears, are influenced by all three and this will be investigated thoroughly in the next part.

3 GHANA'S LEGAL FRAMEWORK ON RELIGIOUS FREEDOM

[24] UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <www.refworld.org/docid/453883fb22.html> accessed 19 July 2021

After clearly establishing what and why religious freedom exists, Ghana's legal framework must be digested. The Constitution is Ghana's supreme law and serves as the foundation for all fundamental human rights and freedoms.[25]

Article 21(1) (b) is to the effect that 'freedom of thought, conscience and belief, which shall include academic freedom'. This is the *forum internum*. On the other hand, is article 21(1) (c) which states that, 'freedom to practise any religion and to manifest such practice; (d) freedom of assembly including freedom to take part in procession'. This is the *forum externum*.

Moving away from the substratum of religious freedom, we encounter article 17 which contains within it freedom from coercion and discrimination. It states, among other things, that no person shall be discriminated on the basis of gender, race, colour, origin, religion, creed or social or economic status. This is further bolstered by article 28 which makes it unconstitutional to deny children educational opportunities or medical treatment solely on the basis of religious beliefs.

On the corporate status of religion, article 21(1) (e) guarantees the freedom of association.

It will be recalled that while the *forum internum* cannot be derogated from, the *forum externum* can. Article 21(4) is instructive in this respect. It lists a wide range of exceptions on which article 21(1)(b) and 21(1)(c) can be derogated. These exceptions cover public order, public morality, public safety, public health et cetera. The exceptions do not make a distinction between *forum internum* or *forum externum* and are indeed broad.[26]

[25] For Directive Principles of State Policy pertaining to non-discrimination on religious grounds, see 1992 Constitution, arts 35 and 37. For detailed discussion on religious freedoms in Ghana see E K Quashigah, 'Legislating Religious Liberty: The Ghanaian Experience' (1999) Brigham Young University Law Review 589; Nyinevi and Amasah (n 2)

[26] Rosalind I J Hackett, 'Regulating Religious Freedom in Africa' (2011) 25 Emory International Law Review 859. For the problems surrounding broad exceptions, see Ahmed Salisu Garba, 'Permissible Limitations to Freedom of Religion and Belief in Nigeria' (2020) 15 Religion and Human Rights 57–76.

What is clearly missing from this discussion is the rights of parents to have control over the religious education of their children. Ghana does not have an express provision on this.

In all of this, it should be remembered that Ghana is a secular state though it encourages moral, educational and socio-economic co-operation with different religious groups in the country.[27] As such, the State and its citizens are to refrain from favouring one religious group over another. Article 56 prevents Parliament from establishing common program of a religious or philosophical nature. All of this is best summed up in the following words from Justice Adinyira in *James Kwabena Bomfeh Jnr v Attorney General:*[28]

> The constitutional provisions as articulated in articles 17, 21(1) (b) (c), 35(1) (5) (6) (a), 37(1), 56, guarantee freedom of religion in no uncertain terms. The wordings are explanatory, simple and easy to appreciate their import and admit of no ambiguity.
>
> The combined effect of the letter and spirit of these provisions guarantees the fundamental freedoms of the citizen including the right to practice any religion and to manifest such practice. By the letter and spirit of these provisions religious pluralism and diversity which are features of a secular state are clearly recognised and thereby discrimination on any ground is prohibited…
>
> The Constitution of the 4th Republic, while secular in nature, affirms and maintains the historical, cultural, and religious or atheist character of Ghanaian society. Obviously, secularism in the context of the Ghana Constitution must be understood to allow, and even

[27] For a fuller discussion on the Ghana's institutional arrangement with respect to religious freedom, see Prosper Batariwah, 'Freedom of religion, Religion-State Relations and State Neutrality in Ghana: An Examination of the 1992 Constitution and A Critique of the Supreme Court's Decision in James Kwabena Bomfeh Jnr v Attorney General' (LLB long essay, University of Ghana 2020).

[28] (Supreme Court, 23 January 2019).

encourage State recognition and accommodation of religion and religious identity.

4 GHANA'S JURISPRUDENCE ON RELIGIOUS DISCRIMINATION IN EDUCATIONAL INSTITUTIONS

At this point, there is no reasonable doubt that religious freedom carries with it an additional right not to discriminate against persons on the basis of their religious beliefs. It may be surprising to some to know that Ghana has had a long battle with religious discrimination in education institutions. I recount that history.

In 1961, the Education Act of 1961(Act 87) was passed. Apart from the administrative matters to which it was passed to address, it stated in section 22:

> **Section 22 - Provisions Relating to Race, Language and Religion**
>
> (1) No person shall be refused admission as a pupil to, or refused attendance as a pupil at, any school on account of the religious persuasion, nationality, race or language of himself or of either of his parents.
>
> (2) No test or enquiries shall be made of, or concerning the religious beliefs of pupils or students prior to their admittance to any school or college.
>
> (3) No person attending or desirous of attending a school as a pupil shall, if his parent objects, be required to attend or to abstain from attending, whether in the institution or elsewhere, any Sunday school, or any form of religious worship or observance, or any instruction in religious subjects.

> (4) Any person who contravenes the provisions of this section commits an offence and shall be liable on summary conviction to a fine not exceeding fifty pounds.

This provision was important for a number of reasons. Notably, it did not only make it illegal to refuse to admit a pupil on the basis of his religious persuasion, it also made it a crime with penal consequences. When a new constitution was being drafted in 1968, the country continued to recognize the worrying trend of students being forced to participate in religious instruction or observance which contradicted their own and to which they objected. To this end, the following were inserted into the 1969 Constitution the following:

> No person shall be hindered in the enjoyment of his freedom of conscience and for the purposes of this article the said freedom shall include freedom of thought and of religion, freedom to change his religion or belief, and freedom either alone or in community with others, both in public and private to manifest and to propagate his religion or belief in worship, teaching, practice and observance
>
> No person who by reason of tender years, minority, sickness or other sufficient cause is unable to give his consent shall be deprived by any other person of his right to medical treatment or educational or other social or economic benefit by reasons only of nay religious or philosophical doctrine or belief.
>
> No person attending any place of education shall except with his own consent or if he is a minor, the consent of his parents or guardian be required to receive religious instruction or take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion or denominational practice other than his own.[29]

[29] 1969 Republican Constitution, art 21.

A mere legislative injunction was not enough. The Supreme law of the land had to re-emphasize this salient fact of non-discrimination. These two sources recognized religious discrimination in educational institutions at two points: at the point of entry and after entry through to completion. So, in one breath, students could not be discriminated against during the admission processes because of their religious beliefs and in the other, they and/or their parents were free to choose which religious observances they should participate in. This was remarkable progress.

On a rather sad note, the Education Act of 1961 was repealed and replaced by the Education Act of 2008 (Act 778) which eliminated section 22 of Act 87 altogether. What was more worrying is the failure of the legislators to place in its stead a similar provision or at least a watered-down version of it. The Education Act of 2008 has itself been repealed by the Pre-Tertiary Education Act of 2020 (Act 1049). Act 1049 has maintained the status quo.

Perhaps section 22 of Act 87 was taken out because of the provisions of the 1992 Constitution. Despite the religious freedom provisions of the 1992 Constitution as outlined earlier, there is only a prohibition on discrimination at the point of entry as seen from article 28 and none after entry. As such, the Courts will have to imply the latter from the general anti-discrimination provisions of the Constitution. This is a wholly unsatisfactory affair since Ghanaians Courts are often slow to imply things into the Constitution unless it is absolutely necessary and supported by the language of the Constitution.

5 THE CONTRIBUTION OF THE *MARGHUY CASE* IN ADDRESSING DISCRIMINATION IN EDUCATIONAL INSTITUTIONS

With a more nuanced backdrop, I return to the *Marghuy case*. The facts have already been provided in the introduction to this paper and it serves no purpose to reiterate them. At the High Court, one of the rejected students, Tyrone Marghuy through his father challenged the constitutionality of his non-admission. To him, the keeping of his Rasta was not a "flippant lifestyle" but rather a genuine expression of his religious beliefs. It was also his case that the failure of Achimota School to admit him breached his right to equal

educational opportunities and facilities; freedom of thought, conscience and belief; freedom to practise any religion and to manifest such practice; right to his human dignity; right to enjoy, practice, maintain and promote tradition or religion to the provision of the 1992 Constitution; right not to be deprived of education by reason only of one's religious beliefs; and right to administrative fairness.

Achimota School on other side of the bar hinged their arguments on three grounds. It first argued that the rules were time tested rules which applied neutrally to all students. It further contended that the rules were for the orderly management and proper regulation of the school. It also submitted that the recognition of an exception for one student would discriminate against all other students who abided by the rules.

Furthermore, the Attorney General argued on a number of grounds some of which were very similar to those of Achimota School. The Attorney General was of the view that the applicant had not adduced any evidence to demonstrate any denial of his right to worship, receive religious instruction or his right not be discriminated against. Further, the Attorney General submitted that it is entirely constitutional to restrict the personal liberties of children under eighteen years for the purpose of their welfare and this extended to Achimota being able to make rules and regulations governing the behaviour of students. Thus, it was in the public interest 'that school authorities maintain a high level of discipline and decorum by putting in place rules and regulations'.

These arguments are simply an extended version of the three focal points within which debates were advanced in favour of Achimota: rules are rules, hygiene and discipline, and the opening of the floodgates.

To address these competing claims between rights and public interest requirements, the Court began by establishing the appropriate test applicable in human rights applications. The Court held that human rights are not absolute and Courts are therefore enjoined to undertake a balancing activity between the individual's right and the public interest. Thus, rights must be

consistent with public interest requirements otherwise the court would not be duty bound to place a judicial stamp on an applicant's claim.[30] On this basis, the legitimate enquiry for the judge was to weigh the rules of Achimota against the provisions of the 1992 Constitution to determine whether or not the rules were constitutionally permissible.

The Court then proceeded to make its decision on three grounds: the issue of internal rules in relation to the 1992 Constitution, comparative persuasive authority, the proportionality test. These are discussed seriatim.

On the issue of internal rules as against the 1992 Constitution, the Court proceeded to hold that the test for discrimination was not simply a matter of treating everyone equally but rather treating equal persons equally and treating unequal persons unequally as held in *Nartey v Gati*.[31] Thus, the Court held that the Achimota School's discrimination argument was untenable since it failed to 'properly situate and or balance the efficacy of the school's rules as against the freedom the applicant to practice and manifest the Rastafarianism religion'. Though the School had the power to make rules under the Pre-Tertiary Education Act of 2020 to maintain discipline, there was no material connection between the keeping of dreadlocks and discipline in school. Hence, there was no legitimate basis to maintain such a rule which would result in the applicant's loss of hair. In the absence of a legitimate basis, the internal rules of Achimota School contravened the 1992 Constitution's express guarantee of rights. This posture of the Court effectively disposed of all three of the focal grounds around which the debate was wound.

Additionally, the Court noted with appreciation, persuasive authority from other jurisdictions which essentially pertained to Rastafarians and the

[30] Cases relied on: *Raphael Cubaee v Miachael Yeboah Asare and Two Others* (Suit No J6/04/17); *The Repubic v Eugene Baffoe-Bonnie and Four Others* (Supreme Court, 28 February 2018*); Civil and Local Government Staff Association of Ghana (CLOSSAG) v The Attorney General and Two Others* (Supreme Court, 14 June 2017).

[31] [2010] SCGLR 745.

keeping of dreadlocks.[32] The Court then came to the conclusion that constitutional rights can be restricted by policy, rules or regulations only when there is a concrete justification for doing so. Thus, the public interest must outweigh the individual's claim to rights.

The Court noted that the position taken by the persuasive authorities appeared to be in tune with article 12(2) which of the Constitution as further expounded by the Civil and Local Government Association of Ghana case where the test for determining whether a restriction is justifiable was described as one of necessity and proportionality. In applying this test to the facts before it, the Court came to the conclusion that no evidence was adduced to show how the keeping of short hair reinforced discipline or how discipline would be compromised by the keeping dreadlocks. The Court when on to hold that 'the respondent's aim or objective for the said rule are so omnibus that the ultimate results they seek to achieve per the rule as an educational set up is lost on the Court'.

On these bases, the Court concluded that the barricades set up by Achimota School unlawfully curtained his rights for which reason the applicant was entitled to declarations and further orders to facilitate his admission into the school.

This case is a watershed moment for religious freedom in Ghana. There was an indication earlier that religious discrimination which takes place in educational institutions takes place at two levels. The *Marghuy case* adequately addresses this issue at the point of entry. In the absence of an express constitutional or legislative provision regarding religious practice after entry, the case offers useful insights into how the existing human rights framework can be used to address that issue. So, the habit of public missionary schools preventing Muslim students from wearing hijabs to school or fasting during

[32] *JWM (Alias P) v Board of Management High School and 2 Ors* [2019] EKLR (Kenya); *Dzova v Minister of Education, Sports NAD Culture and others* (2007) AHRLR 189 (ZWSC 2007) (Zimbabwe); *Department of Correctional Services and Another v Police and Prisons Civil Rights and 5 Ors* [2013] ZASCA 40 (South Africa).

Ramadan can be considered highly suspect in light of the principles of the *Marghuy case.*

Though religious freedom provisions have existed since 1969, the development of this freedom has lagged behind that of other fundamental human rights.[33] Together with the decision of the Supreme Court in *James Kwabena Bomfeh Jnr v Attorney General* and the *Marghuy case*, contours of religious freedom are being defined. Imperfections and criticisms about these decisions would always exist but these cannot trample on the fact that judicial authorities exist to help fashion out the meaning of religious freedom in Ghana. Hitherto, judicial decisions in respect of religious freedom were either rare or at best tangential as compared to other fundamental human rights.

6 CONCLUSION

Religion is an extremely sensitive concept and has either served as peacemaker or *casus belli* in many situations the world over. It only becomes a *casus belli* when religious intolerance is allowed to fester and grow into a cancerous tumour.

It is in the interest of any viable democracy that commits itself to the recognition and enforcement of human rights to ensure that everyone, irrespective of the person's station in life, enjoys these rights. In that regard, this paper properly outlines what religious freedom means and why it is worth protecting. Ghana's constitutional and legislative commitment to religious freedom generally and the prevention of religious discrimination in educational institutions have also been discussed to show the strengths and weaknesses therein. The essence of this paper is dedicated to the momentous

[33] In the 1990s, a number of decisions of the Supreme Court bolstered the fundamental freedom provisions of the 1992 Constitution. For example, freedom of Speech under art 21(1)(a) (*New Patriotic Party v Ghana Broadcasting Corporation* [1993-94] 2 GLR 354, *National Media Commission v Attorney General* [2000] SCGLR 1); Freedom of assembly under art 21(1)(d) (*New Patriotic Party v Inspector General of Police* [1993-94] 2 GLR 459); Freedom of Assembly under art 21(1)(e) (*New Patriotic Party v Attorney-General* [1996-97] SCGLR 729). In contradistinction to these, the earliest case which deals squarely with religious freedom under the 1992 Constitution is *James Kwabena Bomfeh Jnr*.

Marghuy case discussing its timeliness and relevance to religious freedom discourse in Ghana.

However, the task of preventing religious discrimination in educational institutions cannot simply be left to the judiciary. It behoves the legislature to take measurable and timely action to enact appropriate legislation as was done in 1961 to guide and compel education administrators to do the right thing of balancing rights against the public interest before making rules to guide each educational institution. Undoubtedly the task is old but real concrete progress that is translatable to the ordinary lives of citizens is only just beginning. And time is all.

PHILOSOPHER (SUPREME COURT) JUSTICES, NOT CHRONIC CONSTITUTIONAL CHRONICLERS

Prosper Andre Batinge*

ABSTRACT

Ghana's constitutional museum houses three lifeless Constitutions: the 1960 Constitution, the 1969 Constitution, and the 1979 Constitution. The Consultative Assembly prepared the 1992 Constitution and submitted it to the Provisional National Defence Council on March 31, 1992. A national referendum on this draft Constitution was held on April 28, 1992; this referendum approved the 1992 Constitution by 92%. The Constitution of the Fourth Republic of Ghana (Promulgation) Law, 1992 (PNDCL 282) enacted the 1992 Constitution, vaulting it into force on January 7, 1993. The new 1992 Constitution had merely started crawling than movements to have it housed in Ghana's constitutional museum began. I make the case for Philosopher Justices of a new special Constitutional Court tasked with bending the 1992 Constitution in sync with the times and the needs of the country rather than ceding to the call of chronic constitutional chroniclers for a new Charter of governance for Ghana.

1 INTRODUCTION: DEMANDS FOR A NEW CONSTITUTION FOR GHANA

The Economic Fighters League is calling for a new Ghanaian Constitution. The League repeatedly demands a new Constitution at various fora, one of, which, was the recent Constitution Day on January 7, 2022. Among other things, the League contends that the 1992 Constitution needs replacing because it is harmful to most Ghanaians.[1] In fact, the League describes

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[1] '"We Don't Need a New Constitution"—Pianim' (*Ghanaweb,* 2 February 2022) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/We-don-t-need-a-new-constitution-Pianim-1459339> accessed 2 February 2022.

Ghana's current Constitution as a '*Sakawa*' constitution, as the League is convinced that 'Ghanaians are getting increasingly aware that their enemy is the 1992 Constitution' and therefore, the 1992 Constitution 'must die if [Ghanaians] must live'.[2]

FixTheCountry movement is also calling for a new Constitution. Oliver Barker-Vormawor, the most visible face of this movement, sees a new constitution as a necessary means to his unrelenting demand for accountability and good governance in Ghana.[3]

Solidaire Ghana is similarly of the view that a new constitution will pave the path of Ghana's match towards progress, development, and abundance. 'It is time to push the frontiers for a constitution that will meet our needs as a people', the Executive Director of Solidaire Ghana is quoted to have said at a forum on the topic, 'A Review of the 1992 Constitution and Its Effect on The Economy'.[4] At this same forum, Prof. Kofi Abotsi, Dean of the University for Professional Studies Law School is reported as saying that 'the 1992 constitution of Ghana needs periodic reviews to diffuse any threats of hopelessness among the people'.[5]

Prior to these recent demands for a new constitution, there had been even louder calls and substantial steps for a new Constitution or amendment to the current Constitution. Former President John Evans Atta Mills in response to these calls, inaugurated a Constitution Review Commission on 11 January 2010. Drawing its powers from the Constitution Review Commission of Inquiry Instrument 2010 (C.I. 64), the members of the Constitution Review Commission were asked to: 'sample the views of Ghanaians on the strengths and weaknesses of the 1992 Constitution; identify portions of the 1992

[2] Ibid.
[3] 'Arrest of #FixTheCountry Convener: What we know so far' (*Ghanaweb,* 12 February 2022) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Arrest-of-FixTheCountry-convener-What-we-know-so-far-1467343> accessed 13 February 2022.
[4] '"1992 Constitution Does Not Meet the Needs of Ghanaians"—Benjamin Essuman' (*Ghanaweb,* 1 March 2022) <www.ghanaweb.com> accessed 1 March 2022.
[5] Ibid.

Constitution Ghanaians want amended; and recommend to Government its findings as well as provide a draft Bill for possible amendments to the 1992 Constitution'. The Commission submitted its Report to the government on December 20, 2011, and the government subsequently issued a White Paper on the Report.

Not every Ghanaian, to be sure, is demanding a new Constitution. But Ghanaians who are against the call for a new Constitution are difficult to quantify because few have spoken against the call for a new Constitution. Kwame Pianim, a renowned Ghanaian economist, thinks the 1992 Constitution should not be replaced. At the launch of the John Evans Atta Mills Memorial Heritage in Accra on 1 January 2022, among other things, Mr. Pianim said: 'I do not agree with those who are saying, we need a new Constitution. The Constitution we have, with a few judicial adjudications can be brought to light, a few changes'.[6] He added that the problem is with Ghanaians and not the Constitution'.[7] On one common reason cited for demanding a new constitution—that the president under the 1992 Constitution is too powerful—Pianim argues that the same Constitution empowers Parliament and citizens to constrain presidential powers especially his appointment powers.[8] I swim against the tide for a new Constitution. Instead, I advocate for Philosopher Justices of a new special Constitutional Court tasked with fashioning the 1992 Constitution in sync with the times and the needs of citizens rather than ceding to the call of chronic constitutional chroniclers for another Constitution.

The rest of this Article is organized as follows. The next section points out the obvious: No Constitution is perfect. The third section argues that a transformative, purposive interpretation of constitutions has proven apt at perfecting imperfect constitutions. The fourth and fifth sections advocate for Philosopher Justices of a special Constitutional Court with the sole task of bringing the arc of the 1992 Constitution in sync with the times and the needs

[6] '"We Don't Need a New Constitution"—Pianim' (n 1).
[7] Ibid.
[8] Ibid.

of Ghanaians. The sixth section concludes by stating that the success of this special Constitutional Court of Philosopher Justices depends on the trust it exudes in Ghanaians in addition to its ability to transform Ghana by bending the Constitution to bear on the needs and aspirations of citizens.

2 NO CONSTITUTION IS PERFECT

Plato is probably the framer of a constitution for a political community, if a hypothetical constitution. True enough, Plato in his works such as the *Republic* places premium on statesmen who are experts of how a *polis* should be governed. But such philosopher kings are a rarity if they exist. Realizing this later in his long and admirable intellectual journey, Plato writes *Laws*—his last and longest major work—suggesting how constitutions should be framed to pilot a *polis* towards its aspirations of ensuring a flourishing life for its people. Cognizant of the imperfections of the framers of constitutions, Plato recommended amending constitutions when necessary. All framers of constitutions are aware that no constitution is perfect and need amendments.

Archibald Cox, an American constitutional scholar, pays glowing tribute to the creativity and deep-thinking that the framers of the Constitution of the United States of America put into that document. But Cox remarks that the greatest contribution of the framers of that historical Charter of governance, the fulcrum around which the greatest republic of our time was forged, is less in its perfection than in the framers' recognition of the need for its continuous improvement:

> Two centuries ago, the Framers of the Constitution of the United States of America outlined a unique structure of government. Their majestic phrases fix limits and evoke historic ideals, but their genius also lay in leaving for the future questions upon which they could not agree and other questions they could not possibly foresee. In time, it thus fell

> to the Supreme Court of the United States to decide the unanswered questions as they arose.[9]

It may be inferred from Cox's quote above that perfecting a constitution does not necessarily entail its periodic overhauling through national referenda or its amendment by Parliament or Congress or in the most disastrous instances, its annulment by the military through a coup d'état as Ghana witnessed in three instances in 1966, 1972, and 1981. The crucial task of perfecting a constitution often falls properly to its interpreters, in the case of the United States and in most constitutional democracies, the judiciary, specifically, the Supreme Court. Still,

> Constitutions, in general, do not last very long. The mean lifespan across the world since 1789 is 17 years. Interpreted as the probability of survival at a certain age, the estimates show that one-half of constitutions are likely to be dead by age 18, and by age 50 only 19 percent will remain.[10]

In fact, the lifespan of constitutions of countries in the global south is shorter, 12.4 years for Latin America and 10.2 years for Africa.[11] And the lifespan of Ghana's three previous Constitutions is even shorter, about 3 years. The 1992 Constitution is therefore an outlier—it has been in existence for close to three decades. Within this context, the call for a new Ghanaian Constitution may be in order.

But still, the call for a new Ghanaian Constitution should not be heeded. Because 'on balance, constitutions that endure should be more likely to promote effective, equitable, and stable democracy'.[12] But how long should constitutions last in a democracy?

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[9] Archibald Cox, *The Courts and the Constitution*' (Houghton Mifflin Company 1989).
[10] Thomas Ginsburg, Zachary Elkins, and James Melton *the Lifespan of Written Constitutions* (2009) 47.
[11] Ibid.

[12] Ibid 1.

> For those who use the American document as the standard, the answer may well be 'forever.' Surely, however, longevity is not desirable as an end in and of itself. Constitutions are designed to stabilize and facilitate politics, but there is certainly the possibility that constitutions can outlive their utility and create pathologies in the political process that distort democracy. Such constitutions surely deserve replacement.[13]

Again, no constitution is perfect. But replacing or amending constitutions has proven not the best solution to dealing with imperfect constitutions.[14] The demonstrated panacea to imperfect constitutions is the judiciary. 'In the United States, of course, judges of the Supreme Court have filled in the details of the vague 18th century document to make it suitable for modern life. They have done so notwithstanding the lack of explicit textual basis for constitutional review'.[15]

3 A TRANSFORMATIVE/PURPOSIVE/INTERPRETATION

The Fourth Republican Supreme Court of Ghana voluntarily adopted an open-minded, liberal, purposive, expansive, and evolving interpretation of the 1992 Constitution with the aim of avoiding the concerns that the demanders of a new constitution for Ghana are raising. Justice Edward Wiredu (as he then was) in *Nartey v Attorney-General & Justice Adade*[16] wrote at length of interpreting the Constitution purposively:

> The 1992 Constitution envisages that the implementation of its provisions as a living, vibrant and humane document would lead to harmonious, beneficent, healthy, and fair results. These qualities are aimed at achieving justice. The Constitution abhors discrimination in any form, disparity

[13] Ibid 9.
[14] Ibid 13.
[15] Ibid 4.
[16] [1996-97] SCGLR 63.

