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A NOTE FROM THE EDITOR-IN-CHIEF

The Editorial Board is thrilled to present the Ninth Volume of the Ghana School of Law Student Journal which also doubles as the sophomore edition of the digital journal.

This journal features eight articles discussing a wide range of topics affecting the Ghanaian society and the world at large. These topics range from conversations on elections, to AI and cryptocurrency.

This Volume is dedicated to the esteemed Frederica Ahwireng-Obeng Esquire, an impeccable lawyer of over fifty years' standing at the Bar and features a foreword written by her.

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

With Ghana's upcoming general election, Samuel Kwadwo Owusu-Ansah in his article **"Whose Tune Does the Piper Play? An Appraisal of Political Party Finance Regulation in Ghana"**, discusses Ghana's election financing regime in comparison to that of other states and how Ghana can improve election financing regulation to reduce perceived and actual corruption and ensure the advancement of Ghana's democracy.

"Of Directors and Presumption of Innocence" by Redeemer Kwaku Agbanu involves a discussion of the decision in the case of ***Adu Gyamfi v the Attorney-General*** as it relates to the provisions of the Companies Act, 2019 (Act 992) regarding the qualification of company directors and the provisions of the constitution concerning presumption of innocence.

Oswald K. Azumah in his article **"Of Lower Courts & Superior Courts: Guarding the Administration of Justice Against Contempt. A Befitting Burial to *Republic v District Court Grade I, Dunkwa-On-Offin; Ex Parte Owusu*"** sheds light on the lapses in the decision of the esteemed judge in the case of ***Ex Parte Owusu*** supra and calls on the legislature to atone for the gaps caused by the decision.

With digitalization has come the introduction of electronic payment services and Ghana has not been left behind in this transition. Godslove Wesley Etornam Gomado discusses the current licensing regime of electronic payment services under the Payment Systems and Services Act, 2019 (Act 987) in his article **titled "Payment Systems and Services Act 2019; Licenses and Resultant Regulatory Issues"**. He highlights the various regulatory issues under the current regime and compares it to the system prevalent in other Sub-Saharan African states and global trends in the electronic payments industry.

Still on the conversation of digitalization as it relates to monetary terms, the

article **"The Future of Cryptocurrency in Ghana: Regulatory Challenges and Opportunities"** written by Martin Waana-Ang and Kenneth Atsu Dogbey, delves into the conversation of cryptocurrency by analyzing Ghana's regulatory approach and comparing it to that of other states. The authors then provide valuable insights into how Ghana might navigate the evolving cryptocurrency landscape to harness its potential for national growth.

Richard Obeng Mensah and Martin Waana-Ang start the conversation on the trending topic of Artificial Intelligence in their article **"Navigating the Complexities of AI: Challenges in the Protection of Copyright Regarding Authorship and Ownership"**. Their article focuses on a discussion of A.I as it relates to intellectual property rights and copyright laws.

Michael Ofosu Duodu in his article **"Defining Responsibility of States Towards Sustainable Use of the Environment: the Nature of Due Dilligence Obligation in the Context of Transboundary Environmental Harm"** contributes to the conversation on the obligation of due diligence as it relates to transboundary environmental harm.

With an increased number of natural disasters, the world over and changing weather conditions, the conversation on climate change has intensified and Ghana has not been left out. A shift is steadily being made towards the protection of the environment and the departure from the use of fossil fuels. Hubert Tieku analyzes how Africa should approach the energy transition in his article **"Energy Transition in Africa: A Balanced Approach for Sustainable Development"**.

The final article in this Volume, is an international article written by Nigerian, Ojo Oluwadunsin Hecares. He delves into the legal complexities involved in illegal transplant cases in Nigeria in his article titled **"The Ethical and Legal Dimensions of Missing Organs: Prosecuting Medical Practitioners in Illegal Transplant Cases.** He points out the present challenges within the current legal framework and what might be done to address this.

Each individual article is available for download at https://gsljournal.org/.

It is our hope that you enjoy the articles and that they inspire you to continue the conversation on these topics.

Editor-in-Chief
Ewurama Mongson
2024

FOREWORD

In accepting the invitation from the Students' Representative Council (SRC) to write this foreword for the ninth edition of the journal, I am mindful that I will be expected to share my experience with its numerous readers, especially the hundreds of lawyers most of whom I have interacted with during my almost fifteen years as Senior Lecturer and Head of the Faculty of Family Law and Practice at the Ghana School of Law.

When I look back at my last fifty-four years at the Ghana Bar, it seems as if it all happened overnight. But on sober reflection, I recall the years that I spent in private practice, at the Attorney-General's Department as a State Attorney and at the Volta River Authority as a Legal Adviser. I proceeded overseas where I gained further experience in the banking industry and in academics.

My association with the Ghana School of Law subsequently, teaching Post-Call and Professional Law Courses, has been a continuation of my professional encounter which I have come to love so fondly. In the end, I attribute my expertise to a persistent yearning for learning, open-mindedness and creative approaches to solving emerging problems. These are virtues that I may recommend to my younger lawyer colleagues.

Some of the contributors of this volume are lawyers or are at the school, about to be called to the Bar. Thus, the papers are well-witten with the clarity of expression that enables non-legal persons to comprehend and participate in the debates to which they call our attention.

The nine papers comprising this volume cover a wide range of themes including finance, ethics, digitalisation and the environment, all falling within the broader study area of sustainable development. Characteristically, the problems they highlight, the research questions they seek to answer and the purposes that they strive to achieve are contemporary challenges of the fourth industrial revolution. Furthermore, each paper is structured with theoretical underpinnings and illustrated with real-life cases to enhance their value, significance, and relevance. Additionally, their discussions provide insights that generate fresh and novel ideas for both theory and practice. Finally, they undertake comparative analyses between Ghana and countries selected from the rest of the world to extend the scope of their implications for further research.

The first paper compares political party financing in Ghana with selected commonwealth countries to expose its weaknesses and recommends the establishment of an Elections

Ombudsman. The question is whether this will be of much help considering that the Electoral Commission has evolved over the years and could be refined to perform this role if found necessary.

The second paper dwells on the recent collapse of the financial sector leading to the Bank of Ghana tightening regulations on the suitability of persons for company directorship which ultimately undermines the presumption of innocence notion enshrined in the Constitution, 1992. This controversy, in the area of corporate governance, generates new avenues for research and practice.

In the third paper, the powers of Lower and Upper Courts are re-examined, the author arguing that the distinction between the two has become syllabic and urges rectification.

The fourth paper examines the broad subject of digitalizing payment systems in Ghana and the need for regulations to fill the loopholes in the present system.

At a more specific level, however, the fifth paper focuses on cryptocurrency and identifies legal uncertainties, cybersecurity threats and infrastructural gaps which are obstacles to sustainable technological advancement.

Authorship and ownership of AI-generated innovations have become global concerns that countries at various stages of development have to address, on the basis of broadly accepted principles. The sixth paper takes up this topic and argues for a balanced approach that recognises the value of human creativity, while addressing the unique capabilities of AI, for example.

Illegal human organ harvesting, another ethical issue, is interrogated in the seventh paper based on a Nigerian case study from which useful lessons emerge. Considering the strong correlation between ethics and culture, it appears that resolution lies in customizing in specific contexts, lessons learnt from global experiences.

The last two papers relate directly to the environment. The eighth paper examines due diligence in the common use of natural resources and reviews the literature on normative principles under international law. The case of the Grand Ethiopian Renaissance Dam dispute with Egypt, draws lessons for Ghana and other countries to review their environmental laws.

Finally, in the ninth paper, the author questions alternative strategies for transitioning from fossil fuels to renewable energy. Given that Africa is endowed with large amounts of natural oil and mineral resources, among others and the continent is at a low level of development, this problem may be approached not from a regulatory perspective alone, but also from multidisciplinary approaches to arrive at cost-effective and pragmatic solutions.

The synopses above reveal the array of theoretical, policy and practical implications that may be drawn from the current edition of the journal. The choice of thematic areas is timely not only because this is a year of

elections around the globe including Ghana, but also because it is likely to motivate readers to get more interested in contemporary themes that signify the current stage of the fourth revolution in Ghana and Africa. I wholeheartedly endorse it for a much wider readership.

Mrs. Frederica Ahwireng-Obeng ESQ
Senior Lecturer and Head of the Faculty of Family Law and Practice
Ghana School of Law
2024

EDITORIAL BOARD

DEDICATION

This 9th Volume of the Ghana School of Law Student Journal is dedicated to Mrs. Frederica Ahwireng-Obeng for her numerous years of dedicated service to the Ghana School of Law and the Ghana Bar.

ARTICLES

WHOSE TUNE DOES THE PIPER PLAY? AN APPRAISAL OF POLITICAL PARTY FINANCE REGULATION IN GHANA

Samuel Kwadwo Owusu-Ansah[1]

ABSTRACT

Researchers have long found a positive relationship between weak political party finance regulation and perceived and actual corruption and vice versa in democracies. Ahead of the 2024 general elections in Ghana, there has been renewed interest in the matter in political and civil society circles. This article will first examine the current state of political finance regulation in Ghana and engage in a comparative analysis with political finance regimes in other countries to ascertain the strength or otherwise of the Ghanaian regime. It will conclude by suggesting some models of political financing regulations and the establishment of an Elections Ombudsman to regulate and enforce campaign finance matters and other related matters.