> and any inequitable results arising out of its implementation. It provides equality before the law and ensures that there is uniformity, discouraging all forms of arbitrariness. An absolute discretion as enjoyed under PNDCL 161 is alien to its letter and spirit. An interpretation of any of its provisions must be guided by the above objectives or requirements to achieve the desired results. We must therefore in embarking on our duty of interpreting the provisions of the Constitution avoid such construction as would breed discrimination, disparity, absurdity and where necessary adopt a more liberal approach to achieve just and fair results.[17]

The judgements of Ghana's Supreme Court are abundant with recourse to interpreting the Constitution liberally for fair results in several cases as Justice Wiredu wrote above.

Prior to the 1992 Constitution, in *Tuffour v Attorney-General*,[18] Sowah JA (as he then was) elegantly and famously excited support for a purposive reading of the Ghanaian Constitution then. Endorsing Justice Sowah's dictum in the *Tuffuor* case, in *Asare v Attorney-General*,[19] Date-Bah JSC (as he then was) wrote: 'The "spirit" to which Sowah JSC refers is another way of describing the unspoken core underlying values and principles of the Constitution. Justice Sowah enjoins us to have recourse to this 'spirit' or underlying values in sustaining the Constitution as a living organism'.[20]

If the Supreme Court did not voluntarily adopt an evolving, transformative reading of the 1992 Constitution, the 1992 Constitution itself strongly suggested in Article 34(1) that the Constitution should be interpreted to advance Ghana's political, social, economic, cultural, educational, and

[17] Ibid 79 (Edward Wiredu JSC)
[18] [1980] GLR 637 (CA) 647.
[19] [2003-2004] 2 SCGLR 823.
[20] Ibid 835 (Date-Bah JSC)

religious goals.[21] Only a transformative, purposive, liberal, open-minded, and expansive interpretation of the 1992 Constitution would advance these listed goals in article 34.

'The interpretation and enforcement of provisions of the Constitution can thrust the Supreme Court right into the middle, as it were, of social policy making'.[22] Date-Bah wrote this in reference to the Court's decision in *Federation of Youth Association of Ghana (FEYDAG) (No. 2) v Public Universities of Ghana & Others* (No. 2)[23] that the full fee-paying policy of the public universities neither contravened articles 25(1)(c), 38(1) and 3(a)-(c) on the right to education nor the prohibition against discrimination in articles 17(2), (3) and 4(a) of the Constitution.

This purposive, transformative approach to interpreting constitutions is taking hold in developing countries especially and for obvious reasons. Justice Willy Mutunga, a former Chief Justice of Kenya, wrote of this transformative approach to constitutions in a recent article.[24] Justice Mutunga defines transformative constitutions in that article as 'capturing the idea of fundamental societal change through the instrumentality of law, especially the law of the constitutions'.[25] Others before Justice Mutunga had championed transformative constitutions.[26] 'Underpinning the very idea of a transformative constitution … is the idea that the constitutional

[21] Article 34(1) of the 1992 Constitution provides in relation to the interpretation of the Constitution: 'The Directive Principles of State Policy contained in this Chapter shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society'.

[22] Samuel Kofi Date-Bah, *Reflections on the Supreme Court of Ghana*, (Wildy, Simmonds & Hill Publishing 2015) 245

[23] [2011] SCGLR 1081.

[24] Willy Mutunga, 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?' (2021) 8 *The Transnational Human Rights Review* 30-60 <https://digitalcommons.osgoode.yorku.ca/thr/vol8/iss1/2>

[25] Ibid 31.

[26] Pius Langa, '*Transformative Constitutionalism*' (2006) 17:3 Stellenbosch L Rev 351; Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) South Africa JUTA, 24-25.

superstructure is embedded in a theory that it will be an instrument for the transformation of society rather than a historical, economic, and socio-political pact to preserve the status quo'.[27]

Ghana does not need another new Constitution. 'The fact is that new constitutions almost always are written in the wake of a crisis or exceptional circumstances of some sort. There are some exceptions … By and large, however, the link between crisis and constitution-making is quite robust'.[28] No such crisis exists in Ghana to warrant a new Constitution.[29]

I am of the view that the Supreme Court would do more in tailoring the Constitution to the needs of citizens and, hence, address the concerns of the demanders of a new Constitution if Philosopher Justices of a special Constitutional Court are tasked with solely bringing the 1992 Constitution in sync with the times and the needs of our people.

4 PHILOSOPHER JUSTICES

A Supreme Court tasked with constantly moulding the Constitution to the times and the needs of its citizens must be a Supreme Court of Philosopher Justices. Such Philosopher Justices do not fall from the sky. Nor are they to be imported from elsewhere. Ghana's Philosopher Justices must be educated/mentored accordingly or properly identified as fit for this supreme task. A Philosopher Justice is not an ordinary justice of the bench. While the Philosopher Justice is a human being, the wisdom and pragmatism that he/she exudes are not ordinary.

Keen observers of Supreme Courts, both in Ghana and abroad, give what may be considered the core desiderata of such Philosopher Justices. Among these

[27] Mutunga (n 24) 32.
[28] Jon Elster, *'Forces and Mechanisms in the Constitution-making Process'* (1995) 45 Duke Law Journal 364, 370.
[29] Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (2nd edn, University of Toronto Press 1993) 106.

desired traits are that they are logic oriented, visionary, forward looking[30] worldly informed and abreast with public policy[31] with an unyielding fidelity to Rule of Law[32] as well as possessing practical skills such as strong advocacy, commons sense, luminous oral and written communications skills, administrative skills.[33] And to benefit from a broad spectrum of perspectives, the Justices should be drawn from diverse fields, experiences, and ideologies. Bimpong-Buta puts it this way:

> In that regard, the composition of the Supreme Court should be a blend and balance of competent persons with varied experiences recruited from, on one hand, outside the Bench who are either experienced legal practitioners from the Bar or lawyers who, in addition to their experience, possess high academic credentials; and on the other, competent superior court judges promoted from the Bench, from either High Court or the Court of Appeal.[34]

To this, I add that these Justices should straddle the diversity of various epistemic disciplines. But competence and merit should never be sacrificed for such desire diversity or other considerations no matter how laudable.

Admittedly, such Philosopher Justices are a rarity, but they are not impossible to identify or to educate. In30 fact, a perusal of the judicial output, competence, temperament, and vision of former Supreme Court Justices of Ghana would unveil some of them as befitting of the description of Philosopher Justices. The Justices of the Supreme Court at the dawn of the Fourth Republic generated a considerable momentum for the development of a constitutional democracy in Ghana. The nation was lucky to have a crop of

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[30] Seth Y Bimpong-Buta, *The Role of the Supreme Court in the Development of Constitutional Law in Ghana* (Advanced Legal Publications 2007) 643.
[31] *Edusei v Attorney-General* [1996-97] SCGLR 1, 32 (Hayfron-Benjamin JSC); Date-Bah (n 24) 251-252.
[32] Date-Bah (n 22) 256.
[33] Albert Kodzo Fiadjoe, '*The Independence of the Judiciary*' Address to the Guyana Bar Association Law Conference (23 November 2000).
[34] Bimpong-Buta (n 30) 643.

independent-minded judges[35] who began to lay the foundation of a thriving constitutional democracy'.[36]

5 SPECIAL CONSTITUTIONAL COURT

While the concept of Philosopher Justices in Ghana is novel, the idea of a special Constitutional Court is not. Some have suggested that the current Supreme Court of Ghana should be restructured to accommodate a special Constitutional Court division:

> The Special Constitutional Court Division being advocated, composed of at least seven justices, should be empowered to exercise the Supreme Court's original jurisdiction, i.e. the enforcement and interpretative jurisdiction in terms of article 2(1) and 130(1) of the 1992 Constitution. The court may be similar to the Constitutional Court … of South Africa …[37]

The proponent of the special Constitutional Court, Seth Yaboaa Bimpong-Buta defines its composition and jurisdiction akin to the Constitutional Court established under section 166 of the 1996 Constitution of the Republic of South Africa (Act 108 of 1996). Section 167(1)-(3) thereof provides that:

> (1) The Constitutional Court consists of a President, a Deputy President and nine other judges.
> (2) A matter before the Constitutional Court must be heard by at least eight judges.
> (3) The Constitutional Court—
> (a) is the highest court in all constitutional matters;

[35] Date-Bah (n 22) 18: 'The composition of the Supreme Court on the date of the coming into force of the 1992 Constitution was as follows: Mr. Justice P.E.N.K. Archer (Chief Justice); Mr. Justice N.Y.B. Adade; Mr. Justice G.R.M. Francois; Mr. Justice I.K. Abban (who was, then, on secondment to the Seychelles); Mr. Justice I.N.K. Wuaku (who soon retired on 30 March 1993); Mr. Justice Amua-Sekyi; Mr. Justice P.V. Osei-Hwere (who also soon retired on 31 March, 1993); Mr. Justice G.E.K. Aikins; Mr. Justice E.K. Wiredu; Mrs. Justice J. Bamford-Addo; Mr. Justice C.F. Hayfron-Benjamin; Mr. Justice A.K.P. Ampiah; and Mr. Justice F.Y. Kpegah'.

[36] Date-Bah (n 22) 16.

[37] Bimpong-Buta (n 30) 643.

(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

The current jurisdiction of the Supreme Court of Ghana 'is not a constitutional court in the continental European meaning of the term'.[38] The Current Ghanaian Supreme Court is therefore not positioned to grow the 1992 Constitution in a manner that would effectively and timely address the concerns of demanders of a new Constitution.

An effective special Constitutional Court should not be bogged down by multiplicity of jurisdictions and duties as is the case of Ghana's current Supreme Court. 'To do this effectively, it should not be burdened with many cases not falling within the category of strategic cases or cases of public importance… Its case load needs to be limited so that it can be more reflective and able to concentrate on the leading strategic legal issues affecting national life'.[39] An effective special Constitutional Court when created should have the sole role of interpreting (and enforcing) the Constitution. The other courts should have the jurisdiction to enforce the Constitution.[40] The appellate jurisdiction of this special Constitutional Court should be limited, if at all. It is best probably that aggrieved parties do not have an automatic right of appeal to this special Constitutional Court. '[T]his would enable a sieving process to ensure that only cases presenting substantial issues of law are allowed an appeal to the highest court of the land'.[41] An effective special Constitutional Court should have the liberty to treat decisions of prior Supreme Courts before the Fourth Republican 1992 Constitution as persuasive rather than binding to give the court room for innovation and development of the law.[42] An effective special Constitutional Court should

[38] Ibid 23.
[39] Date-Bah (n 22) 253.
[40] Ibid 253-254.
[41] Ibid254.
[42] Ibid.

have the liberty to depart from its earlier decisions when necessary to bring the Constitution in sync with the signs of the times and in service of the needs of the country.[43] But to safeguard certainty of the law, a truly effective special Constitutional Court of Philosopher Justices should not frequently and commonly depart from its decisions, however.[44] An effective special Constitutional Court should not assume the role of Parliament, making laws as it pleases. But such an effective special Constitutional Court of Philosopher Justices should fill the gaps in the law and not refer every legislative lacuna to Parliament or other law-making body.[45]

And finally, a true effective special Constitutional Court should have the best of Justices, Philosopher Justices. For optimum output, the Philosopher Justices of the special Constitutional Court should be assisted by three law clerks each. These law clerks should be recruited from the best performing students of new lawyers who are called to the bar. Date- Bah explains as follows:

> It is thought that all the Justices of the Supreme Court should be supported with a system of law clerks funded by the State. The experimental law clerk schemes for them funded by donors have proved a valuable resource. Through legal research, aided by bright young legal talent, the erudition in the judgments of the Justices can be raised. Erudition contributes to authority and should be facilitated. Any system of law clerks which is instituted should be funded well enough to be able to attract some of the best law graduates produced by the Law Faculties in Ghana and elsewhere. It would be understood that the position of a law clerk was not a permanent position, but a stepping-stone for

[43] Ibid 254-255.
[44] Ibid 255-256.
[45] Ibid 255.

the brightest lawyers on their way to their ultimate career path.[46]

6 CONCLUSION

The success of such a special Supreme Court of Philosopher Justices, like a Supreme Court anywhere would depend more on other factors than its ability to bend the 1992 Constitution to the times and needs of citizens.[47] Its success would flow in large part from the trust of Ghanaians. 'The moral and political authority available to the Supreme Court is, however, not automatic, and has to be earned by the shrewdness, erudition and relevance of its decisions and its endeavour to protect the values held dear by the Ghanaian people, as expressed in the Constitution'.[48] As well, this special Constitutional Court should not have an iota of corruption on any of its members or its proceedings; it should be the bastion of integrity.

In concluding and to be clear, I do not look at the 1992 Constitution 'with sanctimonious reverence and deem [it] like the arc of the covenant, too sacred to be touched'.[49] I am simply of the view that we need, rather, Philosopher Justices of a Special Constitutional Court to bend the transformative arc of the1992 Constitutions to our needs and aspirations than the service of chronic constitutional chronicles as some of our compatriots are calling for.

[46] Ibid 256.

[47] The New York Times Editorial Board, 'Ketanji Brown Jackson Won't Be Able to Change a Radical Court Yet' (*The New York Times,* 25 February 2022) <https://www.nytimes.com/2022/02/25/opinion/ketanji-brown-jackson-supreme-court.html> accessed 25 February 2022

[48] Date-Bah (n 22) 201.

[49] In an epistle to Samuel Kercheval on July 12, 1816, Thomas Jefferson argued that constitutions should not be viewed as untouchable sacred documents.

A REVIEW OF GHANA'S MINERAL REVENUE REGIME

Edith Asiedu-Odame[*]

ABSTRACT

The 1992 Constitution of Ghana vests mineral resources in the President of the Republic of Ghana to be held in trust for the people of Ghana. The State generates revenue from these resources from which public expenses are met. However, it seems to be the case that despite a long continuous history of mining in Ghana, the accountability of the government with respect to the revenue generated from the exploitation of mineral resources leaves much to be desired, hence falling short of the citizenry's expectation in terms of development. This article examines this problem and how to deal with it. This article draws inspiration from international best practices and the Petroleum Revenue Management Act 2011 (Act 815) to make a case for the passage of legislation that defines the use to which mining revenues may be put and in what proportions. It is also argued that any proposed legislation should contain embedded rules and institutions of accountability.

1 INTRODUCTION

Ghana is endowed with lots of mineral resources, most of which are non-renewable in nature. Over the years, concessions have been granted to nationals and foreigners, individuals and corporations, artisanal and small-scale miners as well as large-scale miners alike to mine the resources.[1] These minerals include but are not limited to gold, diamonds, bauxite and manganese and in recent times, petroleum. Mining of these minerals have been done since the 6th century, where they were done on small-scale basis

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[1] Minerals and Mining Act 2006 (Act 703), ss 5 and 82.

with medieval tools like pick axes and shovels.[2] Upon colonization and in recent times, more sophisticated tools and equipment have been introduced to enable the exploitation to be done more effectively and on a larger scale.[3]

The Constitution 1992, in article 257(6) has vested mineral resources in their natural state in the president to be held on behalf of and in trust for the people of Ghana.[4] The trust obligation conferred on the president with respect to the mineral resources has been described as a trust in the form of an unenforceable governmental obligation.[5] A trust of such nature does not connote the creation of a fiduciary relationship between the government and the citizens which can be judicially enforced. This sort of trust has diminished the extent to which a citizen can enforce the trust obligation in mineral rights in Ghana against the government through the courts of law.

Due to the diminished enforceability of the President's trust obligation, it is imperative, that laws are passed and implemented which ensure that the government is held accountable to the citizenry on matters concerning the use of mineral resources and the revenue derived therefrom. Unfortunately, such high level of accountability is lacking in the mining sector.

2 AN OVERVIEW OF GHANA'S MINERAL SECTOR

The laws which governed the mining of minerals before independence were silent on the management of the revenue derived from mineral exploitation.[6] These laws only regulated the allocation of mineral concessions. After independence, the government enacted a new law, the Minerals Act 1962 (Act 126) which created an administrative framework for the post-independent

[2] Gavin Hilson, 'A Contextual Review of the Ghanaian Small-Scale Mining Industry' (2001) 76 Mining Minerals and Sustainable Development 1.
[3] Ibid.
[4] 1992 constitution, art 57(6).
[5] *Adjaye v. Attorney General and others* (30 March 1994, HC)
[6] Laws such as the Minerals Ordinance 1936 (CAP 155) as amended by CAP 157 and Concessions Ordinance 1939 (CAP 136) regulated the giving out of mineral concessions. These laws did not specify how the rents received from the concessions are to be used by the State.

mining industry but failed to address the issue of revenue management and utilization. The revenue derived was subsequently treated as revenue for consumption and investment; there was no established policy to provide direction on mineral revenues.[7]

It should also be noted that by the 1980s, Ghana's mining industry had stagnated.[8] The domination of the industry had kept private capital at bay. The mines were inefficiently run, technology was obsolete and miners demotivated.[9] However, efforts to revamp the industry in line with prescriptions by the Bretton Woods institutions' Structural Adjustment Programs led to the eventually re-introduction of private capital and the subsequent privatization of the industry.[10] To effect these neo-liberal reforms, the Mining and Minerals Law 1986 (PNDCL 153) was passed. Unfortunately, this law, like the old, was also silent on the issue of revenue management and failed to specify how revenue from the industry was to be disbursed and/or utilized.[11]

In 2006, The Minerals and Mining Act (Act 703) was passed to strengthen the framework established in the 1980s and to bring the industry's commitments, roles and responsibilities in line with the 1992 Constitution. The Minerals and Mining Act was amended in 2015 with a further amendment in 2019. The Minerals and Mining Act is the primary legislation on mining in present-day Ghana. The Minerals and Mining Act, just like its predecessors also failed to address the issue of revenue management in the sector.[12]

2.1 Effectiveness of the laws

The Minerals and Mining Act can be said to have been effective to an extent. It has provided the legal framework for the effective administration of

[7] United Nations Development Plan, *Review of Alignment Between the African Mining Vision and Ghana's Policy/Legal Frameworks for Solid Minerals* (UNDP Ghana Report 2015) 23.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] UNDP Ghana Report 2015 (n 7) 23.

activities of the sector.[13] The Act provides the procedure by which mining companies can acquire licences for reconnaissance, prospecting and exploitation works.[14] It leaves nothing to chance concerning the administrative framework of the industry and these laws have enjoyed compliance over the years.

The only provisions in the Act however that talk about the revenue to be derived from the activities of the mining companies are found in Sections 22 to 26. These sections provide for the payment of royalties, annual ground rents, annual mineral rights fees, application fees and how arrears of payments are to be paid for by the companies. The Act, as has already been stated, is silent on the disbursement of revenue derived from the industry.

It is important to state that, there are a number of regulations that have been passed to ensure the smooth running and implementation of the Minerals and Mining Act. These regulations all look at the administrative framework of the sector and not the fiscal aspect.

2.2 Revenue Management and Utilization in the Mineral Sector

In 2016, after almost 60 years of independence, the Minerals Development Fund Act 2016 (Act 912) was enacted with the objective of providing financial resources for the benefit of mining communities. The Act allocates 20% of the royalties derived from mining activities to the Development Fund.[15] The amount is to be disbursed between the Administrator of Stool Lands, the Mining Community Development Scheme, the Ministry, the Minerals Commission, the Geological Survey Department and for research.[16] It however remains silent on the allocation of the 80% remainder.

[13] Ibid.
[14] Act 703, ss 31, 34 and 39.
[15] Act 912, s 3.
[16] Act 912, s 21

Subsequently, the Minerals Income Investment Fund Act 2018 (Act 978) was enacted in an attempt to establish a legal framework to govern all revenue derived from the sector. Act 978 disburses 20% of the mineral revenue specifically to the Minerals Development Fund.[17] Unlike Act 912, Act 978 fails to make a definite disbursement of the 80% of the revenue which has not been allocated to the Minerals Development Fund.[18] It prescribes that the revenue should be disbursed in accordance with the Act, the Investment Policy Statement and the terms of any allocation agreement that has been entered into by the Fund and ratified in accordance with the Act.[19] This provision can best be described as a vague one with no definiteness towards the utilization of the revenue received into the fund.

2.3 Transparency and Accountability in The Sector

The royalties received by the State over the years have not been committed to developing the country in general, and the mining communities in particular, Act 912 notwithstanding. Lots of mining communities are left in deplorable states after mining operations have ceased. Although there is an Act indicating how the revenue derived from royalties and the government's carried interest in the activities are to be disbursed, little is known with respect to whether or not the revenue is being disbursed in the right manner.[20]

There is also an inadequacy of inter-agency collaboration among the various institutions that are responsible for the mineral industry's activities.[21] Agencies like the Minerals Commission and the Ghana Geological Services are expected to work hand-in-hand to ensure that surveying of land for concessions are done properly. The Commission is also expected to collaborate with the Ghana Revenue Authority (GRA) to ensure that reports sent by the mining companies to both agencies tally and that the companies pay their taxes and annual returns. The Commission is also expected to

[17] Act 978, s 31.
[18] Act 978, s 31.
[19] Ibid.
[20] Act 912, s 21; Act 978, s 31.
[21] UNDP Ghana Report 2015 (n 7) 23.

collaborate with the Ghana Chamber of Mines in the performance of its functions. An efficient collaboration would serve as a shield for the sector and ensure that the revenue due to the State from mining activities are promptly and rightly paid.

The problem of inadequate accountability and transparency is not a problem with just the post extraction framework of the mining sector. The mining companies themselves are also sometimes not transparent in their operations.[22] The state structures do require that information obtained by the mining companies should be periodically published and reported.[23] This rule is however not strictly enforced by the state structures. This has created a system where the mining companies choose to comply only in part with the regulations governing them and with no repercussions.[24]

Again, there are inadequate mechanisms in place to check the accuracy of information provided to the Minister and the Commission.[25] Mining companies are mandated to publish the details of the computation of their revenue to the GRA for calculation of their royalties and corporate taxes.[26] In doing so, the companies might be reluctant to publish and make known to the government the exact amount of profit that they make from their activities and these breaches will go unsanctioned since the real figures cannot be obtained by the State.[27] This problem can be attributed to the inadequacy of collaboration between the agencies overseeing the sector.

2.4 The Need for Transparency in the Mining Industry

As at 2019, Ghana was the largest producer of Gold in Africa and one of the largest producers in the world.[28] During and after exploitation, not only did

[22] Ibid.
[23] Act 703, s 19(2).
[24] UNDP Ghana Report 2015 (n 7) 27.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] <https://www.forbes.com/sites/greatspeculations/2021/06/23/updated-top-10-gold-producing-countries/?sh=29a156cd2ce2> accessed 30 August 2022

the corporations pay royalties to the government, they also shared their proceeds with the government, generating lots of revenue to the state.[29] Mineral and quarrying revenue serve as one of the major sources of revenue to the State.

The Ghana Revenue Authority Reports between 2010 to 2020 indicate that, the mining and quarry industries contributed 21.29%, 27.61%, 27.04%, 18.71%, 15.38%, 14.9%, 15.8%, 11.7%, 10.2%, and 18.4% respectively to the total percentage of revenue derived in the country.[30] Without transparency, the revenue realized from the industry can be misappropriated and its full potential will not be realized.

Mineral resources are also exhaustive in nature since they get depleted over time. It is therefore prudent that the revenue derived from the resources are maintained in such a way that they can be utilized by future generations when the resources get depleted. When there is a lack of transparency in the sector especially with regards to the revenue management of the industry, funds derived from the activities of the industry can be used for the private purposes of a few which will not benefit the State as a whole.[31]

Transparency in the revenue management also allows the government to prepare against, quickly detect and swiftly respond to any mismanagement of the mineral funds.[32] It also helps the government to prepare against economic changes and prepare price fluctuations.[33] Accountability is better achieved with transparency. The government and structures put in place to ensure that mineral activities are well carried out can be better held to be

[29] Act 703, ss 24 and 25.
[30] The Ghana Chamber Of Mines Mining Industry Statistics And Data (2019) <www.google.com/url?sa=t&source=web&rct=j&url=https://ghanachamberofmines.org/wp-content/uploads/2020/07/2019-Mining-Industry-Statistics-and-Data-for-Ghana.pdf&ved=2ahUKEwiAgI-hzcD1AhUSlBQKHRddAnIQFnoECDIQAQ&usg=AOvVaw2Uew7e4tkvbZLGDlxzj9va> accessed 20 January 2022.
[31] Perrine Toledano, '*Natural Resource Fund Transparency*' (Vale Columbia Center 2014) 5.
[32] Ibid 2.
[33] Ibid.

accountable with respect to their obligations if the citizens are made aware of the activities of the sector both in administrative functions and the fiscal aspect.[34]

3 INTERNATIONAL PRACTICES OF REVENUE MANAGEMENT

No state can be said to have a perfect system of natural resources revenue management. States undertake different practices in this area and it is often the case that what works for one state may not necessarily work for another state. However, this does not stop states from assessing the effectiveness of their respective mineral revenue systems by reference to that of other states.

In the quest to design transparent natural resource revenue management system, it is imperative that the state establishes a robust fiscal regime concerning the natural resources in question.[35] Without rules, the effective and transparent revenue management system can hardly be achieved. Rules that bind successive governments concerning the aims and objectives of the revenue can help achieve a long-term goal.[36] Having stringent fiscal rules with clearly defined conditions for the deposits and withdrawals of natural resources revenue would ensure that due process is followed and also serve as a check against misapplication of funds.[37]

In Azerbaijan, the lack of clear rules concerning withdrawals led to the government spending more when oil prices were high and moderately when they were low.[38] In Canada, the Providence of Alberta Heritage Fund which

[34] Ibid.
[35] Andrew Bauer, Malan Rietveld and Perrine Toledano, 'Natural Resource Fund Governance: The Essentials' in Andrew Bauer (ed), *Managing the Public Trust: How to Make Natural Resource Funds Work for Citizens* (Revenue Watch Institute and Vale Columbia Center 2014) 3.
[36] Andrew Bauer, *Fiscal Rules for Natural Resource Funds: How to Develop and Operationalize an Appropriate Rule* (Revenue Watch Institute and Vale Columbia 2014) 3.
[37]Joseph C Bell and Teresa Maurea Faria, 'Critical Issues for A Revenue Management Law' in Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz (eds), *Escaping the Resource Curse* (Columbia University Press 2007).
[38] Bauer (n 36) 2.

was established in 1976 as a savings fund for its oil revenues saved less than 4 billion dollars over a twenty-five (25) year period.[39] In the absence of clearly defined laws governing the fund, deposits were not being made although a lot of revenue was being derived by the State from the oil reserves in those years.[40] In 2013, the State government enacted laws to govern the withdrawals and deposits of the fund.[41] The governments of Chile and Trinidad and Tobago have also established clear fiscal rules concerning the management of revenue derived from their natural resource.[42]

In ensuring effective management of natural resource revenue, it is international best practice that a natural resource fund be established. The fund should have clear objectives concerning its purpose.[43] It should be noted that, merely establishing the fund does not automatically imply that there will be effective revenue management. It is therefore important that the rules are established to govern the fund in order to ensure that the objectives of the fund are met. Natural Resource Funds in Russia, Kazakhstan as well as Trinidad and Tobago have clear policy statements and objectives.[44]

Again, clear investment policy rules should be laid down.[45] It is to be observed that a significant fraction of the revenue derived from the natural resources exploitation is not purposed for immediate consumption. States are therefore advised to invest this revenue instead of allowing them to be in an account untouched. Before states take up investment policies, there should be laid down investment rules or guidelines specifying investments which are deemed to be consistent with the objectives of the fund. The Kuwaiti Investment Authority lost an amount of about 5 billion US dollars in investment during the 1990s.[46] This occurred because of a lack of investment

[39] Ibid 19.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid 3.
[44] Ibid 19.
[45] Ibid 21.
[46] Ibid.

policy among other things. States like Canada (the Province of Alberta), Norway and Timor-Leste have codified comprehensive investment policy rules that guide their investment ideas.[47]

Again, a good revenue management system requires a workable institutional framework with clearly defined functions and efficient personnel.[48] As part of the institutional framework, there should be strong internal control and political independence of the structures.[49] Conflict of interest rules should be implemented such that as much as possible, a person's governmental and private duties would not conflict to the detriment of the state.[50] Breaches of ethical as well as conflict of interest standards should be made to attract criminal punishment to ensure strict compliance. Natural Resource Funds in Norway and Texas have very strong internal structures and control, at every level of institutional control including the Board of the funds.[51] This ensures that everybody within the institutional framework is not exempted from being checked and sanctioned if need be.

Just as it is important to establish internal institutional structures of the governing body of the natural resource funds, there is also the need for external checks and disclosures. This can be achieved when the institutional framework is made subject to periodic external audits and assessment the findings of which are published and accessible to the public. External checks can also be achieved when the general public is made aware of not only the activities that go on with the revenue but also of the rules that govern the institutional framework and the revenue itself. This will help in constructive criticisms of the activities and will ensure that the right things are being done. Some States like Alaska, Chile and Norway do this by publishing reports of all activities that relate to the funds for public scrutiny.[52]

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[47] Ibid 22.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid 23.

Independent institutions should also be afforded the necessary facilities to conduct external checks on the governing bodies of the resource fund. These institutions can be reputable law firms, accountancy firms, audit boards, judicial bodies and international organizations. This will ensure that the reports that are published are reliable.

It is again required that institutional fragmentation should be reduced as much as possible.[53] There should be cooperation among the different institutions that are carrying out different roles with respect to the natural resource revenue.[54] The institutions should be mandated to share information and expertise in order to ensure efficient management of natural resource revenue.

An example of an Act that incorporates these best practices in Ghana is the Petroleum Revenue Management Act 2011 (Act 815). The Act establishes the petroleum holding fund, a temporary fund which holds the revenue until they are disbursed as specified in the Act.[55] It further establishes the Ghana Heritage Fund for the holding of excess revenue which would be invested for future generations.[56] The Act provides that ministerial reports must be submitted to Parliament detailing the activities of the various funds and then publicized thereafter.[57] The Act mandates that the revenue derived from petroleum activities should be invested.[58] As such, it establishes an investment advisory committee whose function is to advise the Minister on the viable investment policies that the revenue can be invested in.[59] Another key feature of the Act is the establishment of the Public Interest and Accountability Committee (PIAC) which is to educate the public on the affairs of the revenue derived from petroleum and also ensure that all stakeholders

[53] Jack Calder, *Administering Fiscal Regimes for Extractive Industries: A Handbook* (International Monetary Fund 2014) 28
[54] Ibid 28.
[55] Act 815, s 2.
[56] Act 815, s 5.
[57] Act 815, s 48.
[58] Act 815, s 27.
[59] Act 815, s 29.

comply with the Act.[60] In essence Act 815 has created a regime of revenue management with respect to petroleum revenue that is worthy of applause and ensures that the revenue is being used for specific purposes.

Indeed, if Ghana has been able to develop a scheme for the management of revenue of its Petroleum in line with international best practices, it is surprising that after having mined minerals for so long, a similar scheme has not been developed for the management of mineral revenue. Admittedly, the passage of the Minerals Development Fund Act and the Minerals Income Investment Fund Act are small steps; but small steps too few and far between. While the Minerals Development Fund Act establishes clear rules for the management of only 20% of mineral royalties, the Minerals Income Investment Fund defers the establishment of similar rules to non-binding instruments like policy statements. In light of the justifications provided in this paper, that a proper scheme for mineral revenue management maximizes the amount of revenue obtained and the objectives to which these revenues may be put, it is argued that a scheme similar to that in the Petroleum Revenue Management Act be developed. The next part sets out the details of this argument in the form of recommendations.

4 RECOMMENDATIONS

4.1 Enacting and implementation of laws

International best practices suggest that to improve transparency and accountability in the management of mineral revenue, comprehensive revenue management laws should be made which would provide for the use and management of the revenue. It is suggested that Petroleum Revenue Management Act be modified and passed as a Minerals Revenue Management Act. The passage of a law, any law at all, is half the job. The

[60] Act 815, s 51

implementation of that law is the other. In this part, I outline the areas of focus any prospective law on minerals revenue management should focus on.

4.2 4.1. Institutional Co-operation

Institutions like the Minerals Commission, the Geological Survey Department, the Ghana Chamber of Mines and the Ghana Revenue Authority should be able to co-operate and co-ordinate their activities well. A proper and effective coordination among these bodies will ensure that revenue payable by the mining companies to these agencies will be effectively paid and the right amount will be paid. The mining companies will also be forced to provide accounts of their activities since the bodies collaboratively can be more efficient in demanding of them the accounts.

4.3 Transparency

Transparency in the revenue base of the mining sector can be put under three main heads; transparency in revenue collection, transparency in revenue management and transparency in revenue allocation.[61] Achieving transparency in revenue collection goes hand in hand with effective revenue collection. Revenue should be first of all effectively calculated and collected before there can be full transparency. The Ghana Revenue Authority and the Minerals Commission should work together to calculate the taxes, royalties, various rents and other revenue that the mining companies are expected to pay to the State. The two agencies should not work in isolation but put together their information and logistics to make sure that revenue calculation is effectively done.

Transparency can also be achieved if the revenues to be collected are well documented and published periodically before Parliament and to the general public. Taxes and other revenue to be paid by the companies should also be

[61] Abdullah Al Faruque, 'Transparency in Extractive Revenues in Developing Countries and Economics in Transition: A Review of Emerging Best Practices' (2006) 24 Journal of Energy and Natural Resources L 66.

clearly stated in their contractual agreements and effective sanctions imposed for non-payment. There should be clear regulations about how the revenue derived is to be distributed and within which sector it should be used. These regulations must state clearly the percentages of revenue that are to be used for particular sectors.

The discretion of the government to use the revenue to do as it deems fit should be circumscribed if not totally taken away. The way in which the revenue is used must be publicized periodically and be put under public and parliamentary scrutiny. Transparency in mining revenue management is achievable if the investment policies, the withdrawals and deposits of the revenue and the revenue stabilization mechanisms are well regulated by statute and also open for public participation.

In ensuring that revenue is well managed, the role of the public cannot be undermined. The government should put structures in place that ensure that public participation is prioritized. This is because, the revenue is the property of the general public and so they should be made aware of how the revenue is being used.[62] Public forums should be organized intermittently to seek the knowledge of the general public on how excess revenue can be used. This makes the public have a sense of involvement in the affairs of the revenue thereby piquing their interest in the management of the revenue. Where the general public is constantly asking questions and being curious about what is being done with the mineral revenue, the government will be put on its toes to effectively manage the revenue.

[62]Päivi Lujala and Levon Epremian, 'Transparency and Natural Resource Revenue Management: Empowering the Public with Information?' in Aled Williams and Billon Philippe Le (eds), *Corruption, Natural Resources and Development: From Resource Curse to Political Ecology* (Edward Elgar Publishing Incorporated 2017).

5 CONCLUSION

Poor revenue management in the mining sector cannot be attributed to only the government. All actors of the industry are responsible and must see to it that revenue is well managed in the sector. There should be transparency in the mining revenue management. This calls for hard work and cooperation amongst all the actors of the industry. The mining sector can first of all adopt a replica of the Petroleum Revenue Management Act into its own sector and also ensure that the regulations already in place are well enforced. This will be a better starting point in ensuring that there is effective revenue management in the mining sector. Since the trust imposed upon the President under article 257(6) of the 1992 constitution of Ghana is unenforceable, it is the collective duty of all and sundry to ensure that the revenue being derived from mining is used for the benefit of the whole nation and future generations.

CUSTOMARY SUCCESSION AND THE INHERITANCE RIGHTS OF WOMEN: THE CASE OF ODAMTTEN & OTHERS V. WUTA-OFEI & ORS.

Kwame Adusei[*]

ABSTRACT

In Osu, a Ga Adangbe community in Ghana, the children of a man inherit his self-acquired property upon his death intestate. However, the interests of each child vary depending on the gender of that child. While male children acquire an unimpeachable interest in the estate of their father - an interest that they can alienate in their lifetime or upon death - female children can only acquire a life interest in the inherited property. The rationale for the rule is to ensure retention of the property in the patrilineal family. This paper reviews the case of Odamten v. Wuta-Ofei & Others in which this customary rule was applied. It is submitted that the said customary rule is discriminatory against female children in Osu and other Ga Adangbe communities since the ends it seeks to achieve do not justify the means employed. It is further submitted that when the Supreme Court was presented with the opportunity in the Odamtten Case, the Court ought to have seized same to overrule the said customary law.

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1 INTRODUCTION

> *[T]he time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that, the Constitution was framed deliberately to permit discrimination on the ground of sex…*[±]

Ghana's legal system is pluralistic in nature. This connotes the co-existence of multiple systems of law in the country. In Osu, a Ga Adangbe community, customary succession to property on intestacy is patrilineal. Under Osu customary law, when a man dies intestate, his children inherit his self-acquired property which is deemed to be family property. Whereas male children of the deceased inherit the property absolutely, his female children acquire only a life interest which is not alienable. The Supreme Court of Ghana applied this customary rule in *Odamtten & others v. Wuta-Ofei & Ors*[1], which is the subject matter of this paper. It is submitted that the said customary rule is discriminatory against female children in Osu and other Ga Adangbe communities. It is further submitted that when the Supreme Court was presented with the opportunity in the *Odamtten Case*, it ought to have seized same to overrule or otherwise redefine the said customary rule.[2]

After this introduction, part two of the paper sets out the relevant facts and key holdings of the Supreme Court in the case under evaluation. Afterwards, part three begins by acknowledging the application of the rules of customary law in Ghana's pluralistic legal system. From there, the customary law position on intestate succession in Osu, a patrilineal Ga-Adangbe community is stated with precision. This is followed by a discussion of the constitutional provisions on equality, non-discrimination, and human dignity. Ghana's international obligation to eliminate discrimination against women is also discussed in order to illustrate how the customary law rule of intestate

[±] *Unity Dow v. Attorney-General (Botswana)* [1992] 6 BCLR 1, 17-18 (Martin Horwitz J).

[1] [2018] GHASC 63.

[2] Constitution of the Republic of Ghana 1992 (referred throughout this paper as "1992 Constitution"), art 11(2) customary law is defined to include those determined by the Superior Court of Judicature.

succession as applied to the case under evaluation, undermined these provisions. In this part also, the statutory intervention made by the Intestate Succession Act 1985 (PNDCL 111) is considered. The fourth part of the paper addresses the issue of retroactive application of the 1992 Constitution to the facts of the case. The essay concludes that had the decision of the Supreme Court gone otherwise, it would have been a remarkable step towards more progressive jurisprudence on the enforcement of the property rights of women.

2 FACTS

Robert Wuta-Ofei (deceased), a Ga man from Osu was married to Barbara Wuta-Ofei. The couple had four children; Roberta, Vida, Percy and Raphael (the first respondent). The first respondent was the head of family and the sole surviving child deceased. The appellants were the children of Roberta Wuta-Ofei i.e., grandchildren of the deceased. Robert Wuta-Ofei died intestate in 1970. The subject-matter of the dispute, landed property described as Essie Lodge was the self-acquired property of the intestate. Roberta Wuta-Ofei, a daughter of the intestate and the mother of the appellants purported to devise the entire property to the appellants in her will. The sale was challenged and set aside. A tenancy agreement (Exhibit C) was later entered into between the first respondent; a representative of the appellants; and a daughter of Percy as lessors on the one hand, and the second respondent as lessee on the other hand. The rents from the property was shared equally among the lessors. The first respondent subsequently obtained Letters of Administration to administer the estate of his late father, and then sold the property which is the subject-matter of this case to the second respondent. The appellants sued the respondents in the High Court to set aside the sale of the property on the ground that their consent was not obtained prior to the sale. They traced their interest in the property in their capacity as beneficiaries of the estate of their mother, Roberta Wuta-Ofei. They argued that they were entitled to the share of their mother in the property of her father, Robert Wuta-Ofei (deceased). On the other hand, the first respondent maintained that as the only surviving child of his parents, he had the right to sell the property. The first respondent

maintained that after the death of all his siblings, the property devolved on him as the owner.

2.1 High Court and Court of Appeal Judgments

The High Court and Court of Appeal both dismissed the appellant's action. In affirming the decision of the High Court judge, the Court of Appeal reasoned that the self-acquired property of the intestate, a Ga man, became family property upon his death; and that by Osu customary law, which is patrilineal, it was the children of the deceased who inherited him. The Court of Appeal further held that, even though all the four children of the intestate inherited the property, the female children had only a life interest in the estate. As such, Roberta Wuta-Ofei, mother of the Appellants, obtained only a life interest in the property and the appellants could not have inherited the interest of their mother after her death. On the issue of the capacity of the appellants, the Court of Appeal held that, the appellants as grandchildren of the deceased in a patrilineal area, were not principal members of the deceased's family whose consent was requisite for a valid alienation of the property.[3]

Dissatisfied with the decision of the Court of Appeal, the appellants appealed to the Supreme Court. The grounds of appeal were: first, that the judgment was against the weight of the evidence, and second, that the Court of Appeal erred in holding that, despite PNDCL 111, Osu customary law disabled female children from passing on their interest in the inherited landed property to their children, leading to a situation where the property reverts to the family of the original owner upon death of a sole inheriting female child. It was submitted on behalf of the appellants that, based on the previous conduct of the first respondent in sharing the revenue from the property with the appellants, the first respondent was estopped from denying the family character of the property. On the second ground of appeal, it was submitted that the date for devolution of the estate of the intestate was the time when

[3] The Court of Appeal cited *Yawoga v. Yawoga & Anor* [1958] 3 WALR 309 (HC) 310 (Ollenu J).

Roberta and Vida Ofei died, at which time PNDCL 111 had come into force. Therefore, counsel argued that in the light of the PNDCL 111 and article 17 of the 1992 Constitution, the customary rule limiting the interest of female children in the estate of a deceased father to a life interest with reversionary interest vested in the patrilineal family, was discriminatory and same should be struck down.

2.2 The Decision

The two main legal issues before the Supreme Court[4] were the nature of the interest of a female child in the intestate estate of her father under Osu Customary law; and the appellants' capacity to initiate this action. The court dismissed the appeal by a unanimous decision and upheld the validity of the sale of the property. The Court found that the appellants consented to the sale of the property even though their consent was not essential to the validity of the sale. In arriving at this decision, the Court affirmed the customary law position stated by the Court of Appeal in relation to devolution of property in patrilineal Ga communities.[5] On the applicability or otherwise of PNDCL 111, the Court found that the estate of the deceased estate was administered in 1976 at which date, PNDCL 111 had not come into force. Since PNDCL 111 did not operate retroactively, the Court reasoned that the distribution to the estate of the deceased was governed by the Osu customary law which was his personal law. Osu customary law on intestate succession limited the interest of female children of the deceased to only a life interest with reversionary interest vested in the patrilineal family. The rationale for this customary rule, as found in the judgment of the Court was to ensure that the property remained in the patrilineal family of the original owner. In patrilineal communities, children born to a woman are not members of their mother's patrilineal family. They belong to their father's family, and they inherit their father's properties on his death intestate. Since appellants are not members of

[4] Quorum: Adinyira (Mrs), JSC (presiding), Akoto-Bamfo (Mrs), JSC, Benin, JSC Appau, JSC Pwamang, JSC.
[5] The Court made reference to NA Ollennu, *The Law of Testate and Intestate Succession in Ghana* (Sweet and Maxwell 1966); AKP Kludze, *Modern Law of Succession in Ghana* (Foris Publications 1988) and AKP Kludze, *Ewe Law of Property* (Sonlife Press 2012).

their mother's family, permitting them to succeed to the property would defeat the purpose of the customary rule.

On the very important issue of discrimination raised by the appellants, the Court was of the view that the appellants had not been discriminated against because they had enjoyed revenue from the estate proportionately with the first respondent in the past. The Court proceeded to pass a "comment" on the constitutional issue raised. Here, the court cited its decision in *Togbe Akpoma I v. Mrs. Gladys Mawuli Mensah*[6], and reasoned that under PNDCL 111, where a portion of the residue of the estate of a deceased is to devolve according to customary law[7], a sole surviving female child in a patrilineal system of inheritance would take that fraction of the residue. However, the Court refrained from making any binding pronouncement on the effect of article 17 of the 1992 Constitution on the Osu customary law rule of intestate succession. In the opinion of the Court, that question ought to be reserved for an appropriate case.

3 ANALYSIS OF THE COURT'S DECISION

3.1 Customary Intestate Succession in Osu, a Patrilineal Ga-Adangbe Community

Legal pluralism connotes the multiplicity of normative orders in a given space.[8] Mensa-Bonsu, a Supreme Court Justice of Ghana and legal academic, conveyed this same idea when she wrote that legal pluralism connotes the state of being subject to more than one system of law within a particular legal jurisdiction at one and the same time.[9] Drawing inspiration from article 11 of

[6] [2018] GHASC 67.

[7] Intestate Succession Act 1985 (PNDCL 111), ss 5(1)(d), 6(c), 7 and 8.

[8] Ama Hammond, 'Reforming the Law of Intestate Succession in a Legally Plural Ghana' (2019) The Journal of Legal Pluralism and Unofficial Law 114 <https://doi.org/10.1080/07329113.2019.1594564> accessed 3 September 2022.

[9] HJAN Mensa-Bonsu, 'Transplanting the English Oak: Legalism, Legality, Legal Pluralism and the Criminal Law of Ghana' in Helen Lauer and Kofi Anyidoho (eds), *Reclaiming the Human Sciences and Humanities Through African Perspectives* (Sub-Saharan Publishers 2012) 1187, 1190.

the 1992 Constitution,[10] the Ghana legal system is said to be pluralistic in nature.[11] In Ghana, legal pluralism is reflected in the conflation of formal state laws, including received English laws, religion-based laws and institutions with the customary laws.[12]

Therefore, prior to the commencement of PNDCL 111 in 1985, succession to the estate of a Ghanaian who died intestate was primarily governed by the personal law of that person which invariably turned out to be the customary law of his/her community.[13] It is important to note that prior to 1985, there were also statutory regimes of intestate succession under sections 48 and 10 of Marriages Ordinance (Cap 127) and Marriage of Mohammedans Ordinance (Cap. 129) respectively. These provisions applied to persons who contracted marriages under those statutes.

Generally, intestate succession under customary law depended on whether a person belonged to matrilineal or patrilineal family.[14] In patrilineal communities, children belong to their father's family. This assumption implies 'patri-succession', a term used to explain the right to succeed to and enjoy property rights derived from membership of a family traced through the male line.[15] Again, in patrilineal communities, the general rule of intestate succession is that, children inherit their deceased father's interest in his

[10] 1992 Constitution, art 11.

[11] Richard Frimpong Oppong, 'Managing Legal Pluralism: An Examination of the Colonial and Post-Colonial Treatment of Customary Law under Ghana's Legal System' in HJAN Mensa-Bonsu and others (eds), *Ghana Law Since Independence: History, Development and Prospects* (Black Mask 2007) 443.

[12] *Republic v. Tommy Thompson Books Ltd* [1996-97] SCGLR 804 (SC) 838 (Kpegah JSC); Poku Adusei, 'Towards a Transsystemic Study of the Ghana Legal System' (2017) 6 Global Journal of Comparative Law 25.

[13] This was by virtue of the Courts Act, 1971, s 49 which provided rules for ascertaining the applicable personal law of a person; the Courts Act 1993 (Act 459), s 54 presently provides for these rules.

[14] AKP Kludze, *Modern Law of Succession in Ghana* (Foris Publications 1988) 240-44.

[15] Kludze (n 14) 245; Christine Dowuona-Hammond, 'Women and Inheritance in Ghana' in A Kuenyehia (ed), *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women*, (Human Rights Study Centre, Faculty of Law, University of Ghana 1998) 132, 137.

individually acquired property as of right.[16] With the exception of the Ga Mashie,[17] the Ga Adangbe communities are patrilineal for purposes of succession to property on intestacy. A well-established rule at customary law applied in a long line of Ga cases[18] is that among the patrilineal Ga Adangbe communities, upon the intestate death of a Ga man, the deceased's self-acquired property becomes family property, but the children succeed to the property.[19] Therefore, in the patrilineal Ga-Adangbe, even though the self-acquired property of a deceased Ga man is deemed family property, the authorities are legion that it is the children, and not the family as such who inherit the property.[20]

Although children inherit their deceased father in the patrilineal system, the respective entitlements of the inheriting children depend on their gender.[21] Male children are given preference over females.[22] Unlike the males, a female child acquires only a life interest in whatever devolves on her from her father's estate.[23] Furthermore, the rule was also that the inheriting female child could neither alienate the interest in inherited property *inter vivos*, nor exercise

[16] Kludze (n 14) 188; *Yawoga v. Yawoga & Anor* [1958] 3 WALR 309; AKP Kludze, 'Problems of Intestate Succession in Ghana' (1972) 9 University of Ghana Law Journal 89,117-120; RJH Pogucki, 'Land Tenure in Ghana' Vol. II Land Tenure in Adange Customary Law (1957) 39.

[17] Kludze (n 14) 295 citing *Vanderpuye v. Botchway* (1951) 13 WACA 164 that children did not normally succeed to the intestate in Ga matrilineal communities except children born out of the Ga 'six-cloth' marriage; Nii Amponsah, 'Ga-Mashie Succession: Ascertaining the True Personal Law' (1974) 6 Review of Ghana Law 166.

[18] Kludze (n 14) 260 where the following cases are cited: *Pappoe v Wingrove & Co Ltd* [1921-25) Divisional Court; *Amarfio v Avorkor* (1954) 14 WACA 554; *Solomon v Botchway* (1943) 9 WACA 127; *Larkai v Amorkor* (1933) 1 WACA 323.

[19] Kludze (n 14) 260-261; NA Ollennu, *The Law of Testate and Intestate Succession in Ghana* (1966) No.16 Law in Africa 70.

[20] *Re Lomotey Nukpa (deceased)* (Divisional Court, 24 October 1908) (Griffith CJ); *Okaikor v Opare* (1956) 1 WALR 275, 277 (Quashie-Idun J); *Augustt v. Aryee* [1961] GLR 584 (HC) 588 (Ollenu J); Ollennu (n 19) 171.

[21] Dowuona-Hammond (n 15) 142.

[22] *Sedorme v. Dodor* [1984-86] 2 GLR 79 (CA); Dowuona-Hammond, (n 15) 142 citing Nukunya, *Kinship and Marriage Among the Anlo Ewe*, (Athlone Press 1969) 43-45. See also, Bortei-Doku,E Aryeetey, 'Behind the Norms: Women's Access to Agricultural Resources in Ghana' (Regional Workshop on Managing Land Tenure and Resource Access in West Africa, Senegal, November 18-22, 1996) 214-7.

[23] Kludze (n 14) 189; *Husunukpe v Dzegblor* DC (Land) 48-51, 393.

any testamentary capacity with respect to the property.[24] The rationale for the rule is to ensure that the property is retained within the patrilineal family.[25] Therefore, the interest of the female child in the inherited property does not devolve on her own children upon her death, as it would in the case of a male child.[26] This is because the inheriting female child's own children are not customarily regarded as members of her patrilineal family through which the right of succession is traced.[27] The restrictions on alienation imposed on female children in patrilineal communities is not applicable to male children, who take the inherited property absolutely.[28]

In *Odamtten*, the customary law position, as explained in the preceding paragraphs, was applied by the Supreme Court. The Supreme Court affirmed the decision of the Court of Appeal to the effect that, since the late Robert Wuta-Ofei was a Ga man from Osu, his self-acquired property became family property upon his death intestate. Accordingly, the children of the deceased inherited the property. However, the mother of the appellants being a female child of the deceased acquired only a life interest in the property, which could not pass to the appellants. As the sole surviving son of the deceased, the first respondent inherited the property absolutely and could make a valid alienation of same to the second respondent. It is submitted that the customary rule under evaluation discriminates against female children of the deceased and the Court ought not to have upheld same. The reasons for this submission are explained in the next part of the paper.

[24] *Golo III v Doh and Others* [1966] GLR (HC) 447, 488 (Jiagge J): 'A daughter cannot therefore make any absolute disposition of property inherited from her father'; Kludze, Ewe Law of Property (n 5) 291-292.
[25] Kludze (n 14) 294.
[26] *Golo III v Doh and Others* [1966] GLR (HC) 447, 488; Dowuona-Hammond (n 15)142.
[27] Ibid.
[28] *Yawoga v. Yawoga & Anor* [1958] 3 WALR 309 (HC).

3.2 Arguments on Equality, Non-Discrimination and Human Dignity, under the 1992 Constitution.

The Constitution, 1992 is the supreme law of Ghana, which occupies the foremost position in the hierarchy of laws.[29] Accordingly, any other law found to be inconsistent with the constitution is null and void to that extent.[30] It is obvious from a reading of articles 1 and 11 of the 1992 Constitution, that the constitutional provisions in general, and any rights guaranteed therein in particular are superior to any customary law dictates.[31] The application of customary law in a constitutional democracy as a matter of necessity, demands a discourse on human rights, especially equality before the law, non-discrimination, the right to freely own and hold property.[32]

There are constitutional guarantees of the property rights of women on the issues being discussed in this paper. The Constitution provides for equality of all persons before the law and prohibits discrimination on grounds including gender.[33] Similarly, the constitution guarantees the right to own property, either alone or in association with others.[34] Therefore, there is discrimination when different treatment is given to men and women in relation to property holding which is exclusively premised on their respective gender: whereby women are subjected to some restrictions or disabilities to which men are not made subject, or otherwise granted advantages which are not granted to women. Does the mere fact of disparity of treatment amount to a violation of the equality principle in article 17? The jurisprudence of the Supreme Court, as reflected in some landmark cases is that article 17 of the Constitution, 1992, outlaws unlawful discrimination but not mere discrimination.[35] As such, any

[29] 1992 Constitution, arts 2(1) and 11.
[30] Ibid art 2(1) provides that the Supreme Court has the exclusive jurisdiction to declare a law or an action unconstitutional; *Mensima and Others v Attorney-General* [1997-98] 1 GLR 159 (SC) 200 (Acquah JSC).
[31] Akua Kuenyehia, 'Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa' (2006) 40 UC Davis Law Review 385, 400.
[32] Ibid.
[33] 1992 Constitution, art 17.
[34] 1992 Constitution, art 18.
[35] *Nartey v. Gati* [2010] SCGLR 745; *Asare v. Attorney-General* [2012] GHASC 31; *Federation of Youth Association of Ghana (FEDYAG) v. Public Universities of Ghana & Others* [2010] SCGLR 265.

discrimination on the grounds of sex or gender *simpliciter* is not unlawful. It is unlawful if the dissimilar treatment is not for a lawful and legitimate purpose. The test was laid down in the *locus classicus* of *Nartey v. Gati*,[36] where in summary, the Supreme Court held that, equality under article 17(1) means freedom from unlawful discrimination. According to the Supreme Court, the crucial issue is whether the differentiation in rights of persons who are similarly placed is justifiable by reference to an object that is sought to be served by a particular statute, constitutional provision or some other rule of law.

The *ratio decidendi* from these cases would mean that, after the fact of discrimination on the ground of gender has been established, a further inquiry is needed to find out why the discrimination has taken place. It is the result of this inquiry which will determine the unlawfulness or otherwise of the offending discriminatory law or practice. It is argued that the Osu customary law which restricts the interest of inheriting female children of an intestate in the self-acquired immovable property of the deceased to only a life interest, unlawfully discriminates against women. It is further argued that the ground for the discrimination is arbitrary and unjustifiable. I proceed to give reasons in support of this position in the subsequent paragraphs.

The discriminatory practice lies in the fact that both male and female children of a man from Osu are persons who are similarly placed by virtue of their status as children of a deceased intestate. However, they are treated differently in terms of property holding under Osu customary law on intestate succession. This differential treatment lies in the respective interests of female and male children in the inherited immovable property. Whereas male children take the property absolutely, female children have only a life interest in the property. The disadvantage here is that, whereas a male child (such as the first respondent) who inherits property absolutely is in the same position as a purchaser and may alienate his interest either *inter vivos* or *post mortem* the inheriting daughter on the other hand acquires only a life interest, and she

[36] [2010] SCGLR 745.

can neither alienate her interest *inter vivos* nor dispose of it by testamentary disposition to her own children.[37] Kuenyehia, a former judge of the International Criminal Court, rightly observes that as a body of laws rooted in tradition and historical experiences, customary law is fraught with certain inherent problems that render its application disadvantageous to women especially in the area of succession.[38] The operation of these customary laws almost always tend to give men precedence over women. Such gender inequality relegates women to a subordinate position, which in turn affects their access to resources.[39]

Having identified the obvious inequality in the property rights of female and male children, who inherit their deceased father in patrilineal societies, I proceed to give reasons why the differentiation in their rights is not constitutionally justifiable with reference to the object that is sought to be served by the impugned customary law rule on intestate succession. The rationale for the Osu customary law under evaluation has been explained to be based on a fundamental principle of customary law which required the retention of the property in the patrilineal family.[40] The question is whether the means employed by the customary rule justifies the end it sought to achieve. Kuenyehia advises that since these 'laws and practices of custom are deeply rooted in community-specific historical, socioeconomic, and cultural experiences, one must be very cautious when making value judgments about customary laws and practices'.[41] Bearing this in mind, it is humbly submitted that the means employed by the customary rule is unjustifiable even if there existed in the past certain sound underlying assumptions for what now seems to be the lack of protection for inheriting daughters and their children.

Since the sole import of the customary rule was to ensure that the inherited property remained in the patrilineal family, one would have thought that a

[37] *Yawoga v. Yawoga & Anor* (n 30); Kludze (n 14) 294.
[38] Kuenyehia (n 31) 390.
[39] Ibid.
[40] Kludze (n 14).
[41] Kuenyehia (n 31) 388.

gender-neutral approach would be employed; so as to restrict both inheriting male and female children of the deceased from making outright alienation of the inherited property. Instead, only female children are restricted from alienating the property. On the other hand, inheriting male children take the property absolutely as if they were purchasers. They are placed in a position to alienate the property *inter vivos* without any restrictions whatsoever in law. This necessarily implies that, the inheriting male children may choose to sell the property to persons who are not members of their patrilineal family, as was done by the first respondent in the *Odamtten Case*. Similarly, the inheriting male children may choose to devise the property under a will to a friend or any other person who is not a member of the patrilineal family. In both instances, the inherited property which was given to the male children absolutely for the purpose of ensuring the retention of the property in the patrilineal family is eventually transferred to persons who are not members of the family thereby defeating the purpose of the customary rule. In the end, the property is not retained in the family and the inheriting female children and their heirs are rather disinherited. This begs the question whether there is any reasonable justification for placing these limitations on female children. It is strongly submitted that the customary rule serves no purpose today. It is merely a relic of traditional notions of men taking precedence over women. It is submitted that the customary rule under evaluation flies in the face of Article 17 of the 1992 Constitution.

Furthermore, the Osu customary rule under evaluation which precludes children of a woman from inheriting their mother's property on her intestate death on the basis that they do not form part of her patrilineal family is also unjustifiable. In the end, the property devolves on the siblings, paternal cousins, nephews and nieces of the woman in order to retain the property in the patrilineal family. It would appear that this customary rule is justifiable in the light of the rationale given. However, this is only superficial. It is submitted that, when women acquired very little property in their own right in the past, the injustice caused by this system was not very clear.[42] But the

[42] Kludze (n 14) 192.

circumstances of women have changed considerably over the years. A woman may acquire and accumulate property, virtually to the same extent as a man.[43] In that case, there is no justification whatsoever as to why the children of a woman in the twenty-first century cannot inherit her self-acquired property simply because they do not form part of the patrilineal family in which she belonged under customary law. It is submitted that the disability imposed on children in patrilineal communities excluding them from inheritance of their mother's estate is unfair.

In light of the foregoing, it is submitted that the Osu customary rule on intestate succession which is applicable in most Ga Adangbe communities amounts to an unlawful discrimination as it sins against the letter and spirit of articles 17 and 18 of the 1992 Constitution.

It is further submitted that the inequality occasioned by the said customary rule is not only discriminatory against women, but also infringes on their right to dignity, which must be inviolable under articles 15(1) and (2).[44] Human dignity means that an individual (in this case, inheriting female children) feels self-respect and self-worth.[45] The customary rule degrades women in Osu and other Ga Adangbe areas to the extent that the rule is premised solely upon their gender, instead of their needs, capacities, or merits.[46] As noted by the Canadian Supreme Court, human dignity within the context of equality does not relate to the status or position of an individual in society *per se,* instead, it relates to the manner in which a person legitimately feels when confronted with a particular law.[47] The question to be asked is this: does the customary rule under evaluation treat inheriting female children (and their own children) unfairly, taking into account all the relevant circumstances

[43] Ibid.
[44] 1992 Constitution, art 15; *Ocansey v Electoral Commission* [2010] SCGLR 575; *Dexter Johnson v The Republic* [2011] 2 SCGLR 601; *Asare v Attorney-General* [2012] GHASC 31.
[45] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 [53]; *R v Kapp* [2008] 2 SCR 483 [19-22], both cases are cited in *Asare v Attorney-General* [2012] GHASC 31.
[46] Ibid.
[47] Ibid.

regarding the individuals affected and excluded by the law?[48] It is submitted that the customary rule indeed violates the equality and non-discrimination clause as well as the dignity of female children in patrilineal communities.

3.3 Ghana's International Obligation

Apart from the constitutional provisions discussed, Ghana has signed and ratified significant international treaties that impose obligations on the State to ensure equality of the sexes and eliminate discrimination against women.[49] Like all other State parties, Ghana is duty bound under Article 5 of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) to eliminate customary rules and practices based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[50] Furthermore, the African Charter guarantees equality before the law and non-discrimination on grounds of sex.[51] In a more detailed rendition, article 18(3) of the Banjul Charter imposes an obligation on Ghana to ensure the elimination of every form of discrimination against women, as well as, the protection of women's rights as stipulated in international conventions.[52] As observed by one author, progressive judges have been known to call such treaty provisions to their aid when domestic legislation on an issue is lacking or unsatisfactory.[53] In *Attorney-General v. Unity Dow,*[54] it was argued that sections 4 and 5 of the Botswanan Citizenship Act, 1984 were

[48] Ibid.

[49] Ghana ratified the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) on 2 February 1986. On January 24 1989 Ghana ratified the African Charter on Human and Peoples' Rights (African Charter). By the formulation of 1992 Constitution, art 75 Ghana is a dualist state. Therefore, international treaties signed by the executive require parliamentary ratification by resolution or Act of Parliament in order to bind the State on the international plane and alter rights and obligations internally. On this point, see *Republic v. High Court (Commercial Division), Accra; Ex Parte Attorney-General (NML Capital and Republic of Argentina-Interested Parties)* [2013-2014] SCGLR 990.

[50] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women* (18 December 1979) UNTS vol 1249, art 5(a).

[51] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* (Banjul Charter) (27 June 1981) (1982) 21 ILM 58, arts 2 and 3.

[52] Ibid art 18 (3).

[53] Kuenyehia (n 31) 401-404.

[54] [1994] 6 BCLR 1.

not unconstitutional because section 15(3) of the Constitution of Botswana did not textually outlaw discrimination on grounds of sex. The High Court reasoned that the grounds on which persons may not be discriminated against as stated in section 15(3) of the Botswanan Constitution were not exhaustive and that, the right to not to be discriminated against because of one's sex is in accordance with the spirit of the Botswanan constitution.[55] The Botswanan Court of Appeal (3-2) affirmed this decision.[56] In a powerful dictum, the learned High Court judge expressed himself thus:

> The time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the ground of sex.[57]

Likewise, in *Ephraim v Pastory*,[58] Mwalusanya J. of the Tanzanian High Court called in aid these treaties. In that case, the appellant filed a suit seeking a declaration that the sale of land by the first[st] respondent was void, as females under Haya Customary Law had no power to sell clan land. The Court held that, the customary law discriminated against women on the ground of sex in violation of the CEDAW, the African Charter, the ICCPR as well as the Tanzania Constitution. In Nigeria, the Court of Appeal in *Mojekwu v. Mojekwu*,[59] overruled the '*oli-ekpe*' custom of the South-East Nigerian which excluded widows from intestate succession to property.

The aforementioned cases illustrate the courts' recognition of the hardships faced by women under customary rules and a clear inclination to decide cases in a manner as to alleviate hardship, thereby protecting the inheritance rights

[55] E K Quansah, 'Unity Dow v. Attorney-General of Botswana – One More Relic of a Woman's Servitude Removed' (1992) 4 African Journal of International and Comparative Law 195, 199.
[56] [1994] 6 BCLR 1, 92, 136.
[57] Ibid.
[58] (2001) AHRLR 236 (TzHC 1990).
[59] [1997] 7 NWLR 283 (CA).

of women and children.[60] Indeed, I wholeheartedly agree with Kuenyehia that, the pro-rights stance taken by the judges in these case reflect a very progressive attitude toward the enforcement of the rights of women which is worthy of emulation by courts all over the African continent, including the Supreme Court of Ghana.[61] Therefore, it is submitted that the failure of the Supreme Court in *Odamtten*, to incorporate these international human rights standards into its ruling is a most regrettable omission.

It is further submitted that, had the Supreme Court applied these international norms in addition to the equality and non-discrimination clause in the 1992 Constitution, there is no doubt that the Court would have arrived at the unimpeachable conclusion: that Roberta Wuta-Ofei, mother of the appellants and her children, the appellants were discriminated against, and their dignity violated by customary law rule which restricted the interest of inheriting female children in patrilineal communities to a life estate, precluding any transfer to their children. On the contrary, the Supreme Court held that there had not been discrimination in terms of Article 17 since on the facts of the case since the appellants continued to have a share of the revenue from the property proportionately with the first respondent. With great deference to the learned justices of the Supreme Court, it is humbly submitted that this holding contradicts the courts earlier holding in the judgment on the issue of estoppel, where it was held that, an arrangement by the family of the parties did not change the family nature of the property and the law applicable to the management of family property which is customary law. In fact, having made the latter pronouncement, it comes as a surprise that the court later held that the mere fact that the appellants continued to be given a share of the revenue from the property meant that there was no discrimination. The customary position as explained above, clearly shows that, the sole surviving male child of a deceased in Osu, a patrilineal Ga Adangbe community takes the property absolutely as if he was a purchaser. Therefore, as alluded to in the paragraphs above, applying the true customary position would mean that the first

[60] Kuenyehia (n 31) 394-395.
[61] Ibid 404.

Respondent being the sole surviving child and a male son of Robert Wuta-Ofei (deceased), he took the disputed property absolutely. It is on this basis that both the Court of Appeal and Supreme Court upheld the sale of the property by the first respondent to the second respondent. It must be reiterated that the appellants as children of Roberta Wuta-Ofei (deceased) obtained no interest in the property under the customary law rule, since their mother had only a life interest in the property, which could not have passed to them upon her death. This means that the continuous participation of the appellants in the revenue from the property proportionately with the first respondent is merely an arrangement by the parties borne out of the 'goodwill and benevolence of the first respondent towards his nephews and nieces', to borrow her Ladyship's words. From the Court's own decision, such arrangements did not change the applicable customary law under which the first respondent was not duty-bound to share the revenue from the property with the appellants. Thus, the first respondent will not be estopped from rescinding from this arrangement in which case the appellants would have no reasonable cause of action to challenge his decision since they have no interest in the property at customary law. All of this boils down to the very foundational issue of discrimination discussed above. Consequently, the issue of discrimination was left open and undecided by the Supreme Court. With the greatest respect to the learned justices of the Supreme Court, *Odamtten* presented a clear opportunity for the court to determine the constitutionality of the Osu customary law rule of inheritance in light of the non-discrimination and equality clause of the Constitution. There could not be a more appropriate case to do justice to the issue.

3.4 Statutory Intervention – Intestate Succession Act 1985 (PNDCL 111)

The injustice perpetrated by the application of customary law rules on intestate succession, required the enactment of laws to ensure gender parity.[62] The legal pluralist approaches to law reform suggest that, when dealing with

[62] Kuenyehia (n 3131) 395.

customary law, the State may choose to reform or conserve customary law or combine the two options.[63] Recognizing that the customary law rules on intestate succession did not sufficiently reflect the increasingly significant role that women play in the household economy, the Ghana enacted the Intestate Succession Law 1985 (PNDCL 111) which came into force on June 14, 1985.[64] As evidenced in the Memorandum to PNDCL 111, the special strength of the Act, is highlighted the prescribed uniform rules for distribution of property upon intestacy irrespective of the type of community to which one belonged.[65] The principal aim of the law is to eliminate all existing discrimination against either spouse and ensure equal rights of women in particular and their dependent children.[66] Therefore, with the passage of the PNDCL 111, the seemingly pernicious effects of these customary law rules on property rights of inheriting female children and grandchildren of man who dies intestate in patrilineal communities have been moderated to a large extent. Since the PNDCL 111 is religion-and-ethnic-neutral, it seeks to substantially limit the application of different customary systems of inheritance in matters of intestate succession in Ghana.[67]

PNDCL 111 has given statutory blessing to the right of children to inherit property from their intestate parents. This time, since the PNDCL 111 is ethnic-neutral, the law confers a right of inheritance on all children of the intestate irrespective of their gender. What is commendable about the Act is that, under section 14, where property devolves on two or more persons under the Act, they are to divide the property among themselves in equal shares.[68] The simple effect of section 14 means that all children, regardless of sex or gender, will receive equal shares in the estate of their deceased parent.[69]

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[63] Ama Hammond (n 8), citing BW Morse and GR Woodman 'Introductory Essay: The State's Options' in *Indigenous Law and the State* (Foris Publication Laws 1988) 5–24; and M Forsyth, *A Bird That Flies with Two Wings: The Custom and State Justice Systems in Vanuatu* (Canberra ANU Press 2009).

[64] Kuenyehia (n 31) 396.

[65] Dowuona-Hammond (n 15) 132-133; Memorandum to the Intestate Succession Act 1985 (PNDCL 111).

[66] Ibid.

[67] Poku Adusei (n 12) 26.

[68] PNDCL 111, s 14.

[69] Kludze (n 14) 189.

Therefore, the sex discrimination in the distribution of inherited property between male and female children under Osu customary law is whittled down by the Act since the law regards all children as equally entitled to succeed to their parents.[70]

However, 'the vestiges of sex discrimination existing under the customary law rule have not been completely extirpated'.[71] This is because of sections 5(d), 6(c), 7 and 8 of the Act by which the devolution of the specific fractions of the residue of the estate is to be governed by customary law. Therefore, the Osu customary rule which excludes children from inheriting their intestate mother will remain applicable in respect of the distribution of the portion of the estate devolving according to customary law.[72] Similarly, the fraction of his estate which is to devolve according to customary will be distributed according to the Osu customary rule and female children will still be discriminated against. Text writers like Professor Kludze have expressed the hope that the statutory directive under section 14 of the Act on equality of treatment of children of both sexes may expedite the total eradication of sex discrimination.[73] Unfortunately, the application of the law does not rest on the subjective hopes of individuals and the fact remains that the total elimination of discrimination against women in the customary law under evaluation has not been achieved by the Act.

The fact that the remnants of the customary law rule remain today is yet another reason why the Supreme Court in *Odamtten,* should have taken up the challenge to completely consign the patently discriminatory custom to the archives. As alluded to earlier, the Supreme Court is given the power to declare any rule of customary law, which is inconsistent with any constitutional provision as null and void.[74] Also, the constitution defines

[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] 1992 Constitution, art 2.

customary law to includes those decided by the superior court of judicature.[75] Therefore, the Supreme Court should have taken the challenge to at least, make judicial customary law[76] as to bring the discriminatory customary law rule in sync with the needs of the modern Ghanaian society.

In light of the foregoing analysis, it would have followed naturally, that if the Act was applied to the distribution of the estate of the late Robert Wuta-Ofei then, the portion of the estate that devolves on his children should have devolved to all his children equally. As such, the mother appellants would have been competent to dispose of her interest in the disputed property *inter vivos* or *post mortem.* In that case, the consent of the appellants would be requisite for a valid alienation of the whole property by the first respondent to the second respondent. However, the part of the estate which was to be distributed under customary law would mean that the discriminatory Osu customary rule would still apply. The foregoing analysis leads to the question whether or not PNDCL 111 applies to the distribution of the estate of Robert Wuta-Ofei (deceased)? The question of retroactivity is considered in the next paragraph.

The effect of section 1 of PNDCL 111 is that the Act is to have prospective effect as it applies generally to the estate of a person who dies intestate on or after 14th June, 1985 which is the commencement date for the Act. However, where the person died intestate before the commencement of the Act on June 14, 1985, but his/her estate had not been distributed before the Act came into force, the Act would apply to the devolution of the estate if there was a pending dispute.[77] In *Odamtten,* Robert Wuta-Ofei died in 1970. For PNDCL 111 to apply to the devolution of the deceased's estate, it is essential to prove that the estate of Robert Wuta-Ofei (deceased) had not been distributed as at 14th June, 1985 when the PNDCL 111 came into force, and that there was a

[75] 1992 Constitution, art 11(2)
[76] A K P Kludze, 'Problems of Intestate Succession in Ghana' (1972) 9 University of Ghana Law Journal 89; Kwamena Bentsi-Enchill, 'Intestate Succession Revisited I (A Comment on Dr. Kludze's Problems of Intestate Succession in Ghana)' (1972) 9 University of Ghana Law Journal 123.
[77] Kludze (n 14) 205.

pending suit in relation to the distribution of his estate at the said date. The Supreme Court found that the administratrix administered the estate in 1976. Since the distribution of the estate of Robert Wuta-Ofei (deceased) had taken place prior to June 4, 1985, it follows that PNDCL 111 was not apply to the distribution of the said estate. Consequently, the Supreme Court held that, the applicable law was the patrilineal system of inheritance since PNDCL 111 would not operate retroactively. To this extent, it is submitted that the decision of the Court is unimpeachable.

4 RETROACTIVE APPLICATION OF THE CONSTITUTION

It is an incontestable principle that the Constitution, 1992 does not operate retroactively unless otherwise stated.[78] It follows that if the Constitution has been held to be prospective and not retrospective in its operation, then articles 17 and 15 of the Constitution, when read together with articles 2(1) and 107 which proscribes retrospective legislation, must also be prospective and not retroactive in its application.

However, it must be pointed out that, nowhere in the judgment of the Supreme Court in *Odamtten* did the Court raise or the address the issue of retroactive application of article 17. In fact, the reason for refraining from deciding the issue on article 17, as stated in the judgment of the Court was that the appellants had not been discriminated against on the facts of the case. The Court then reserved the question of discrimination for a more appropriate case. But as the author has submitted earlier in this paper, there could not be a more appropriate case than *Odamtten* for the resolution of the issue of discrimination. The mere fact that the appellants were permitted to have a share in the revenue from the property did not change the patently discriminatory effect of the customary law. Moreover, it appears that the Supreme Court missed the import of the appellant counsel's submission on discrimination. Whereas counsel argued that the custom was discriminatory

[78] *Ellis v Attorney-General* [2000] SCGLR 24, 44 (Atuguba JSC); *Amidu v. Electoral Commission* [2001-2002] 1 GLR 457, 472-475 (Atuguba JSC); *Omaboe III v Attorney-General & Lands Commission* (2005-2006) SCGLR 579; *Nii Kpobi Tetteh Tsuru III v Attorney-General* [2011] GHASC 20.

against inheriting female children in patrilineal communities, the Court addressed the issue of discrimination from the angle of the appellants who were grandchildren of the deceased. It is submitted that the Court should have addressed the issue of discrimination as against the mother of the appellants who was a daughter of the deceased, and through whom the appellants traced their title.

Assuming that the Supreme Court had held that article 17 of the 1992 Constitution could not be retroactively applied to the facts of *Odamtten*, it may be argued that article 25 of the 1969 Constitution, which was in force at the date when the estate of the late Robert Wuta-Ofei was to be distributed prohibited discrimination on grounds of sex. Thus, the Supreme Court could have made a declaration to that effect. However, it is submitted that the Supreme Court established under the 1992 Constitution, has its jurisdiction clearly defined and it is very doubtful whether the Supreme Court established under the 1992 Constitution can interpret and enforce the Constitution, 1969. Nevertheless, it is submitted that the Supreme Court could have resorted to article 33(5) of the constitution[79] and decided the issue of discrimination by reliance on the international treaties which place obligation on Ghana to eliminate discrimination against women in the area of intestate succession.

5 CONCLUSION

Even though self-acquired property of a deceased man from Osu, a patrilineal Ga Adangbe community, is deemed family property upon death intestate, the relevant customary law is that the children of the deceased inherit the property. Under this system of inheritance, female children obtain only a life interest whilst the male children obtain an absolute interest with the right of alienation. This paper has demonstrated that this customary law rule of inheritance is discriminatory against women in patrilineal communities and by extension, their children who are disinherited. Even though PNDCL 111

[79] 1992 Constitution, art 33(5); *New Patriotic Party v Inspector-General of Police* [1993-94] 2 GLR 459. Under this article the constitutional rights are not exhaustive and the courts may apply those rights that are inherent in a democracy and intended to secure the freedom and dignity of man.

has substantially altered the customary position, the rule still applies to the portion of the intestate estate that devolves according to customary law. Therefore, it has been argued firmly that in the case of *Odamtten,* the Supreme Court should have declared the said rule of customary law to be in violation of the equality and non-discriminatory clauses and Ghana's international treaty obligations. The failure of the Court to rule as such comes as a regrettable omission and a major setback in the fight against discrimination against women. In effect, *Odamtten* is decided and shelved but the customary rule continues to discriminate against women.

APPEALING SENTENCE AFTER THE REPEAL OF A CRIMINAL STATUTE – A CRITIQUE OF *OBENG GYEBI v THE REPUBLIC*

Godslove E. Bogobley[*]

ABSTRACT

This article analyses the principle of legality as formulated in the 1992 Constitution. It argues that the 1992 Constitution, with limited exceptions, forbids the retroactive application of legislation. Further, it critically examines the Supreme Court's attempt in Obeng Gyebi v the Republic to create an exception to the principle of legality. In analyzing the case, it concludes that not only is the Supreme Court's decision inconsistent with the provisions of the 1992 Constitution, but it also goes against public policy considerations. The article then suggests that in light of our constitutional framework, the problem identified by the Supreme Court can only be addressed by use of the prerogative of mercy given to the President under article 72 of the 1992 Constitution.

1 INTRODUCTION

The Criminal Offences Act 1960 (Act 29) is the primary statute on criminal offences in Ghana. Previously, section 149 of the Act provided that robbery was a first degree felony but did not specify the punishment. Thus, the punishment for robbery if convicted under the then section 149 was life imprisonment or any other lesser term.[1]

However, in 1972, the Suppression of Robbery Decree (NRCD 11) was passed. Section 2 provided that persons accused of robbery may be tried summarily

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[1] Criminal and Other Offences (Procedure) Act 30, s 296(1) provides: 'Where a criminal offence is declared by an enactment to be a first degree felony and the punishment for that offence is not specified, a person convicted of that offence is liable to imprisonment for life or any lesser term'.

under the Decree, and if convicted, must be sentenced to either death or life imprisonment and no less. The implication of the passing of the Decree was that there were now two regimes under which persons could be punished for the offence of robbery: Act 29 and NRCD 11. This resulted in inconsistencies with respect to how the offence of robbery was punished.

To remedy these inconsistencies, the Criminal Code (Amendment) Act 2003 (Act 646) was passed to harmonize the punishment for the offence of robbery. Section 149 as amended now provides that the punishment for robbery is a term of imprisonment of not less than ten years, or where an offensive weapon is used, not less than 15 years. However, discrepancies in sentences for the offence of robbery remain because there are inmates in the system who were convicted under section 2 of NRCD 11.

The Supreme Court attempted to remedy one of such discrepancies in *Obeng Gyebi v the Republic*[2] when it reduced the sentence of the appellant on the basis, *inter alia,* that the law under which he was punished (that is, NRCD 11) has been repealed and a new and lesser punishment provided.

With the greatest of respect to the learned Justices in this case, I disagree with the decision of the Court and proffer three reasons for so doing. First, the decision is inconsistent with the 1992 Constitution. Second, the decision undermines the reputation of the criminal justice system if the principle applied is to become common practice. Third, the decision creates an avenue for mischief.

Nonetheless, this case has shed light on a legitimate issue that should not be overlooked. I will thus suggest that since the power of the courts to intervene in this instance has been limited by the 1992 Constitution, recourse may instead be made to the President's prerogative of mercy as provided for in article 72 of the 1992 Constitution.

[2] [2021] DLSC 10765.

The first section of this essay will contain an introduction. In the introduction, I will give a background and explain the necessity of this exercise. In the second section, a summary of the facts of the case and the decision of the court will be provided. I will proceed with my analysis in the third section, discussing my reasons for disagreeing with the decision of the Honourable Court. The fourth section will contain my recommended approach towards resolving the issue at hand. Finally, this essay will be brought to a close in the fifth section with a summary of the entire essay and my conclusions.

2 CASE SUMMARY

2.1 Facts of the Case

The appellant and five others on 1st January 1999 entered a house at Boate near Obuasi, where they met the co-worker of the owner of the house. The robbers ordered him at gunpoint to lead him into the bedroom. They then beat him and the other residents up and made away with cash and gold. Upon complaint to the police, the appellant was arrested and charged under Act 29 but sentenced under NRCD 11.

The case under review was an appeal against the judgement of the Court of Appeal which upheld the life sentence handed to the appellant by the trial court.

The grounds of appeal were, *inter alia*, that the punishment was excessively harsh with regards to the evidence on record, and that the High Court failed to consider any mitigating factors available then.

2.2 Decision of the Court

In allowing the appeal, the Supreme Court pointed out that there was another question to be answered aside the grounds of appeal, although that was not the main issue of contention. The question was: 'what happens when a person

is convicted and sentenced under a provision that is repealed and/or replaced with a reduced sentence while the person appeals the sentence?'

The Court in answering this question proceeded by rehashing the trite principle that an appeal is by way of a rehearing, and went on to state that the law to be applied is the law 'as it is *when the appeal is heard* not as it was when the trial occurred.' (Emphasis mine)

The Court then noted that at the time of the instant appeal, the law governing sentencing had changed from what it was when the appellant was initially sentenced. The Court went on to state that although it would be barred by article 19(11) from imposing a higher sentence (if the new law required), it could reduce the sentence (if the new law imposed a lower sentence) by virtue of section 35(2)(e) of the Interpretation Act 2009 (Act 792). Therefore, since NRCD 11 had been replaced by a law imposing a lower sentence, the appellant was entitled to that lower sentence.

Having regard to the totality of the circumstances of the appellant's conviction and sentence, and the statutory changes aforementioned, the Supreme Court reduced the appellant's sentence from life imprisonment to thirty years from the date of the conviction.

3 ANALYSIS OF THE DECISION OF THE COURT

It is worthy of note that the Court in its decision made reference to other mitigating factors in the case, such as the time spent on remand. However, the focus of this article is on the Court's pronouncement regarding the retroactive application of reduced sentences.

As stated above, I proffer three reasons why I disagree with the Court's decision:

i. The Court's decision is inconsistent with the principle of legality under the 1992 Constitution.
ii. The Court's decision undermines the reputation of the criminal justice system.

iii. The Court's decision provides an avenue for mischief.

These objections will be discussed seriatim.

3.1 The Decision is Inconsistent with the Principle of Legality under the 1992 Constitution

The argument put forward by the Honourable Court is inconsistent with the principle of legality as formulated in the 1992 Constitution.

The principle of legality is expressed in the Latin maxim *nullum crimen sine lege, nulla poena sine lege*, which means there should be no crime or punishment except in accordance with a fixed predetermined law. In the Ghanaian legal system, the principle of legality been variously formulated in the 1992 Constitution, specifically in article 19 clause 5 and clause 11 of article 19 reproduced below:

> (5) A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.
>
> (11) No person shall be convicted of a criminal offence unless the offence is defined *and the penalty for it is prescribed in a written law.*

In sum, article 19(5) mandates that the offence a person is charged with is legally in existence at the time the person commits the offence, while article 19(11) requires a written law of crimes, that is, the creation of crimes in a written form.[3] The import of these provisions is most vividly illustrated in the celebrated case of *Hassan v the* State,[4] where the Supreme Court on appeal

[3] *Tsatsu Tsikata v Attorney-General* [2005-2006] SCGLR 612.
[4] [1962] 2 GLR 1504 (SC).

overturned the conviction of the appellant on the basis that at the time he was arrested, the offence he was charged with had not yet been created by statute.

Thus, it is clear that the criminalization of actions after they have occurred is prohibited by the principle of legality as formulated in the 1992 Constitution. But the question remains: If offence-creating statutes cannot be applied retroactively, can new punishment be applied retroactively under the 1992 Constitution?

An answer for this may be found in article 19(11). It is argued that this provision, when read as a whole, implies that both the offence and the punishment must have been in existence at the time the sentence is given. The Honourable Court reached a similar conclusion when it stated that '…an enhanced sentence under a new law by definition was not prescribed in a written law at the time of the commission of the criminal conduct…'.[5]

This position is reinforced by article 19(6) which reads as follows:

> No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

It is worthy of note that article 19(6) only makes reference to situations where the new penalty is harsher than the old one. No provision is explicitly made for when the new penalty is less harsh than the former, which was the situation in the case under review.

However, it is submitted that the retroactive application of the lesser penalty is also prohibited by the 1992 Constitution. Indeed, the Court, while disagreeing with this position, did recognize its validity. Speaking through Kulendi JSC, the Court said

[5] *Obeng* (n 2).

> This then begs the question, "what happens in a case (such as this one) where the newer mitigating sentencing regime is less harsh than the previous sentencing regime's minimum sentencing guideline?" *Surely, it cannot be said that the older sentencing regime contemplated the less harsh sentence since it explicitly excluded the less harsh sentence.* To those who pose that question, we would first say that that is a very valid question.[6]

In support of my position, recourse may once again be made to article 19(11). As stated above, the import of this provision is that both the offence and punishment must be in a written law at the material time. Thus, any new law providing for a lesser sentence is caught by the provisions in article 19(11) since, in the words of the Court, the new penalty 'by definition was not prescribed in a written law at the time of the commission of the criminal conduct'.[7]

Furthermore, when article 19(11) is examined in light of other provisions in the Constitution, the same conclusion can be drawn. It is trite that as a rule of interpretation, there is a presumption of consistency among the various parts of the Constitution. This was explained in *Nii Nortey Omaboe v Attorney-General & Anor*[8] where Professor T.M. Ocran JSC said, '… if a literal approach would lead to an absurdity, repugnance, or logical inconsistency, then one would have to avoid it and adopt another interpretation because it is presumed that the makers or the document did not intend to create an absurdity or inconsistency'.[9] In other words, a provision of the Constitution should not be interpreted and applied in a manner inconsistent with other relevant provisions of the Constitution.

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[6] Ibid 7 (Emphasis mine).
[7] Ibid.
[8] [2005-2006] SCGLR 579 (SC).
[9] Ibid 5.

Articles 19(5) and (6) all reproduced above provide clearly against the retroactive application of criminal legislation. An even more general prohibition is found in article 107 which provides that:

> Parliament shall have no power to pass any law
>
> (a) to alter the decision or judgment of any court as between the parties subject to that decision or judgment; or
>
> (b) which operates retroactively to impose any limitations on, or to adversely affect the personal rights and liberties of any person or to impose a burden, obligation or liability on any person except in the case of a law enacted under articles 178 to 182 of this Constitution.

Article 107(a) is of particular relevance to the case under review. If the law is that Parliament cannot make a law which has the effect of altering a decision of a court, it implies that any new legislation imposing a lesser sentence cannot be applied to alter a decision of a court which was properly rendered based on the prevailing law at the time.

The Court made haste to rely on the English case of *Da Costa v Cocburn*[10] to say that an appeal is by way of re-hearing and that rehearing entails 'applying the law as of the time the appeal is heard not when the trial occurred'. This proposition however, with great respect to the Honourable Court may not be entirely accurate in light of article 107(a) since the implication would be that the new law passed by Parliament would have indeed altered the properly rendered decision or judgement of the trial court.

Thus, if article 19(11) is to be construed in a manner consistent with articles 19(5), 19(6) and 107 of the 1992 Constitution, then the irresistible conclusion is that the 1992 Constitution prohibits the retroactive application of *all*

[10] (1970) 124 CLR 192.

punishment-creating legislation, including those that introduce lesser sentences for already existing offences.

The Honourable Court, however, sought to escape this conclusion by relying on section 35(2)(e) of the Interpretation Act 2009 (Act 792). There, it is provided as follows:

> (2) Where an enactment repeals or revokes an enactment, in this subsection and in subsection (3) referred to as the "old enactment", and substitutes, by way of amendment, revision or consolidation with any other enactment,
>
> (e) where a penalty, a forfeiture or a punishment is reduced or mitigated by a provision of the enactment so substituted, the penalty, forfeiture or punishment, if imposed or awarded after the repeal or revocation, shall be reduced or mitigated accordingly.

In relying on this provision, the Court came to the conclusion that it could be applied *mutatis mutandis* to situations where the accused has been convicted, but has not exhausted their constitutionally guaranteed right of appeal.

With the greatest of respect, I disagree. First, assuming the Court's reasoning and application of section 35(2)(e) were to be accepted as valid, such reasoning and application would have to be consistent with the 1992 Constitution, since the Constitution is supreme and any act inconsistent with it shall to the extent of the inconsistency be void.[11] However, as has already been demonstrated, the Constitution forbids the retroactive application of all statutes, including punishment-creating statutes. Thus, the Honourable Court's reasoning and application of section 35(2)(e) would be inconsistent with the Constitution and ought not to stand.

It is further submitted that attempting to apply section 35(2)(e) *mutatis mutandis* to the case under review is improper. This is because there is a key

[11] 1992 Constitution, art 1(2).

difference between the scenario envisioned by the said provision, and the scenario in the case. In the former scenario, trial has not been concluded since no sentence has been passed. This is emphasized by the words 'if imposed or awarded after the repeal or revocation'. However, in the case under review, the trial had already been concluded since the appellant had already been convicted and sentenced.

The importance of this distinction was highlighted in the case of *British Airways and Anor v Attorney-General*.[12] In that case, the plaintiffs were on trial in the Circuit Court for breaching the External Companies and Diplomatic Missions (Acquisition or Rental of Immovable Property) Law, 1986 (PNDCL 150). However, PNDCL 150 was repealed in the course of the trial. The plaintiffs thus brought an action in the Supreme Court for a declaration *inter alia* that their continued prosecution was in contravention of article 19(11) of the 1992 Constitution.

In holding for the plaintiffs, the Court placed emphasis on the fact that the trial had not been concluded before PNDCL 150 was repealed. Acquah JSC as he then was, speaking about the effect of article 19(11) on the plaintiffs' case said:

> The use of 'is' clearly shows that the formulation looks beyond the time of the commission of the offence to ensure the legality of what happens thereafter. *If at any stage before the conviction, the law creating the offence and the punishment is totally repealed without any saving, the investigation and proceedings cannot be continued.*[13]

A similar conclusion was reached in *Francis Kodjo Fiebor v the Republic*.[14] The appellant had been convicted of robbery and sentenced. The grounds of appeal were, *inter alia*, that the sentence was harsh in the circumstance of the

[12] [1997-98] 1 GLR 55 (SC).
[13] Ibid 71 (Emphasis mine).
[14] (CA, 10th November, 2011).

appellant. In determining this ground, the Court of Appeal through Dennis Adjei JA stated that:

> This enactment, Act 646, which has done away with life imprisonment and death sentence in robbery cases, I must admit that the appellant cannot take benefit under this Act 646 because of the time of the passage of the Act in 2003; the appellant had already been convicted.

It is submitted that the reasoning in the *British Airways* and *Fiebor* cases is applicable. Section 35(2)(e) clearly contemplates a situation where the punishment for the offence is amended before sentence is imposed. This requirement is so fundamental that the section cannot be applied in a situation where the trial reached its final conclusion (such as this case). Thus, section 35(2)(e) was not applicable to the case under review. The decision of the Court was therefore inconsistent with the 1992 Constitution, in spite of the Court's attempt to avoid the said unconstitutionality.

3.2 The Decision Undermines the Reputation of the Criminal Justice System

I will now proceed to my second argument. The decision of the Court to substitute the (original) punishment for a lesser punishment for an offence that was tried and punished prior to the passing of the new sentencing law undermines the reputation of the criminal justice system. This is because the decision ignores the interests of finality.

'Finality' in this context refers to the interest of the state in preserving a criminal judgement.[15] It may be in respect of the conviction of the accused, or the sentencing of the accused when convicted. Regarding when a judgement can be said to be final, some scholars are of the view that the judgement is final when the appellate process has been exhausted.[16] But many criminal

[15] Ryan W Scott, 'In Defense of the Finality of Criminal Sentences on Collateral Review' (2014) 4 Wake Forest Journal of Law & Policy 179.
[16] Ibid.

trials do not go beyond the trial court. It is therefore fair to add that a criminal judgement is final if the timeframe within which to appeal lapses and no appeal has been made. In Ghana therefore, the judgement is final if no appeal is made within a month.[17]

Finality is essential to the reputation of the criminal justice system. In a criminal trial, the general public has an interest in the outcome, since the wrong is not just against the victim, but society as a whole. It is therefore imperative that the general public maintains confidence in the criminal justice system. However, subjecting the final outcome of a criminal trial to uncertainty affects the confidence of the public in the criminal trial process, since the public wants a visible, transparent and conclusive end to proceedings. As was memorably stated in an American case:

> No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.[18]

It would be manifestly difficult to maintain confidence in the criminal justice system if persons already sentenced can go to Court for a reduced sentence merely on the basis that Parliament has introduced a new punishment for that offence - punishment which did not exist at the time the convicted persons were sentenced. This is because the lack of finality implies a lack of confidence within the system about the possibilities of justice, a sentiment that would ultimately rub off on the persons the system is supposed to regulate.[19]

Furthermore, the deterrent value of criminal law, which contributes to the reputation of the criminal justice system, is also affected by the decision of the

[17] Criminal and Other Offences (Procedure) Act 30, s 325(1) provides that 'An appeal shall be entered within one month of the date of the order or sentence appealed against'.
[18] *Mackay v United States* 401 U.S. 667, 691 (1971) (Harlan J).
[19] Paul Bator, 'Finality in Criminal Law and Federal Habeas Corpus for State Prisoners' (1962) Harvard Law Review 76, 441.

Court. Deterrence, together with other utilitarian ideals are used as indices to evaluate the effectiveness of the criminal justice system. The point here is simple. Deterrence is an important foundation of the criminal justice system; indeed, it is one of the aims of punishment.[20] Hence, it stands to reason that its ability to deter crime is a factor in the reputation accorded to the system as a whole.

However, when the interests of finality are ignored, such as in the case under review, the deterrent value of the criminal law is reduced. Certainty of punishment is a crucial element of effective deterrence.[21] Potential offenders are better deterred if it is unequivocal that they would face exactly the sanctions in place at the time should they commit the offence. A reduction in this certainty provides less incentive for such persons to obey the law. In sum, finality is essential to the deterrence of criminal law, which in turn is a contributing factor to the reputation of the criminal justice system because deterrence is an indicator of its effectiveness.

It has however been argued by some scholars that the reputation of the criminal justice system is not undermined if a lesser punishment is applied retroactively.[22] According to this view, the public does not care much if a lesser sentence is applied retroactively, as long as the conviction remains intact.

Nonetheless, this view is unpersuasive. The public is as vested in the punishment given to the convict as the conviction itself. Of what is significance is a conviction to an ordinary person if the person convicted of a crime today is walking free tomorrow? Take for instance, a case where a person is on trial for murder. Any person, although ignorant of the specific stipulations of the law, is likely to be aware that the punishment for murder involves going to prison for a long time. Imagine further that the person after

[20] *Kwadu v the Republic* [1971] 1 GLR 272 (HC).
[21] Bator (n 19).
[22] Sarah French Russell, 'Reluctance to Resentence: Courts, Congress, and Collateral Review' (2012) North Carolina Law Review 91, 79.

trial has been convicted, sentenced and has spent fifteen years in prison, but a new law is then passed reducing the punishment for murder to ten years. Per the decision of the Court, this new punishment applies to the convict, and he is entitled to immediate release. However, the reputation of the system would be in question because in the eyes of the public, the convicted person would not have been sufficiently punished by the courts, in spite of the conviction.

3.3 The decision creates an Avenue for Mischief

I shall now proceed to my third and final argument disagreeing with the decision of the Court. It is submitted that the decision of the Court in the case under review creates an avenue for the occasion of mischief in the criminal justice system. Such mischief may manifest in different ways.

First, the principle that a reduction in sentences should apply retroactively, if accepted, would afford Parliament the opportunity to interfere with the workings of the criminal justice system. In theory, Parliament would be able to directly alter the judgement of a court in a criminal case by reducing the sentence or even repealing the offence for which the person was convicted. I understand any scepticism that the reader may have towards the possibility of this mischief occurring, but a similar phenomenon has in fact happened in Ghanaian jurisprudence. In *Balogun v Edusei,*[23] after Hon Krobo Edusei, Minister of the Interior, and another person had been found to be in contempt of court, the legislature at the time passed an Act for the sole purpose of indemnifying the two individuals.

The framers of the 1992 Constitution have sought to prevent this mischief through the formulation of article 107 which provides that Parliament shall have no power to pass any law to alter the decision or judgment of any court as between the parties subject to that decision or judgment**.** Yet, the Court

[23] (1958) 3 WALR 517 (HC).

through this decision is inadvertently offering Parliament the opportunity to do just that.

Furthermore, the decision of the Court may occasion mischief among convicted and sentenced persons who seek to escape full punishment for their offence. The point here is that every time the punishment for an offence is reduced, the retroactive application of the new rule will result in an increase in appeals and applications by inmates trying to take advantage of the new rule. In other words, the decision of the Court has the potential to open the floodgates which would lead to mischief. This concern is also not without basis. In the American case of *Ring v Arizona*,[24] Justice O'Connor noted that the introduction of a new rule in a previous case had resulted in a seventy-seven percent increase in the number of habeas corpus petitions filed in federal courts.

Mischief is also occasioned when one considers the fact that article 14(5) of the Constitution requires that 'A person who is unlawfully arrested, restricted or detained by any other person *shall be entitled to compensation from that other person.'* The retroactive application of the law as proposed in the case under review can lead to a situation where we may have persons falling in this bracket. Does the State compensate such persons? For example, A was convicted of crime X and sentenced to twenty years' imprisonment based on the law at the time the offence was committed. A new law reduces the sentence for that offence to a maximum of fifteen years. By the time the new law was passed, A had spent seventeen years in prison. He takes advantage of the new law and he benefits from it. It is clear that based on this scenario, A would have spent two years more in prison than what is prescribed by the new law. Is A entitled to compensation from the State? It is submitted that the Ghanaian criminal justice system should be guided by such policy concerns against potential mischief, especially in the light of limited resources available.

[24] 536 U.S. 584 (2002).

4 THE WAY FORWARD

In spite of the objections raised to the decision of the Supreme Court under review, the issue identified by the Court is a legitimate one that cannot be ignored. In this section, I shall proceed to offer solutions to the issue.

4.1 The Prerogative of Mercy

In my opinion, though the courts should not and cannot remedy the issue in light of our unique constitutional framework and other policy concerns, the Constitution does not leave persons such as the appellant in this case without an avenue for potential relief.

The 1992 Constitution in article 72 gives the President the prerogative of mercy. Article 72(1) provides as follows:

> (1) The President may, acting in consultation with the Council of State,
>
> (a) grant to a person convicted of an offence a pardon either free or subject to lawful conditions;
>
> (b) grant to a person respite, either indefinite or for a specified period, from the execution of punishment imposed on him for an offence;
>
> (c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or
>
> (d) remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.

The scope of this power was discussed in *Agbemava v the Attorney-General*.[25] The Supreme Court held that the prerogative of mercy could be exercised in

[25] [2018] GHASC 52.

respect of any criminal offence under Ghanaian law, and that such the exercise of such power could not be questioned by the courts unless it infringed on other provisions of the 1992 Constitution.

I am of the opinion that the prerogative of mercy is the appropriate way to address the discrepancy in sentences identified by the Supreme Court in the case under review for the following reasons. First, it is not in conflict with the principle of legality as formulated in the 1992 Constitution, since the exercise of this power does not *change* the punishment given but rather *forgives* the convicted person. Thus, the person remains punished in accordance with the prevailing law at the time of conviction and sentencing.

Second, the discretionary nature of the prerogative of mercy acknowledges that the inmate is not entitled to a reduced sentence by virtue of the fact that there is a statutory change in the punishment for the offence for which he was convicted. The President in consultation with the Council of State exercises this power only in circumstances he sees fit, and the reduction of sentences might be one of such circumstances. This discretionary nature preserves the reputation of the criminal justice system since it does not suggest an inconsistency in the punishments handed down by the courts. Indeed, the Supreme Court in the *Agbemava* case hinted at this when it said, 'it must be pointed out that the exercise of this power in this country has never been subjected to the test whether or not there was a mistake in the court's decision which the pardon sought to rectify… Article 72 does not impose or even imply any such condition'.[26]

Furthermore, the mischief discussed in the preceding sections is curbed since the exercise of this power would not amount to the alteration of a judgement by Parliament. The convicted person who benefits from the exercise of the prerogative of mercy would also have no legitimate claim to compensation because the detention would still be lawful.

[26] Ibid.

4.2 Suggested Approach

With respect to the specific situation in the case under review, I suggest that the Ghana Prisons Service should compile a list of the inmates sentenced under NRCD 11 and immediately recommend them to the President for exercise of the prerogative of mercy.

Going forward, I suggest that the Prisons Service creates a comprehensive database containing information about the prisoners, the offences they were convicted for, and the statutes under which they were sentenced. With this database in hand, the Prisons Service should be notified of any statutory changes to punishments for existing offences.

When the Prisons Service is duly notified of any changes made to punishments by Parliament, the Service should cross-reference the statutory changes with the available information in the database and determine the inmates convicted under the statutes which have been amended. When this is done, the Prisons Service Council should then recommend that the President exercise the prerogative of mercy in favour of such persons, on the bases of the statutory changes and other factors such as good conduct.

5 CONCLUSION

In this paper, I have endeavoured to demonstrate that the decision of the Supreme Court in the case under review cannot be correct in the light of our constitutional framework and is problematic in the light of policy considerations. I have then sought to show that the prerogative of mercy is the appropriate way to go in our peculiar circumstances, and have given suggestions as to how the issue identified by the Court can be remedied.

MANDATORY ALTERNATIVE DISPUTE RESOLUTION (ADR): A WORTHWHILE APPROACH TO RESOLVING LAND DISPUTES UNDER ACT 1036

Paul Obeng Atiemo[*]

ABSTRACT

In an effort to expedite dispute resolution, decongest the law courts and to provide for other forms of voluntary dispute settlement in Ghana, the Alternative Dispute Resolution Act 2010 (Act 798) was passed. The Land Act 2020 (Act 1036) has made it mandatory for aggrieved persons in certain land related disputes to at first instance attempt settlement of their dispute in accordance with Act 798 before resorting to the law courts. This article identifies some of the land related disputes provided for in the Land Act 2020 (Act 1036) for which parties are obliged to first attempt a resolution by ADR before proceeding to the law courts. The settlement of dispute outside the court system have proven to be an effective and efficient option to dispute resolution in Ghana and with its introduction as the first option to land related disputes, it is expected that the resolution of certain categories of land related disputes would be expeditious and cost effective.

'Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough'. ǂAbraham Lincoln. [±]

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[±] Abraham Lincoln, 'Notes for a Law Lecture' in Roy P Basler, Marion Dolores Pratt and Lloyd A Dunlap (eds), *The Collected Works of Abraham Lincoln, vol 2* (Rutgers University 1953) 82 <https://quod.lib.umich.edu/l/lincoln/lincoln2/1:134.1?rgn=div2;view=fulltext;q1=peoria > accessed 1 September 2022.

1 INTRODUCTION

Before the advent of the colonial system of justice delivery, native wisdom had established elaborate and effective dispute resolution systems. Mediation, negotiated settlements to mention a few were the mainstream dispute resolution processes employed by native Ghanaians to resolve their disputes.[1] Land cases were resolved in the native courts presided over by the native authorities such as a chief or an "odikro" of the area and his elders. Dispute resolution at the level of the native courts were resolved expeditiously and with the active participation of the parties. Since the colonial masters assumed control of Ghana, then Gold Coast, the mode of dispute resolution has been the adversarial system characterized by litigation. Litigation as a means of dispute resolution is adversarial, highly aggressive, confrontational and very expensive. Expensive in two ways: it is monetarily expensive and time consuming. Delivering the lead judgement of the Supreme Court in the case of *Adu v. Kyeremeh*,[2] Adade JSC stated that:

> It is a serious indictment on the administration of justice in this country that a case [land related] of such simple dimensions should take as long as 26 years to see itself through the courts. It started in November 1960; it is now, in April 1987, being given hopefully its final farewell. 24 out of these 26 years were spent in the Court of Appeal alone. When in 1981, in Abba v. Nframa, Supreme Court, 30 November 1981, unreported, I came upon a similar situation, I whined. That case took twelve years. This one is worse.[3]

Nene Amagatcher argued that the resolve of Ghana to explore alternative means of dispute resolution by the passage of the Alternative Dispute

[1] Nene A O Amegatcher, 'A Daniel Come to Judgment: Ghana's ADR Act, a Progressive or Retrogressive Piece of Legislation?' Ghana Bar Association Annual Conference Continuous Legal Education Workshop 20 September 2011 <http://mariancrc.org/wp-content/uploads/2014/08/GHANA-BAR-ASSOCIATION-ANNUAL-CONFERENCE1.pdf> accessed 1 September 2022.

[2] [1987-88] GLR 137 (SC).

[3] *Adu v Kyeremeh* [1987-88] GLR 137 (SC) 138 (Adade JSC).

Resolution Act 2010 (Act 786) is 'a Daniel that has come to save our judicial system from drowning under the weight of the huge backlog of cases, interminable delays, high costs and unsuspected litigants unwilling to try other alternative systems of dispute resolution'.[4] Act 786 introduces three main means of dispute resolution including mediation, negotiation and arbitration. It is worth a note that the Alternative Dispute Resolution (ADR) Act also recognizes customary arbitration.

Ghana's judiciary has adopted the use of ADR as a viable means of dispute resolution by the introduction of 'Court Connected ADR' and/or 'ADR week' as a strategy to clear the backlog of cases that weighs down the courts. As regards court connected ADR, Magistrates or Judges may on their own or at the request of the parties to a case, refer cases before them to ADR offices set up by the Judiciary to mediate and attempt settlement of the dispute.[5] Since 2007, a week in each legal year is set aside by the Chief Justice to create mass public awareness in order to educate the citizenry on the use of ADR to settle disputes.[6] Speaking on the success of the Court Connected ADR for the year 2019, the Judge in charge of ADR, Justice Irene Charity Larbi disclosed that out of a total of 6,209 cases listed for mediation, 3,041 of the cases were settled amicably representing 49 per cent settlement rate.[7]

Recognizing the above benefits of ADR, the drafters of Act 1036 have included ADR mechanisms as a means of settling disputes. Act 1036 sets out various instances in which aggrieved persons in a land dispute may submit at first instance to the resolution of their cases in accordance with Act 798, before commencing legal action in a court of law. It follows then that an aggrieved person in some land-related disputes may not at first instance commence legal action in the law courts unless they have exhausted the processes of

[4] Amegatcher (n 1) 3.

[5] Interview with Charles Turkson, Greater Accra Regional ADR Coordinator, Judicial Service of Ghana (Accra, February 17, 2021).

[6] Justice A Tandoh, Speech at the launch of ADR week in Accra on 1 December 2015 <www.modernghana.com/amp/news/659162/alternative-dispute-resolution-adr-week-launched.html> accessed 18 April 2021

[7] Grace Senam Klay, 'Ghana: Judicial Service Launches 2020 ADR Week in Ho' *Ghanaian Times* (Accra, 13 March 2020) <https://allafrica.com/stories/202003160439.html> accessed 25 May 2021.

Alternative Dispute Resolution (ADR). A Court of law would thus dismiss such land related disputes that comes before them at first instance from the 23rd day of December 2020, when the Land Act 2020 (Act 1036) was gazetted.

2 INSTANCES THAT ENJOIN THE USE OF ADR UNDER ACT 1036

The following are some of the instances under the Land Act 2020 (Act 1036) where parties to land related disputes are to first attempt settlement of their dispute via ADR before they proceed to the law Court for redress.

2.1 Dispute as to Compensation over Damaged Land

Act 1036 vests authority in the Lands Commission to give written authorization to any official or licensed surveyor to enter upon any land to carry out demarcation or survey work.[8] If the said official in the performance of his duties causes damage to the land, the occupier is entitled to be compensated by the Lands Commission in an amount commensurate with the assessed value of the damage caused.[9]

Accordingly, section 25 of Act 1036, *inter alia*, provides that a person who is dissatisfied with the value assessed for compensation may apply to the Lands Commission for a review of the assessed values and where they are still dissatisfied after the review, they may submit the matter for resolution under Act 798. It follows then that although aggrieved persons are entitled to commence legal action in court over the amount of compensation assessed, it is expected that they first exhaust the processes of alternative dispute resolution before proceeding to court.[10]

[8] Act 1036, s 24(1).
[9] Ibid s 25(2).
[10] Ibid s 25(5).

2.2 Dispute as to Compensation over Damaged Land Caused by a Concessionaire

Where the Lands Commission (acting on behalf of the State) grants a land concession in a locality to a person, the law confers on the concessionaire, the right to enter the land for purposes of survey or feasibility studies.[11]

However, where damage is caused to an adjoining land or property as a result of the entry by the concessionaire, compensation must be paid to the affected owners. If a dispute arises as to the amount to be paid in compensation by the concessionaire to the owners of the damaged property or land, Act 1036 provides for such concerned persons to first, petition the Lands Commission for redress. If the claimant(s) is dissatisfied with the decision of the Lands Commission, the matter may further be referred for settlement by arbitration under Act 798. To this end, Section 241 (5) of Act 1036 provides:

> On an entry under subsection (1), the authorized person [concessionaire], staff or workman shall pay for any damage caused by the entry and in case of a dispute as to the amount to be paid either that authorized person, staff or workman or the person claiming compensation may refer the matter to the Lands Commission and subsequently where that person is dissatisfied with the decision of the Lands Commission, that person may resort to arbitration under the Alternative Dispute Resolution Act, 2010 (Act 798).

2.3 Dispute as to Compensation or Restoration

Under Act 1036, the President may by executive instrument authorize the temporary occupation and use of a land for a period not exceeding five years subject to the payment of compensation assessed on rental terms.[12] After the expiration of the five years temporary occupation or use, the president has

[11] Ibid s 241(1).
[12] Ibid ss 271(1)-(4).

three options, first, to renew the temporary occupation or use of the land for a further period of five years term; second, to compulsorily acquire the land in accordance with Article 20 of the 1992 constitution or thirdly, restore the land to the condition that it was and give it back to its owners.[13] Where the state elects to give back the land but fails to restore the land to its previous condition, the law enjoins the state to pay compensation to the affected persons in lieu of the restoration.[14]

Where there is disagreement between the State and the owners of the property as to the condition of the property or over the amount to be paid as compensation in lieu of the restoration, Section 274 of Act 1036 provides that 'the Lands Commission shall refer the matter for resolution under the Alternative Dispute Resolution Act, 2010 (Act 798)'.

2.4 Dispute as to Compensation over Compulsorily Acquired Land by the State

Article 20 of the 1992 Constitution recognizes the eminent domain power of the State. That is to say, the State may in the public interest compulsorily take possession of or acquire a private land and convert it for pubic purpose on stated grounds provided for in law. Where the state exercises its power of eminent domain, prompt payment of fair and adequate compensation has to be paid to the owners of the land.[15] A person with interest in or right over the land has a vested right of access to the High Court either directly or on appeal from any other authority for the determination of his interest or right and the amount of compensation to which he is entitled.[16] Accordingly, section 239 of the Act 1036 provides that compulsory acquisition by the State must follow the proceedures provided in sections 240 to 249 of Act 1036.

[13] Ibid ss 271(4)-(5) and 273.
[14] Ibid s 273.
[15] Constitution 1992, art 20(2)(a).
[16] Ibid, art 20(2) (b).

Where persons whose property has been compulsorily acquired are dissatisfied with the amount assessed and paid to them as compensation, Act 1036 *inter alia* provides that such persons should first appeal for review of the assessed value (of their 'lost land or property') to the Lands Commission and if still dissatisfied after the review, further refer the matter for settlement in accordance with Act 798.[17]

It is important to note that as an exception to the general rule of mandatory ADR under the Act 1036, even though Section 253(3) provides for aggrieved persons to settle disputes as to compensation over compulsorily acquired lands by means of ADR, the said section 253 (3) does not take away the right of a person to seek redress at the High Court.[18] This is consistent with article 20 (2) (b) of the 1992 Constitution of Ghana.

2.5 Dispute as to Conflicting Claims of Interest and Rights over Compulsorily Acquired Lands

Where the state exercises its eminent domain powers in accordance with Article 20(2) of the 1992 Constitution and there are rival claims as to the ownership of the parcel of land acquired, the law enjoins the disputed parties to at first instance, settle the dispute in accordance with Act 798.[19] But this does not take away the right of a claimant to resort to the High Court in accordance with 20(2)(b) of the Constitution.[20]

2.6 Dispute as to the Renewal of Leased Lands

Another instance where Act 1036 requires parties in a land dispute to first attempt settlement of their dispute outside the courtroom litigation is where a dispute arises between a lessee and lessor over the terms for the renewal of a leased land.[21] In this regard, Act 1036 inter alia provides that where a bare

[17] Act 1036, s 253(3).
[18] Ibid s 253(4).
[19] Ibid ss 250 and 254(1).
[20] Ibid s 254(2).
[21] Ibid s 50(15).

land was leased to a person and the lessee, who is an indigene of the area, has developed the land for residential purposes; a farm of perennial crops on the land; or a commercial or industrial property on the land, the said lease on the expiry of the term shall be subject to automatic renewal.[22] Where there is however disagreement as to the new terms of the renewal of the lease, the parties must first attempt to settle the dispute in accordance with Act 798 before they resort to a court of law.[23] The effect of section 50(14)-(16) of Act 1036 is that, a person cannot commence legal action in court at first instance over a dispute involving the renewal of leased land unless an alternative means of dispute resolution as provided for in Act 798 is exhausted.

2.7 Dispute as to the Position of a Boundary within a Registration District

Under section 91(2) of the Act 1036, in any uncertainty or dispute a regarding land boundary in a registration district, the Land Registrar is enjoined to advise the claimants to refer the dispute for resolution under Act 798 for the purpose of the determination and indication of the position of the boundaries. Consequently, until such time as the settlement under Act 798 has been exhausted, a court has no jurisdiction to entertain an action concerning a dispute as to the boundaries of a parcel within a registration district.[24]

2.8 Dispute as to Land in a Registration District

Section 98(1) of Act 1036 also obliges parties in a land dispute in a registration district to first attempt settlement of their dispute by ADR before resorting to the law courts. Consequently, land related disputes involving lands particularly in the Greater Accra region and parts of other regional capitals of Ghana (which are declared registration districts) must be commenced first by ADR.

[22] Ibid s 50(9).
[23] Ibid s 50(16).
[24] Ibid s 91(4).

2.9 Disputes as to Conflicting Claims of interest in Land in a Title Registration District

In respect of conflicting claims of interest in land by two or more persons in a title registration district, Section 115(1) of Act 1036 requires the claimants to seek resolution of the dispute under Act 798 on the directions of the Land Registrar. Consequently, until the process for resolution referred to in this section has been exhausted, a court shall not entertain an action in respect of conflicting claims.[25]

2.10 Appeals from the Decision of the Regional Lands Commission

Section 102(3) of Act 1036 *inter alia* enjoins the Lands Registrar not to register a large-scale disposition of a stool or skin land, or clan or family land unless the Regional Lands Commission in accordance with articles 36(8) and 267(3) of the 1992 Constitution gives its consent and concurrence to the disposition. The combined effect of articles 36(8), 267(3) and 267(4) of the 1992 Constitution is that, the Regional Lands Commission may refuse to consent or concur for the registration of a large tract of stool, skin, family or clan lands on grounds that (i) registration of the said land would amount to a breach of their fiduciary role to their subjects and (ii) that the disposition is not consistent with the development plan of the area concerned.

Where applicants, in respect of clan or family lands, are dissatisfied with the decision of the Regional Lands Commission to give consent or concurrence to enable the Land Registrar to register their interest in land, section 102(7)(a) of Act 1036 obliges such aggrieved persons to settle the dispute in accordance with Act 798. On the contrary, where the Regional Lands Commission refuses consent for the registration of a large-scale disposition involving stool or skin lands, section 102(7)(b) of Act 1036 in accordance with article 267(4) of the 1992 constitution entitle the aggrieved persons to challenge the refusal at first instance in the High Court.

[25] Ibid s 115(2).

2.11 Refusal by the Land Registrar to register land at first registration

Again, Section 106 of Act 1036 *inter alia* vest authority in the Land Registrar to reject an application for first registration by a person whose claim of a land is founded on an instrument on stated grounds. Further to the above, when a person's application for first registration is rejected by the Land Registrar, he is obliged at first instance to appeal to the Lands Commission in the region where the land is situated for redress. If the aggrieved person is dissatisfied with the decision of the Regional Lands Commission, he may refer the matter for resolution in accordance with Act 798 before heading to the law courts.[26]

2.12 Dispute as to Refusal by the Land Registrar to Register a Lease

Where a lease is made in breach of an obligation binding on the grantor, it has no effect and the Land Registrar may refuse to register it. An applicant who is dissatisfied with the decision of the Land Registrar to refuse registration of the lease shall then refer the matter for settlement alternative to courtroom litigation under the ADR Act.[27]

2.13 Dispute as to Refusal by the Land Registrar to Register a Land

Act 1036 confers authority on the Land Registrar to register interests or instruments affecting lands into the land register. Again, the Land Registrar is mandated under section 223 of Act 1036 to refuse to register an instrument affecting a particular land on grounds stated in the law. A person who is aggrieved by the decision of the Land Registrar not to register their interest in land or instrument is obliged to at first instance seek redress in accordance with Act 798.[28]

[26] Ibid s 107(4).
[27] Ibid s 143.
[28] Ibid s 225 (5) and (6).

2.14 Dispute as to the Refusal of a Lessor to Give Consent for the Assignment of Lease

Another instance where parties in a land dispute may first attempt settlement alternative to courtroom litigation is in respect of the registration of a lease which contains an agreement (express or implied), that the lessee shall not deal with or transfer the property without the written consent of the lessor. Where the lessor's consent is not obtained, the registration would be refused and lessee who is dissatisfied with the refusal, may refer the matter for resolution under Act 798.[29]

2.15 Errors Made During Rectification by the Land Registrar

Act 1036 inter alia vests authority in the Lands Registrar to rectify the land register or an instrument presented to him for registration on stated grounds.[30] Where the decision of the Land Registrar to rectify the land register is either not founded in law and/or affects the interest of a person, the Land Registrar may be challenged by the dissatisfied party. To this end, section 194(5) of Act 1036 provides, 'A person who is dissatisfied with a decision of the Land Registrar under this section may refer the matter for resolution under the Alternative Dispute Resolution Act 2010 (Act 798)'. It follows then that a person whose interest in land is affected by the decision of the Land Registrar to rectify the land register is expected to at first instance exhaust the process of ADR before resorting to the law courts.

[29] Ibid s 142(3).
[30] Ibid s 194(1).

2.16 Dispute as to the Award of Indemnity by the Land Registrar

Section 196 of Act 1036 provides that, subject to the Limitation Act and any other law, a person is entitled to be indemnified by the State if his or her property is damaged or is prevented from acquiring land or an interest in land, as a result of errors in the land register or a certified copy or an extract from the register or by reason of a mistake in the register which cannot be rectified under the law. The decision as to whether a right of indemnity has arisen as well as the award and cost incurred under section 196 is vested in the Lands Commission when an application is made to it by an affected party. It follows then that an applicant who is dissatisfied with the decision of the Lands Commission (as to an award or cost incurred or if their right to claim indemnity has arisen), may at first instance settle the dispute outside courtroom litigation before commencing legal action in court.[31]

2.17 Review and Appeal of the Decision(s) of the Land Registrar

The general position of the law is that, where a State official fails or refuses to perform a duty imposed on him by law, an aggrieved person may resort to a court of law and seek an order to compel such official to perform such duty imposed by law. On the contrary, the Act 1036 enacts that where the land registrar fails or refuses to perform a duty imposed on him by law; or a person is dissatisfied with any decision by the Land Registrar (in the performance of his duties), such aggrieved person is obliged to at first instance, attempt settlement alternative to courtroom litigation. That is to say, a person dissatisfied with the decision or conduct of the Land Registrar is required to, first, petition the Lands Commission for redress; if the concerns are not resolved, the matter may further be referred for settlement in accordance with Act 798.[32]

[31] Ibid s 198.
[32] Ibid s 201.

3 OBSERVATION

According to Justice Sir Dennis Dominic Adjei, A Ghanaian Court of Appeal judge, this is the first time that ADR resolution mechanisms have formed an integral part in resolving land disputes.[33] The learned Justice further stated that under the repealed laws that governed land administration in Ghana, the closest provisions that came to ADR was the role of the "tribunals" established by the Land Commission to settle land related disputes.

The current position of the law is that certain land disputes should not be commenced at first instance in the court of law unless and until the procedures for the resolution of disputes under Act 798 have been exhausted. Consequently, the courts it is more likely than not that the courts will decline jurisdiction in respect of such disputes until there is evidence that the ADR process for resolution has been exhausted.

A common phrase that appears in Act 1036 is that disputes, at first instance, be settled 'in accordance with the Alternative Dispute Act, 2010 (Act 798)'. Consequently, parties in a land dispute may elect to settle their differences either by negotiation, mediation, arbitration or customary arbitration.

It is also observed that Act 1036 did not take into consideration what happens when a party to a dispute fails to attend or give consent for the dispute to be settled by way of ADR. The concept of ADR requires that both or all parties agree for their dispute to be settled by means of ADR. Where, for instance, the petitioner or the Lands Commission in accordance with Act 1036, refers a dispute to ADR but the respondent fails to attend the ADR sessions, by the rules of ADR, the respondent cannot be compelled to attend the sessions. Consequently, the petitioner would have to resort to the law court for redress and even compel the attendance of a defendant by a court order. Indeed, the

[33] Speech delivered at the Inaugural Lecture of the Land Act 2020 (Act 1036) held at the Conference Room of the Ghana Academy of Arts and Science and under the theme 'the Changing Trends in Land Law, Policy, Governance and Management under the Land Act 2020 (ACT 1036)' on 29 April 2020.

action would in my view be lawful because at that stage, the processes of ADR would have been exhausted.

It is again observed that the drafters of the Act 1036 proceeded on the assumption that an Alternative Dispute Resolution Centre (ADR centre) as stated in Act 798 exists although such a Centre does not currently exist. The ADR Centre according to section 115(1) of Act 798 is to facilitate the practice of ADR without being involved in the actual resolution of a dispute. It follows then that persons who elect to settle their dispute in accordance with Act 798 may apply to the ADR Centre and request for their assistance to resolve their dispute.

In an effort to operationalize and promote the settlement of dispute outside of courtroom litigation, the Judiciary has established an ADR Centre within its institutional set up and has appointed officers to ensure its functioning.

The Lands Commission in coming up with a legislative Instrument (L.I) to operationalize the Lands Act 2020 (Act 1036) may take a cue from Ghana's Judiciary and establish an Alternative Dispute Resolution Centre within its institutional set up with the object to facilitate the resolution of dispute in accordance with Act 798.

There are also other private individuals and organizations that may serve as centres to assist parties resolve disputes including the Ghana Arbitration Centre, Ghana Association of Chartered Mediators and Arbitrators (GHACMA), Gamey & Gamey Academy of Mediation and the West Africa Dispute Resolution Centre (WADREC).

4 CONCLUSION

ADR mechanisms such as negotiation in its various forms, mediation and arbitration have been in use for some time now and are fast gaining popularity as a preferred methods of dispute resolution. Parties who have gone through some ADR processes like mediation acknowledge their satisfaction and trust in the process.

The success story of the various ADR processes practiced over the years including Court Connected ADR, the ADR Week of the Judicial Service, just to name a few gives hope that the mandatory ADR provisions in the Land Act 2020 (Act 1036) would go a long way to reduce the frequency of land related legal suits that are brought before the law courts.

IS THE VICTIM VICTIMIZED? THE VICTIM IN THE PLEA BARGAINING PROCESS IN GHANA

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ABSTRACT

This article examines plea bargaining as envisaged in the Criminal and Other Offences (Procedure) (Amendment) Act, 2022 (Act 1079). The article reviews the rights and roles of the victims in the plea bargaining process and further investigates whether victims are accorded the right to participate in the plea bargain process at any stage or are made to play the role of 'good Victorian children' (i.e., seen but not heard). The article concludes that the plea bargain is a step in the right direction. However, in order not to create doubts for victims over the appropriateness of the plea bargain, this note suggests that the prosecutor must furnish the victim with a written statement that succinctly defines the plea bargain offer. It is believed that the article can evoke debate and have positive contributions in shaping the law on plea bargaining in Ghana.

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1 INTRODUCTION

The entire legal profession has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers – healers of conflicts.[1]

For every crime committed, there are at least two victims: it is a wrong committed against an individual and against the society. The society suffers a violation of its laws, and the actual victim suffers an injury to person or property. Despite this, the State in our criminal Justice system is clothed with the powers to commence, maintain or discontinue criminal prosecution.[2] The failure to allow victims to play a meaningful role causes victims to be victimized twice; first by the crime and then by the system.

Victims have become dissatisfied that they have been alienated by the system. The danger of a high level of victim dissatisfaction is that victims will become discouraged from future participation in the criminal justice system. The evidence suggests that this is not an idle concern. Researchers noted in one study that the more experience victim witnesses had with the courts, the more reluctant they were to have any subsequent involvement with the criminal justice system.[3]

The concept of plea bargaining was started in the USA but has now gained international recognition.[4] It has spread its roots from USA to most of the world and every major country has accepted this concept entirely or in parts.[5] After the

[1] Warren E Burger, 'The State of Justice' (1984) 70 ABA Journal 62, 66

[2] 1992 Constitution, art 88(3) gives the Attorney-General, the power to initiate and conduct all prosecutions of criminal offences. The power of the Attorney-General to enter *nolle prosequi* in a criminal trial is specifically provided for under the Criminal and Other Offence (Procedure) Act, 1960 (Act 30), s 54(1); See also, *Gregory Afoko vrs Attorney-General* (SC, 19 June 2019).

[3] Fredric L Dubow and Theodore M Becker, 'Patterns of Victim Advocacy', in William F McDonald (ed), *Criminal Justice and The Victim* (Sage Publications Inc 1976) 147-164.

[4] Jenia Iontcheva Turner, 'Plea Bargaining' in Fausto Pocar and Linda Carter (eds), *International Criminal Procedure* 35 (Edward Eldgar Pub 2014).

[5] Plea bargaining in South Africa is contained in the Criminal Procedure Act 1977 (Act 51), s 105A; Plea bargaining was introduced in India by the Indian Criminal Law (Amendment) Act 2005; Plea bargaining

USA had experimented, reformed and practiced the process of plea bargaining in the 19th Century, Ghana, two centuries after, has now introduced this unprecedented and ambitious development in the realm of its criminal justice system.

This note examines plea bargaining as envisaged in the Criminal and Other Offences (Procedure) (Amendment) Act, 2022 (Act 1079). In the first part of this note, the definition of plea bargain and its classifications as either implicit or explicit, or as charge plea bargain, sentence plea bargain or fact plea bargain are dealt with. The second part also delves into the justifications and critiques of plea bargains. The roles of the participants of the plea bargain process are equally discussed. The note then reviews the rights and roles of the victims under Act 1079 and interrogates whether victims are accorded the right to participate in the plea bargain process at any stage or victims are made to play the role of "good Victorian children" (i.e., seen but not heard).[6] The last part of this note concludes that the plea bargain is a step in the right direction. However, in order not to create doubts for victims over the appropriateness of the plea bargain, the note suggests that prosecutors must furnish victims with written statements that succinctly defines the plea bargain offer. It is hoped that this note will provoke debate and help in shaping the law on plea bargaining in Ghana.

was introduced in Pakistan in 1999 as an anti-corruption law by the National Accounting Ordinance I 1999; Rafael Blanco, Richard Hutt and Hugo Rojas, 'Reform to the Criminal Justice System in Chile: Evaluation and Challenges' (2005) 2 Loyola University Chicago International Law Review 256, 258; Nicola Boari, 'On the Efficiency of Penal Systems: Several Lessons from the Italian Experience' (1997) 17 International Review of Law and Economics 115 – 126; Maike Frommann, 'Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judge?' (2009) 5 Hanse Law Review 195.

[6] Borrowing the observation from *Kenna v US District Court for the Central District of Cal* 435 F.3d (9th Cir 2006) 1011, 1013

2 DEFINITION AND CLASSIFICATION OF PLEA BARGAINING

2.1 What is Plea Bargain?

The definition of plea bargaining varies depending on the jurisdiction and on the context of its use.[7] A plea bargaining is defined as 'the defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state'.[8] Also in the American case of *Santobello vrs. New York*,[9] the court defined plea bargain to mean: 'The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining", is an essential component to the administration of justice....'

The characteristics gleaned from the above definitions of plea bargaining are that the process is at the discretion of the prosecutor subject to the acceptance or otherwise by the court. The definitions stress on the existence of a compromise with each party forgoing its expected goal. The goal of the accused person[10] is to be acquitted and discharged at the end and that of the prosecutor is get the accused person convicted with maximum or satisfactory sentence. This is seen as an eclipse of the criminal justice system.

2.2 Classifications of Plea Bargain

Plea Bargaining can be classified into three types; namely, charge bargaining,[11] fact bargaining,[12] and sentence bargaining.[13] The type of plea

[7] Douglas D Guidorizzi, 'Should We Really Ban Plea Bargaining: The Core Concerns of Plea Bargaining Critics' (1998) 47 Emory Law Journal 753.

[8] William F McDonald, 'From Plea negotiation to coercive Justice: Notes on the Respecification of a Concept' (1979) 13 Law & Society Review, Special Issue on Plea Bargaining 388 citing Herbert S Miller et al (1978) Plea bargaining in the United States.

[9] 404 US 257 (1971)

[10] Accused person and defendant are used interchangeably.

[11] Dawn Reddy, 'Guilty Pleas and Practice' (1993) 30 American Criminal Law Review 1117, 1133.

[12] Ibid 1135.

[13] Abhishek Wadhawan, 'An Analysis of the Plea Bargaining Mechanism in India: The Past, Present and The Future' (2019) 1(4) Law Audience Journal 5; Wayne R LaFave, 'The Prosecutor's Discretion in the United States' (1970) 18 American Journal of Comparative Law 532, 540 – 541.

bargain is determined by the choice of the accused to forgo the crucible of the trial for the compromise of the plea bargain. It can be said that each type has an element of implied sentence reductions but 'differs' in the mode of achieving those reductions.

Charge bargaining refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the defendant in exchange for a guilty plea. This can be further classified into multiple charge and unique charge. In multiple charges, some charges are dropped in return for a plea of guilty to one of them. In a unique charge, a serious charge is dropped in exchange for a plea of guilty to a less serious charge. The multiple charge is also known as the horizontal charge bargaining and the unique charge as vertical charge bargaining.[14]

Sentence bargaining refers to a promise by the prosecutor to recommend a specific or lenient sentence or refrain from making any sentence recommendation following the accused person's guilty plea. In cases of sentence bargaining, the concessions may include shorter prison terms, probation or referring to rehabilitation centers.[15] Under sentence bargaining, trial judges, ordinarily, opt to impose sentences not more severe than those recommended by prosecutors.

Under fact bargaining, a prosecutor agrees not contest an accused person's version of the facts or agrees not to reveal aggravating factual circumstances to the court. There is an agreement for a selective presentation of facts in return for a plea of guilty. This form of bargaining is likely to occur when proof of an aggravating circumstance would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines.

[14] While vertical charge bargaining relates to the severity of the charge (a charge of murder can be lowered to that of manslaughter), horizontal charge bargaining affects the counts (one or more of the several counts may be dropped)

[15] Larry K Gaines and Roger Leroy Miller, *Criminal Justice in Action* (Cengage Learning Inc 2009) 295

Aside this classification, plea bargaining may further be classified in two ways. That is, explicit or express and implicit plea bargaining. Explicit plea bargaining involves overt negotiations between two or three actors (prosecutor, defense attorney and judge) concerning the benefits that may follow the entry of guilty plea. Implicit plea bargaining involves an understanding by the accused person that a more severe sentence be imposed for going to trial rather than pleading guilty. Under the implicit plea bargaining, there is an established pattern of treating accused persons who plead guilty more leniently than those who exercise the right to full trial, by the judges. The accused person then realizes the possible outcome of the entry of guilty plea. This makes him 'throw himself on the mercy of the court' by pleading guilty under the expectation of receiving a more lenient sentence thereby.[16]

2.3 Advantages of Plea Bargaining

Policymakers and justice system leaders in the world are increasingly paying attention to the need to reform the criminal justice system in order to ensure that the system functions equitably, judiciously and transparently. The reasons that are cited for the introduction include;

The courts are flooded with astronomical arrears, the trial life span is inordinately long and the expenditure is very high. Many believe that if plea bargaining were abolished, the legal system would simply collapse from the burden of handling ever-increasing criminal caseloads with severely limited resources.[17] Supporters of plea bargaining contend that while criminal caseloads tend to double every ten years, the resources that deal with them only increase a minimal amount.[18]

[16] John F Padgett, 'The Emergent Organization of Plea Bargaining' (1985) 90(4) American Journal of Sociology 756

[17] Stephen J Schulhofer, 'Is Plea Bargaining Inevitable?' (1984) 97 Harvard Law Review 1039–40

[18] Jeff Palmer, 'Abolishing Plea Bargaining: An End to the Same Old Song and Dance' (1999) 26 American Journal of Criminal Law 505, 513.

Plea bargaining helps in cutting short the delay, backlogs of cases and speedy disposal of criminal cases. This saves the courts time, which can be used for hearing the serious criminal cases, putting a certain end to uncertain life of a criminal case from the point of view of giving relief to victims and witnesses of crime.

Also, victims of crimes might be benefit as they could potentially get some compensation. They need not get implicated or involved either as witness or seeker of compensation or justice any longer than required for acceptance of plea bargaining.[19] Plea bargain makes room for victims 'to be shielded from the emotional stress and sensationalism of trial'.[20]

2.4 Drawbacks of Plea Bargaining

Despite the fact that plea bargaining has enormous benefits, there are always two sides to a coin. We must be neutral to accept the demerits associated with plea bargaining. It has been criticized by scholars to have serious shortcomings such as;

Scholars have long criticized plea bargaining, arguing that the system under which plea bargains are conducted is inherently unfair to defendants, given the power differential between prosecutors and defendants, as well as the coercive nature of the process.[21] It offends fair trial rights. It circumvents the standard of proof, contradicts the right to silence, the right to be presumed innocent, the right against self-incrimination and the right to equality.[22]

[19] KVK Santhy, 'Plea Bargaining in US and Indian Criminal Law Confessions for Concessions' (2013) 7(1) NALSAR Law Review 99-100.
[20] Palmer (n 18)
[21] Stephen J Schulhofer, 'Plea Bargaining as Disaster' (1992) 101 Yale Law Review 1979, 1980.
[22] Penny Darbyshire, 'The Mischief of Plea bargaining and Sentencing Rewards' (2000) Criminal Law Review 895; Douglas Smith, 'The Plea-Bargaining Controversy' (1986) 77(3) Journal of Criminal Law and Criminology 949-968.

Involving the police or prosecutor in the plea bargaining process would invite coercion.[23] Sometimes the prosecutor forces the accused to admit his guilt with unconscionable pressures. Prosecutors have almost unlimited discretion in determining the sentences of defendants since only they have the power to choose which charges to bring, providing them with that much more leverage in plea bargaining.[24] Thus, innocent defendants may be coerced into pleading guilty. This is because, innocent, risk-averse defendants may not be willing to risk going to trial to receive an exceedingly severe sentence, and instead, will choose to plead guilty to ensure a more lenient sentence.[25]

It has been argued that plea bargaining is an unfair way for criminals to easily escape responsibility and a well-deserved substantial punishment.[26] Thus, plea bargaining in their eyes becomes a travesty of justice in that it deprives the victim, the survivors, and the community of their chance to obtain true justice while it favours the accused that is the criminal.

2.5 Role of Participants

What are the respective roles of the prosecutor, judge, victim, and the accused person? Identifying the participants to a plea bargain and defining their roles is necessary to analyze how the victim might be brought into the plea bargain decision.

[23] Guidorizzi (n 7) 771.
[24] George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford University Press 2003) 210, 223.
[25] Guidorizzi (n 7) 771–72; Katherine J Strandburg, 'Deterrence and the Conviction of Innocents' (2003) 35 Connecticut Law Review 336.

[26] Palmer (n 18) 525

2.5.1 Judge

Generally, plea bargaining happens with little judicial involvement – between prosecutors and defense attorneys, behind closed doors and with practically no public oversight. These discussions are informal and out of court. The court participates in the back end only of this process when it approves the plea agreement, putting its imprimatur on a final product that bears little judicial imprint.

In a plea bargain, a judge must determine whether to accept the plea and, if accepted, what punishment the plea merits. Acceptance of a guilty plea requires a judge to determine the voluntariness of the plea, whether there is a factual basis for the plea and whether it would further the administration of justice.[27] A judge is under an obligation to make sure that the sentence imposed on the accused person is commensurate with the charges. A judge, therefore, must perform the seriousness calculus (harm x responsibility) and decide where on the punishment scale the crime fits.[28] Victim participation would also help a judge in working through the punishment calculus by providing more information about a victim's harm.

2.5.2 Prosecutor

A central tenet of plea bargaining is that prosecutors are willing to negotiate settlements to free up trial resources for other cases. The prosecutor has enormous discretion to decide what facts to present before the court and the punishment that should be recommended for the crime committed.[29] The prosecutor bases his decision on whether to proceed to trial or enter into a

[27] Act 1079, s 162H (1); 'Acceptance of Guilty Pleas' (1972) 14 Arizona Law Review 543-550.

[28] Lynne Henderson, 'The Wrongs of Victim's Rights' (1985) 37 Stanford Law Review 937, 994; George P Fletcher, *Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (University of Chicago Press 1988) 63-83; Edna Erez, 'Victim Participation in Sentencing, Rhetoric and Reality' (1990) 18 Journal of Criminal Justice 23.

[29] Gerard E Lynch, 'Screening Versus Bargaining: Exactly What Are We Trading Off?' (2003) 55 Stanford Law Review 1399, 1403-04.

plea arrangement upon many factors: the gravity of the crime, the defendant's criminal record and characteristics, the victim and the evidence.[30]

The prosecutor must inform the victim of the state's plea recommendations and the victim's right to be present at the hearing and express in writing any objections to the plea bargain. Moreover, if the victim is not present at the plea hearing but the prosecuting attorney is aware of the victim's objections, the prosecutor must communicate these objections to the court.

2.5.3 Accused Person

The plea decision is based on provable and defensible realities. While the terms are negotiated by the lawyers in most cases,[31] the defendant is the decider who must play out the entire trial in her imagination and filter her knowledge of the facts through the penal code, criminal procedure, and evidence law, as well as forensic science. And the experience of her attorney is the knowledge filter that must accurately relay the elements of the offence, the merits of the prosecution's case, the attitude of the judge on law and punishment, the defences available and their likelihood of success, as well as any legal issues related to the defendant's perception and competency. These factors weigh more heavily on the defendant's mind when considering to opt for a plea offer.

Ordinarily, an accused person who is innocent and his lawyer will proceed to trial when there is insufficient evidence against the accused person such that it would not make any sense for the accused person to confess to crime the accused person never committed. Nevertheless, fear is the main issue since accused persons are scared of the unknown. It is appropriate that plea bargain should be entered into by the accused person after consultation with his lawyer or should be conducted in the presence of his lawyer to ensure greater fairness in the process due to its quasi-adversary nature.

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[30] William F McDonald, Henry Rossman and James Cramer, 'Plea Bargaining Decisions' in William F McDonald (ed), (1979) 11 *Sage Criminal Justice System Annuals, The Prosecutor* 170

[31] Richard Birke, 'Reconciling Loss Aversion and Guilty Pleas' (1999) Utah Law Review 205, 237.

3 VICTIMS INVOLVEMENT IN THE PLEA BARGAINING: AN OVERVIEW OF ACT 1079

Victims' participation in the plea bargaining may be said to be contrary to the constitutional provision which guarantees an accused person's innocence under Article 19(2)(c). Article 19(2)(c) of the 1992 constitution gives a suspect under investigation or an accused on trial the benefit that the accused person is innocent until the court has found him guilty after a hearing or following a plea of guilt.[32] It can therefore be said that a victim partaking in plea bargaining is not appropriate since it has not been proved as a matter of law that the victims actually suffered a wrong by the accused.

The provision for the participation of victims in the plea-bargaining process under Act 1079 constitutes a leap into uncharted waters under our Ghanaian criminal justice system. The plea bargaining process is commenced with an offer from either the prosecutor or the accused person or the accused person's counsel. This is exemplified in Section 162C of the Plea Bargain Act. It is provided that:

> (1) The plea negotiations referred to in section 162A may be initiated by
> (a) an accused person or counsel for the accused person; or
> (b) a prosecutor in charge of the prosecution of an accused person.

After the plea bargaining has been offered by either the prosecutor or the accused person, a range of rights accrue to the crime victim. The minimum right accorded to the victim in relation to the plea bargaining is the right to information. The second right is the right to be present in court any time there is a hearing. The most substantial right is the right to participate in the plea bargaining process.

[32] *Martin Kpebu (No 2) vrs Attorney-General (No 2)* [2015-2016] 1 SCGLR 143 (Benin JSC)

3.1 Right to Information

The right to information is viewed to be a relatively insignificant right. This is because the public become privy to the information once the proposed or agreed plea bargain is tendered in court. The proposed plea bargain becomes a public record therefore the public enjoys the same right as the victims. The value of the right to be informed is determined by the time involved.

The right to be informed entails bringing to the knowledge of victims their rights and roles. This right also involves informing victims about the progress of negotiation including the rationale behind the decision reached by the prosecution in plea bargaining.[33]

Act 1079 requires that victims be notified when the prosecutor recommends or initiates a plea agreement. Section 162E of the Act stipulates that:

> (1) A prosecutor shall not conclude a plea agreement with an accused person or counsel for an accused person unless the prosecutor has
>
> (a) informed a victim or complainant of the offence or the representative of the victim or complainant of the plea agreement.

This provision grants the victim the right to be informed. However, the provision fails to address some limitations of the plea-bargaining process that affect the victims to some degree. The provision requires the prosecutor to only inform the victims of the plea bargain, this does not allow the victim to fully scrutinize the process and resulting outcomes. This throws weight to the perception that 'the victim's feelings regarding the bargain are not the main concern of prosecutors, who often "forget" that the victim is the reason why

[33] Marie Manikis, 'Recognizing Victims' Role and Rights during Plea Bargaining: A Fair Deal for Victims of Crime' (2012) 58 (3-4) Criminal Law Quarterly 411, 421 – 422.

they are in court'.[34] Also, the provision fails to make provisions for the right to be enforced in the event there is an infraction or an avenue to seek redress when the right is not observed. Clearly, the failure to comply with this provision does not affect the validity of the plea bargain as espoused under Section 162E of the Plea Bargain Act. All that is required of the prosecutor is to ensure that the victims are notified or informed of the plea-bargaining process.

It is recommended that prior to the initiation of a plea bargain by the prosecutor, the prosecutor must give the victim a written statement that succinctly defines the proposed plea bargain offer. The statement must contain a description of the charges to be brought against the accused and rationale underlying the appropriateness of the proposed plea. The statement should also inform the victims of alternative relevant charges and other sentences which the accused person may be liable. This provides greater transparency and control regarding the prosecutor in making decisions and addresses the victims' perceptions of being left out or the victims feeling alienated and disempowered by the plea-bargaining process. Further, it is recommended that the judge should always inquire from the prosecutor whether the victim is in the known of the plea bargain, and if so whether he agrees or disagrees.

3.2 Right to be Present

This suggests that victims may be informed of the negotiated plea and be present in court when the negotiated plea is tendered in court. This of course does not actually afford the victim anything more than is already in place as they, who remain part of the public, are already allowed to attend open court sessions and when the plea bargain is tendered it becomes part of the public record. Under Act 1079, there is no express provision which mandates the

[34] Robert C Davis and others, 'Expanding the Victim's Role in Criminal Court Dispositional Process: The Results of an Experiment' (1984) 75 Journal of Criminal Law & Criminology 491, 492: 'victim becomes "forgotten person"'

prosecutor to inform the victim of the date of the hearing. It is an implied right to be present.

3.3 Right of Participation

Before Act 1079, victims were considered mere spectators in the criminal justice process. Their contributions consisted simply of watching the criminal proceedings, most of which they more than likely did not understand, and waiting for an outcome. From the victim's perspective, the consideration of the victim's needs and opinions may improve the quality of the victim's life by aiding the victim to regain a sense of control over his or her life.[35] Any psychological wounds inflicted by the criminal act may heal with the ability to participate in the court process.[36]

Act 1079 goes further to authorize some form of victim participation in the plea bargain. It bestows on the victims the right to participate through the prosecutor and through the court.

3.3.1 By making representations to the Prosecution

It is noted that most victims are under the mistaken belief that prosecutors are supposed to represent them. Allen Edgar, has put it:

> Many victims already think the prosecutor is supposed to represent them and expect their impact statement to affect the outcome of sentencing. When these expectations go unfulfilled, as they usually do, victim satisfaction increases, not just with the sentencing process but with the criminal

[35] James R. Adams, 'Victims, Truth, and Detention-The People Speak' (1992) 23 McGeorge Law Journal 973, 989-90 (enabling victims to voice their opinions often serves as therapeutic mechanism).
[36] Douglas E. Beloof and Others, *Victims In Criminal Procedure* (3d ed, Carolina Academic Press 2010) 716

> justice system as a whole. Compulsory consultation can only increase the likelihood that victims will think of the prosecutor as representing them, while participation… will generate greater expectations- and subsequent increased dissatisfaction when they remain largely unfulfilled.[37]

Under the Act 1079, it is provided that when a plea bargain is submitted to the court, the prosecutor must certify that the victim was offered an opportunity to see the prosecutor's recommendations and to present an opinion of the recommendations to the prosecutor. It is provided by Section 162E (1)(b) that:

> (1) A prosecutor shall not conclude a plea agreement with an accused person or counsel for an accused person unless the prosecutor has
> (b) afforded the victim or complainant or the representative of the victim or complainant an opportunity to make representations to the prosecutor regarding the contents of the plea agreement.

This implies that, victims have a statutory right to express their view of the plea bargain to the prosecutor. Nevertheless, the prosecutor need not adopt the victim's position, of course. However, the prosecutor is required to listen. Requiring a prosecutor to obtain the victim's views before consummating a plea deal guarantees the victim some measure of voice in the process.

The provisions for victims' right to make representation to the prosecution however suffer at least two main pitfalls. First, the law fails to require the prosecutors to keep records of representation made by victim or address the manner in which victims are to make their views known to the prosecutor, whether orally or in writing. Secondly, it fails to provide any remedy where

[37] Allen Edgar, 'Commentary' (2004) 46 Canadian Journal Criminology and Criminal Justice 505, 507-10

crime victims are left out in the plea negotiation process or their representation totally ignored by the prosecutor. It is trite law that a right without a remedy is no right at all.[38]

3.3.2 Addressing the court

Crime victims' right to address the court entails the hearing of victims' views in open court before the court accepts or rejects a plea bargain. Ordinarily, victims of crime are not parties to criminal proceedings in court and do not have rights to be heard except as witnesses. Plea bargain proceedings do not require the calling of witnesses and so victims do not get to be heard at all. Nonetheless, Act 1079 allows the victim to address the court in two ways: the victim has the right to make a written statement on the impact of the crime which the prosecutor must maintain on file and present to the court before a plea bargain is accepted, and the victim also has the right to address the court on the crime's impact before any plea bargain is accepted.

In respect of victims addressing the court, provisions have been made under Sections 162G (5) and 162E (2) of Act 1079 which stipulate that:

> 162G (5) The Court may inquire from a victim or a complainant of the case whether the victim or complainant has any objection to the plea agreement and the Court shall take into consideration the views of the victim or complainant in considering the plea agreement.
>
> 162E (2) A victim or complainant of a case who objects to the terms of the plea agreement may cause a statement to be filed as part of the plea agreement detailing the grounds for the objection for the consideration of the Court.

The import of the provisions is that the victim is given the right or opportunity to state in writing or orally before the plea bargain is accepted why he does

[38] *Galley v The Republic* [1995-1996] 1 GLR 553 (CA); *Young Trading Agencies v Staveley & Co. Ltd* (1977) 1 GLR 281 (CA) citing *Ashby v White* (1703) 92 ER 126 (KB)

not like the plea bargain. Granting the victim, the right to address the judge ensures that the victim's interests are taken into consideration. The Act which allows the victim to communicate with the court both by filing a written statement and by addressing the court orally is unnecessary. The victim who addresses the court both ways absorbs more time without achieving any additional purpose.[39]

Despite the satisfaction that the victim may attain by participating, there are those individuals who are not at all interested in participating in the plea bargain process at all. They see it as an intrusion into their personal lives. In large part, these victims either did not want to be reminded of the traumatizing incident or did not want their previously uninformed spouses or families to know that the victimization had occurred.

4 CONCLUSION

This piece of legislation is exceptional in the Ghanaian context and will create an alternative, efficient and swift method of resolving criminal matters. Also, it will elevate the victim's roles in plea bargain by requiring prosecutors to consult victims on plea bargain. Fortunately, Act 1079 requires victims to object to the plea agreement at an early stage. This gives victims an effective voice in the disposition of criminal cases, thus, the victim's objection to the plea bargain would not be poorly timed. They have an opportunity to participate at the initial stage, when the majority of disposition decisions are made.

Nevertheless, the plea bargain law suffers from some defects which have to be cured to ameliorate the crime victims' experience. It is recommended that prior to the initiation of a plea bargain by the prosecutor, the prosecutor must

[39] *Butz v Economou* 438 US 478 (1978); *Stump v Sparkman* 435 US 349 (1978); *Dykes v Hoseman* 776 F.2d 942 (11th Cir 1985); *Krempp v Dobbs* 775 F.2d 1319 (5th Cir 1985); *Cameron v IRS* 773 F.2d 126 (7th Cir 1985).

give the victim a written statement that succinctly defines the proposed plea bargain offer. Also, it should be included in the Act or guidelines to be issued that a judge cannot accept a plea bargain unless it has been certified by the prosecutor that the rights have been observed as done in some American states. It is noted that the Act which empowers the victim to communicate with the court both by filing a written statement and by addressing the court orally is unnecessary. The victim should be made to elect between either addressing the court viva voce or by a written statement since it absorbs more time without furthering the benefits of the plea-bargaining mechanism.

The passage of the Act is indeed timely and it is expected that the Act will decongest the prisons, hasten criminal trials and make the criminal justice system more efficient.

RETROACTIVITY OF THE CONSTITUTION AND THE RIGHT TO PROPERTY: REVISITING ELLIS V ATTORNEY GENERAL

Nhyira Yaa Boatemaa Amponsem[*]

ABSTRACT

In Ellis v Attorney General, the Supreme Court of Ghana held that the Hemang Lands Acquisition and Compensation Law, 1992 (PNDCL 294) was competently passed by the Provisional National Defence Council (PNDC) in accordance with the applicable law before the coming into force of the Constitution, 1992 on 7th January 1993. According to the Court, the provisions of the 1992 Constitution, which operated prospectively could not be retroactively invoked to declare the provisions of PNDCL 294 null and void. The constitutional provisions which Counsel for the Plaintiff cited as having been contravened by PNDCL 294 included Article 20 which is found in the 'Human Rights Chapter' of the Constitution. This commentary revisits the Supreme Court's approach to the right to property in Ellis v Attorney General. The question to be addressed is whether property rights are created by the Constitution or guaranteed under it and therefore capable of being determined as applying only prospectively and not retrospectively?

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1 INTRODUCTION

Access to land equates access to food[40] and housing.[41] Although land is important to many people, it is estimated that half of the world's population encounters insecure property rights in land. About a quarter of the world's population is landless making insecure land titles and landlessness major contributory factors to poverty around the world. The situation is exacerbated by renewed interest in large scale acquisition of land in Africa by States and multinational companies for agricultural, industrial, housing and forestry purposes as well as mineral exploration. For these reasons, access to land, it appears, is a human rights issue.

In *Ellis v Attorney General*,[42] the Supreme Court of Ghana held that the Hemang Lands Acquisition and Compensation Law 1992 (PNDCL 294), by which the State compulsorily acquired the lands of the Ellis and Wood families, was competently passed by the Provisional National Defence Council (PNDC) in accordance with the applicable law before the coming into force of the Constitution, 1992 on 7th January 1993. According to the Court, the provisions of the Constitution 1992, which operated prospectively could not be retroactively invoked to declare the provisions of PNDCL 294 null and void. The constitutional provisions which Counsel for the Plaintiff cited as having been contravened by PNDCL 294 included Article 20 which is found in the 'Human Rights Chapter' of the Constitution. As stated in the preceding paragraph, land is an important resource. For this reason, the State's indiscriminate exercise of its power of eminent domain continues to create deep local resentments and tension between the State and pre-acquisition

[40] Jean Ziegler, *Report of the Special Rapporteur on the Right to Food* Commission on Human Rights (27th August 2002) UN DOC. A/5/356, para 22.

[41] Miloon Kathari, *Report of the Special Rapporteur on Adequate Housing Gas a Component of the Right to an Adequate Standard of Living*, Commission on Human Rights (3rd March 2005) UN Doc. E/CN4/25/4, para 41.

[42] [1999-2000] 2 GLR 377 (SC)

landowners.[43] This could however be avoided if the State followed the laid down practice of paying adequate compensation and allowing for dispute resolution avenues when acquiring these lands.

This commentary seeks to clarify the nature of property rights as guaranteed in Constitutions with specific reference to the 1992 Constitution and the Ghanaian legal system. In part 1, I will discuss property and property rights as rights properly so called. I will also discuss rights as 'observed practice' under Ghanaian customary law. After, I will discuss the right to property as provided by the 1992 Constitution and how this right is impacted by the principles of non-retroactivity posited by the Supreme Court in the *Ellis* case. Then I will conclude in part 3 noting the ramifications that are likely to emerge from the principles enunciated by the learned lordships vis-vis-vis the provisions of the Constitution.

2 PROPERTY AND RIGHTS- PHILOSOPHICAL UNDERPINNINGS

Generally, John Locke's (the English philosopher) understanding of property within the context of his 'social contract theory' may provide a reference point for understanding the relationship between individuals, their property, and the State. In the first place, Locke explained what in his view comprised property. 'Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property', he authoritatively stated in his classic work, the Second Treatise. Locke although using the term property to refer to material goods, also defined 'property' as 'Lives, Liberties and Estates'. Locke's primary understanding of property was that of a natural right.[44] He argued that in the 'state of nature', there were no rights in the sense of moral faculties except in so far as agreements had been

[43] Christine Dowuona Hammond, 'Enforcing the Constitutional Framework on Compulsory Acquisition in Ghana: Looking Backward, Forward or Maintaining the Status Quo?' (2016) Vol 29 University of Ghana Law Journal 71-102.

[44] John Locke, Two Treatises of Government (Book ii, Chapter 5, §§ 25–51), 285–302.

concluded and everything is for the use of all.[45] The state of nature refers to a human society that exists other than the civil state where

> All men order their action and dispose of their possessions, and persons as they think fit. Although there is no government ruling this society, there exists a moral law which ought to be obeyed. The right of property was a moral faculty used against other people in requesting them to refrain from interfering with an object owned and to restore that object when they took it.[46]

In this form, the 'right to property' has emerged as substantive right that an established political, and more importantly, legal system must protect. The question then spins on what rights – contemporary rights at that – mean. This shall be explored later in this commentary.

Although Locke's understanding of property within the social contract theory is an interesting one, it was a critique of the English feudal system and does not give us an understanding of how Ghanaian property rights evolved. Property rights in Ghana, it is argued, did not begin with the 1992 Constitution or the 1969 Constitution which was the first Constitution to expressly spell out human rights. Property rights have always existed under customary law as can be deduced from documented conceptions of property and hierarchical rights in property.

Property, in Ghanaian customary law, can be divided into four classifications: land; things savouring the land such as houses, huts and farms (so that one person can own the land, and another can own the crops on it);[47] movables;

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[45] ibid.

[46] ibid.

[47] *Dadzie v Kokofu* [1961] GLR 90 (SC): In this case, the court held that ownership of cocoa farms was to be strictly distinguished from ownership of the land on which they were situated, and that the successor to the land had no automatic claim to such farms, where these had been made by another person under a license granted by the decedent.

and intangible property such as medicine and magical formulae.[48] S.K.B Asante, a Ghanaian jurist, identifies two broad categories of indigenous systems of land ownership in Ghana depending on the political and social organization of the community in question.[49] They are highly centralized states and less centralized political systems. According to him, in the highly centralized States there exists a well-entrenched political authority as well as a high level of social integration. In the less centralized political systems, the political sovereign did not own all the land within its territorial boundaries.

The highest form of interest in land in Ghana is the allodial title. The allodial can be acquired by a stool, a skin, a family or an individual. It is acquired when either of these entities enter upon 'new land' also described as 'terra nullius' and reduces the land into their possession. The allodial title is the highest form of interest a person can hold. For this discussion we will concentrate on allodial title owned by stools and skins.

In highly centralized states like Ashanti and Akim Abuakwa, the stool (a paramountcy or political sovereign) was the overlord of the state and owner of the land within its territorial boundaries. Therefore, no land could be ownerless within these areas.[50] Like other ethnic groups throughout Ghana, land had religious significance and concepts of land ownership were bound up with reverence for ancestors. Land was therefore an ancestral trust committed to the living for the benefit of themselves and unborn generations.[51] The religious idea of ancestral ownership was extended to the legal doctrine of the stool's absolute ownership of land within its territorial boundaries.[52] The Chief's position vis-a-vis stool land was that of a fiduciary who held the land in trust for his subjects and unborn generations. According

[48] SKB Asante, 'Interests in Land in the Customary Law of Ghana. A New Appraisal' (1965) 74(5) Yale Law Journal 848 -885.
[49] ibid.
[50] *Wiapa v Solomon* (1905) 2 Renner's Gold Coast & Nigeria Reports 410.
[51] Asante (n 48).
[52] KA Busia, *The Position of the Chief in the Modern Political System of the Ashanti: A Study of the Influence of Contemporary Social Change on Ashanti Political Institutions* (The Oxford University Press 1951) 44

to Danquah, an indomitable political figure in the period leading up to independence, 'an absolute sale of land was therefore not simply a question of alienating realty; notoriously it was a case of selling a spiritual heritage for a mess of pottage, a veritable betrayal of ancestral trust, an undoing of posterity'.[53]

Before the indigenous economy became largely agricultural, a stool subject could not claim exclusive use or possession over any part of the land because every member of the tribe had equal rights to wander over and hunt upon the land which belonged to all. [54] As time went by, and when people started farming as an economic activity and engaging in commercial activities involving land, they begun to reduce portions of land into their possession, thereby creating the usufructuary interest (customary law freehold) which co-existed with the stool's ownership.[55] Overtime, the subject's usufruct became inviolable. The new usufructuary title has been described as 'inheritable and alienable either by transfer inter vivos or by testamentary disposition.'[56]

Contrary to Asante's assertion,[57] the entire northern part of Ghana is not made up of less centralized systems.[58] The Dagomba State for instance is a highly centralized one. Prior to the establishment of the Dagomba Kingdom, the belief held was that each area possessed the 'spirit' of a specific *Bugli* or *Tengbani* (Earth God or Ancestral Cult) traceable back to creation.[59] The notion that land belonged to ancestors and future generations of inhabitants and was held in trust by the rulers was also held.[60] The Ya-Naa and his hierarchy of

[53] JB Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* (George Routledge & Sons Ltd 1928)
[54] RS Rattray, *Ashanti Law and Constitution* (Clarendon 1929).
[55] *Yiboe v Duedu* (1957) 2 WALR 293 (SC) where the court ruled that the subject's usufruct does not oust but coexists with the stool's absolute interest in stool land.
[56] Ollennu, *Principles of Customary Land Law in Ghana* (Sweet and Maxwell 1962).
[57] Asante (n 48) 848.
[58] ENA Kotey, 'Land and Tree Tenure and Rural Development Forestry in Northern Ghana' (1993-95) 19 University of Ghana Law Journal 102.
[59] Stacpoole 1948 Schedule 2 p2-3
[60] MS Abudulai 'Land Tenure Among the Dagomba of Northern Ghana: Empirical Evidence' (1986) 11(3) Cambridge Journal of Anthropology 72

chiefs constitute a supervisory body exercising some form of 'paternal sovereignty' over Skin land. The Dagomba people represented by the Ya-Na, 'owned' all the land; skin land therefore represents land belonging to the dead, current and unborn members of the Dagomba corporate group.[61] Land in the beneficial and effective occupation of a member of any of the villages remains so indefinitely, is heritable and can be transferred to other members of the village during his lifetime, or to newcomers (with the consent of the chief for the responsible member of his council of elders).

Once a tingbiya, (member of a village), establishes rights in agricultural land, no person, including the chiefs could interfere without the permission of the farmer.[62] Similar evidence was found in relation to Akan corporate kinship groups in Southern Ghana as described earlier.

In parts of Northern Ghana, kinship ties played a predominant role in political organizations and political control was exercised through segmentary lineage systems. Land was vested in lineages or clans, internally unified by common ritual practices connected with ancestor worship. Ritual ownership of land was vested in heads of clans of aboriginal descent, the Tendanas or Earth Priests.[63] When a person (and his family) was the first person to occupy and demarcate a section of land, that person who is also the head of the family becomes the custodian of the land (*Tingadanaa* or *Tindaana* or *Tendanaa* which literally means landowner) including ownership of the trees, water bodies and other resources on it.[64]

[61] Letter from J K Eyre-Smith to Secretary for Native Affairs: 'Memorandum on the Foundation of Native Treasuries in the Northern Territories' (15 September 1931) 1-6.
[62] Abudulai (n 60).
[63] RJH Pogucki, *Gold Coast Land Tenure, A Survey of Land Tenure in Customary Law of the Protectorate of the Northern Territories* (Government Printer Accra 1955).
[64] National House of Chiefs and the Law Reform Commission, *Report on Pilot Phase of Ascertainment and Codification of Customary Law on Land and Family in Ghana (ACLP)* (Vol III, March 2011); See also, *Yakubu Awabego v Tindana Agongo Akubayela* [2016] GHASC 23

2.1 The Right to Property and 1992 Constitution and Human Rights

The 1992 Constitution is the Constitution with the longest lifespan out of Ghana's four Constitutions. In terms of its substantive provisions on human rights, the 1992 Constitution has been described as a qualitative improvement to the rights provisions in Ghana's previous Republican.[65] However, apart from the 1960 Constitution, all the republican Constitutions of Ghana have contained a chapter dedicated to the liberty of the individual.[66] Both the 1969 and the 1979 Constitutions contained provisions which secured the right to protection from deprivation of property also known as the right to protection from expropriation which flows from the right to property.[67] These provisions are similar to Article 20 of the 1992 Constitution which provides that:

> 20. (1) No property of any description, or interest in or right over any property shall be compulsorily taken possession of or acquires by the State unless the following conditions are satisfied –
>
> (a) The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and
> (b) The necessity for the acquisition is clearly stated and is such as to provide reasonable jurisdiction for causing and hardship that may result to any person who has an interest in or right over the property.
> (2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for –

[65] Busia K A Nana Jr, *Human Rights under African Constitutions, Ghana; Competing Visions of Liberal Democracy and Socialism* (University of Pennsylvania Press 2003).
[66] Constitution 1969, ch 4 and 1979 Constitution, ch 6.
[67] Constitution 1969, art 18 and 1979 Constitution art 24.

(a) the prompt payment of fair and adequate compensation; and

(b) a right of access to the High Court by and person who has an interest in or right over the property whether direct or an appeal from any other authority, for the determination of his interests or right and the amount of compensation to which he is entitled.

The right to private property has been described as one of the key underpinnings of our statehood and formally dates to the Bond of 1844.[68] From the standpoint of the theory of constitutionalism and the rule of Law, as a fundamental human right, it is innate to the humanity of the people and cannot even be correctly viewed as having been conferred by any document, declaration, guaranty or other legislative or executive action. As stated above, the rights and freedoms contained in the 1992 Constitution are not given or created by that Constitution. This idea can be found from the spirit of the Constitution which is discernible from its preamble.[69] The preamble by referring to the Almighty God as the starting point in the constitution making process credits God as the source of the natural and inalienable rights which we the people exercised in the making of the Constitution.

Another affirmation from the 1992 Constitution that supports the position that the Constitution is only a guarantor and not a creator of rights is article 33(5). It provides that:

> 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

[68] *Nii Kpobi Tettey Tsuru III v The Attorney General* [2011] GHASC 20.

[69] Kofi Quashigah, 'A Critical Analysis of the Concept of Rights and Freedoms under Chapter Five of the 1992 Constitution of Ghana' (2005-2007) 23 University of Ghana Law Journal 158.

> inherent in a democracy and intended to secure the freedom and dignity of men.

This provision does a number of things. Firstly, it illustrates the inexhaustive and universal nature of human rights. Second, it states that rights, duties, declarations and guarantees relating to fundamental human rights and freedoms need not be specifically mentioned to be enjoyed by persons in Ghana if they are considered inherent in a democracy and intended to secure the freedom and dignity of men. This in essence reaffirms the inherent nature of human rights.

It should however be noted that the right to property can be extinguished in a number of ways, one of these being the State's exercise of its power of eminent domain. In the Supreme Court judgment of *Memuna Amoudy v Mr. Kofi Antwi*,[70] the effect of a compulsory acquisition was stated as follows:

> Land compulsorily acquired vests automatically in the government upon a publication of the gazette notice and the acquisition operates to bar and destroy all other estates, rights, tiles, remainders, reversions, trusts and interests whatsoever of and in the lands acquired.

In simpler language, when the State compulsorily acquires private property, all interests in the land existing at the time of the acquisition are extinguished. There is no allodial owner, no holder of a customary freehold and no holder of a leasehold. The land becomes State property and is lost to its owners unless the interests or rights of the pre-acquisition owners are revived by the Constitution itself. In some cases, the compulsory acquisition of land has led to chronic shortage of land for all conceivable land uses (residential, agricultural and commercial), landlessness among indigenes, massive out-migration of young men and women and radical changes in occupations and means of livelihood of indigenes.[71]

[70] (2004) JELR 68348 (SC).
[71] Dowuona-Hammond (n 43).

Non-compliance with the laid down procedures for compulsory acquisition have dire consequences especially when the State's power is left unchecked. It has been found that land compulsorily acquired usually far exceeded what was required for the stated purposes, with the result that large tracts of expropriated land remained unused for decades.[72] Invariably, the State's power to exercise eminent domain over private land must be exercised for the public good. Compulsorily acquired land can be used for affordable housing projects, road expansion, preservation of wildlife and many other beneficial projects which improve the living standard of citizens and residents. However, private persons should not be rid of their property without adequate compensation. As Jeremy Waldron, a leading legal authority on law and property rights puts it, 'if my private property is to be affected by conservation schemes (in this matter developmental projects), then I am entitled to compensation. For if it is true that the public interest requires conservation of beaches, then the costs of that conservation should be spread across the whole community; it should not be visited particularly on me'.[73]

I sum up the import of article 20 in the following way: It is only fair that if Mr X loses his property to the State and cannot sell it, develop it, or devise it to his children he should at least get adequate compensation for his troubles. If Mr. X has the property valued and realizes that the compensation given by the State is completely inadequate, he should be able to have an audience before an impartial trier of facts, a committee or a court of law that will be able to remedy his situation and compel the State to do right by Mr X.

2.2 The Ellis Case, Retroactivity and Human Rights

In the *Ellis* case the plaintiffs who described themselves as the lawful attorneys respectively of the Ellis and Wood families of Cape Coast, Ghana, took the action for and behalf of the families against the Attorney General as the constitutional representative of the Government of Ghana. They invoked

[72] Ibid.

[73] Jeremy Waldron, *The Rule of Law and the Measure of Property, The Hamlyn Lectures* (Cambridge University Press 2012)

the original jurisdiction of the Supreme Court under Article 2 of the 1992 Constitution for a declaration that:

1. The Hemang Lands (Acquisition and Compensation Law, 1992 (PNDCL 294) was inconsistent with and in contravention of the Constitution, 1992 of the Republic of Ghana, specifically Articles 20 and 107 thereof and was consequently null and void.
2. An order setting aside or striking down as null and void the said PNDCL 294.

PNDCL 294 came into force on the 20th day of November 1992. This was before the coming into force of the 1992 Constitution on 7th January 1993; the Hemang lands were vested in the Republic a few weeks before the effective date of the Constitution.

The Hemang Lands (Acquisition and Compensation) Act – 1992 (PNDCL 294) had very interesting provisions. Section 1 of the Act vested lands specified in the Schedule of the Act in the President in trust for the people of Ghana. This part of the Act is not so controversial. The real problem is found in Section 2 and Section 3 which deal with compensation for acquisition and prohibition of further litigation respectively. Section 2 provided that the Ellis and Wood families (who owned the lands) shall be paid a 'final and total compensation'. The use of the word 'final' seems to suggest that these families will not have recourse to review of the compensation awarded them. Section 3 affirms this observation. It provided that:

> (1) A court or tribunal does not have jurisdiction to entertain an action or any proceedings of whatever nature for the purpose of questioning or determining a matter on or relating to the lands, the acquisition or the compensation specified in this Act.
>
> (2) A cause or matter relating to or connected with any of the lands specified in the Schedule pending before a Court or tribunal is hereby abated.

The most glaring feature of the provision is that by virtue of Section 3, the Ellis and Wood Family's lands are lost to them, and they cannot go to any court or tribunal for any redress concerning the compulsory acquisition.

The Supreme Court in *Ellis* held that the Hemang Lands Law was not in conflict with the 1992 Constitution because the constitution operates prospectively and not retrospectively. The Court was of the view that the Hemang Lands Acquisition and Compensation Law, 1992 PNDCL 294 was competently passed by the Provisional National Defence Council (PNDC) in accordance with the applicable law before the coming into force of the Constitution, 1992 on 7th January 1993. Therefore, the provisions of the Constitution 1992, which operated prospectively could not be retroactively invoked to declare the provisions of PNDCL 294 null and void. In the words of Adjabeng JSC:

> There is nothing in the law suggesting anything else to be done before the vesting of the lands would be complete. At the time the law came into force in 1992, therefore, the acquisition and vesting of the plaintiffs' lands were complete. The only thing the plaintiffs were to do was to collect the compensation stated in the law. I find it difficult to see how this court can legally use the provisions of the Constitution 1992 to declare that PNDCL 294 is null and void.

In *Okudzeto Ablakwa (No.2) v Attorney General & Obetsebi Lamptey,*[74] the Court reiterated the holding in *Ellis*. It was held that Article 20 of the 1992 Constitution is prospective and not retrospective. In that case, the Lands Commission leased to the second defendant, part of compulsorily acquired land (therefore public land). The property was compulsorily acquired to serve as accommodation for public officers. The court held that article 20(5) on usage of compulsorily acquired land was not retrospective.

[74](2011) JELR 68539 (SC)

Except in relation to procedural matters, changes in the law are not to take retrospective effect. Therefore, laws are to take effect from the date of enactment. 'Retrospective' or 'retroactive' means to extend the scope or effect of something to matters that have occurred in the past.[75] 'Retroactive law' is also defined as 'a legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect'.[76] The principle is that *lex prospicit non respicit*. This principle is enshrined in article 107(b) of the 1992 Constitution which provides [in relation to the enactment of statutes] that:

> Parliament shall have no power to pass any law which operates retrospectively to impose any limitations on, or to adversely affect the personal rights and liberties of any person or impose a burden, obligation or liability on any person except in the case of a law enacted under articles 178 or 182 of this Constitution.

The principle of retrospectivity flows directly from the principle that law must be known and be predictable. Clearly, law that is altered retrospectively cannot be said to have been predictable during the time the law is being retrospectively applied to. For instance, on January 1, 2022, wearing yellow kaftans was not a crime under Ghanaian law. However, if Parliament passes a law (to be known as 'YK Act') now to proscribe the act of wearing yellow kaftans which is to have retrospective effect from January 1, 2022, there will be a problem. Because at the time everyone affected by the 'YK Act' wore their yellow kaftans, there was no law prohibiting the act. Thus, current law should govern current events and not reach its hands into the past.

Atuguba JSC in the *Nii Kpobi Tettey Tsuru III* case stated that a proper appreciation of the *Ellis* case is that since the Hemang lands therein were already fully acquired before the 1992 Constitution it would be a retrospective application of it to require that the manner in which they had already been

[75] Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (8th edn, Thomas/West 2004) 1343.
[76] Ibid.

acquired, ought to comply with the 1992 Constitution. On the face of it, this explanation is straight to the point and simply explains why the human rights provisions in Chapters 5 and 6 of the 1992 constitution cannot be juxtaposed with PNDCL 294 and proclaimed void and inconsistent by virtue of Articles 1(2)[77] and 2(1) of the 1992 Constitution.[78] However, when one considers the nature of human rights as being universal and incontrovertible, it will be realized that that argument or explanation is a hard one. If one agrees that human rights are universal and incontrovertible, then one must also agree that human rights existed before the 1992 Constitution. Therefore, a democratically elected government and a judiciary who seeks to protect the rule of law should have protected the right of the Ellis and Woods families to question the acquisition or the compensation which existed when PNDCL 294 was passed. In my opinion, the issue in the Ellis case was not that a right under an enactment was taken away by a new statute nor a new obligation had been created nor a new duty or disability imposed. The matter concerned a human right which already attached to the plaintiffs just because they were people.

Lord Brightman in *Yew Bon Tew v Kenderaan Baas Mara*[79] held that 'A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to already past event.' In the Ellis case, the new duty which the Court may have considered to be imposed was the State's duty to pay prompt and adequate compensation after the compulsory acquisition of the Hemang Lands and the right to access the High Court for redress. Under article 20(1), the duty of the State to pay prompt and adequate compensation

[77] Constitution 1992, art 1(2); This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall. to the extent of the inconsistency, be void.

[78] Ibid art 2(1) 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.

[79] [1983] 1 AC 553 (JCPC)

mirrors the right of the property owner to receive prompt and adequate compensation after their property has been taken by the State.

As stated earlier, the provision can only be seen as an enshrinement of a pre-existing right and not the creation of a right. It is only natural that the State or anyone for that matter pays for whatever it takes from private persons. As stated above, this right existed even before the promulgation of the 1992 Constitution and was in existence under military rule; it is an inherent right.

In my humble opinion, the legal position that the entirety of the Constitution does not apply retrospectively and applies only prospectively by virtue of the Court's holding in the Ellis case is with respect difficult to grasp. This is because the Court ignored the nature of human rights as being innate and not created by any document. The basis of the plaintiffs' complaint in the action was stated in paragraph 21 of their statement of case. It is stated therein as follows:

> (21) The plaintiffs will contend that the said PNDCL 294 is inconsistent with and contravenes articles 20 and 107 of the Constitution, 1992 for the following reasons:
> (1) It involves a compulsory acquisition of the property of plaintiffs' families without any indication that it was in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit and without clearly stating the necessity for such acquisition or providing reasonable justification for the hardship caused to the plaintiffs' families.
> (2) the law does not make provision for the payment of fair and adequate compensation to the plaintiffs' families since the compensation itself provided in the law was unilaterally imposed and is totally derisory and both inadequate and unfair.

> (3) it purports to oust the jurisdiction of the High Court or any other court for the determination of the interest of the plaintiffs and the amount of compensation or other matters relating to the acquisitions…

The Defendant denied that PNDCL 294 is inconsistent with articles 20 and 107 of the Constitution, 1992 because to the Defendant, the Constitution acts prospectively and not retrospectively to affect acquisitions which have taken place months before the coming into force of the Constitution.

3 CONCLUSION

Indeed, the constitution guarantees these human rights which are inherent in all people. It is only a judiciary which is conscious of the nature of human rights which can provide the requisite construction of human rights provisions for the realization of the aspirations inherent in these provisions.[80] It is submitted the statement that the entirety of the 1992 Constitution applies prospectively and not retrospectively is flawed to the extent that rights are innate and cannot be abrogated by a military proclamation of a coup d'état. The more appropriate conclusion considering this article will be that although the 1992 Constitution generally operates prospectively, the human rights provisions therein cannot be included in this prospective operation because they are not created by the Constitution.

[80] Quashigah (n 69)

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