Keywords: Campaign Finance, Political Party Finance, Elections, Electoral Management, Regulations

INTRODUCTION

It may be said with some degree of certainty that the days where "little or no attention [was] given to the subject [of political finance regulation] by scholars on Ghanaian politics"[2] are well and truly behind us. In the period ensuing the coming into force of the 1992 Constitution, academia,

1 LL. B (Lond); MA, Conflict, Peace & Security (KAIPTC); QCL candidate at the Ghana School of Law.

2 Joseph Atsu Ayee, 'Financing of Political Parties in Ghana: An Exploratory Study' in Kwame A Ninsin and Francis K Drah (eds), *Political Parties and Democracy in Ghana's Fourth Republic* (Woeli Publishing Services, 1993) ch 15, 246.

civil society and legal spaces alike have been replete with research and commentary on the question of political finance and its regulation and fittingly so as "finance is the oil that greases the engine of party politics."[3] Extant research has found the legal and regulatory regime of political financing to be inadequate.[4] Nonetheless, despite the immense attention accorded to the question in the Fourth Republic, it pervades public discourse mainly because it has eluded significant reform in the period, a matter that the impending 2024 general election has stoked renewed interest in.[5]

Corruption, disenfranchisement and the proliferation into politics of gains of serious and organised crime and other illegal or illicit activities are the known[6] correlates of our weak political financing regime, with the invariable result that the basic precept of democracy that "the various magistrates of the State should be [our] tenants or delegates, revocable at [our] pleasure"[7] is blatantly overrun in favour of parochial private interests. This incursion into the right of suffrage is not only morally reprehensible but potentially unconstitutional. In *Ahumah Ocansey v Electoral Commission; Centre for Human Rights & Civil Liberties (CHURCIL) v Attorney-General & Electoral Commission (Consolidated)*,[8] the Supreme Court per Date-Bah JSC held:

> The general principle governing elections in Ghana is that they are held on the basis of universal adult suffrage. This principle is embodied in article 42, an entrenched provision, of the 1992 Constitution... Article 42, although it is not contained in Chapter 5 of the Constitution, which is on "Fundamental Human Rights and Freedoms", is for me the first of the fundamental human rights of our Constitution. For without the general right to vote, the system of representative democratic government set out in the Constitution would fall away and be emptied

3 R S Hilne, 'Philippine and Malaysian Fund-Raising and Expenditure Practices in the Southeast Asian Context' in A Heidenheimer (ed), *Comparative Political Finance* (Lexington, D.C.: Heath, 1970) 143 cited ibid.

4 H Kwasi Prempeh & Stephen Kwaku Asare, 'Ghana Political Parties Financing Policy (GPPFP)' (2017, STAR-Ghana) ch 1.

5 John Dramani Mahama, 'Political financing in Ghana' (*JoyOnline,* 23 March 2023) < https://www.myjoyonline.com/full-text-mahamas-speech-on-political-financing-in-ghana-delivered-at-upsa/ > accessed 18 July 2024.

6 Ghana Center for Democratic Development (CDD), 'Understanding How Dirty Money Fuels Campaign Financing in Ghana: An Exploratory Study' (2021) 26-27 < https://cddgh.org/wp-content/uploads/2022/02/Final-Report-CDD-Campaign-Financing-FCDO-11th-June-2021.pdf > accessed 18 July 2024. See also Joseph Oti Frimpong, 'Oiling the Wheels of Multi-Party Politics in Africa: How Power Alternation Affects Party Financing in Ghana' (2019) 55(5) JAAS, 10 < https://doi.org/10.1177/0021909619891188 > accessed 18 July 2024.

7 John Stuart Mill, 'On Liberty', *Great Books of the Western World* (1952) vol 43, 268.

8 [2010] SCGLR 575. See also *Tehn-Addy v Electoral Commissioner* [1996-1997] SCGLR 589.

> of content. Without a democratic representative system of government, constructed on the bedrock of universal adult suffrage, the likelihood would be that the rights enshrined in Chapter 5 would be ineffective.

Thus, given the fundamental nature of the need to guarantee the sanctity of elections, the justification for a more stringent political regulatory regime is uncontentious and the real task is thence to fashion out the means of same.[9]

Political party finance regulation may typically refer to the body of laws, regulations, institutions and norms that supply, mandate, monitor and enforce the acceptable flow of money in the organisation and operations of political parties. As its subclass, campaign finance regulation deals specifically with these inflows before, during and immediately after election seasons.[10] The two would however be used interchangeably in this article. The range of political party finance regulation may be bifurcated. On one hand, there are regulations which govern the flow of money into political party coffers addressing questions like who may contribute, how much can be contributed, how are contributions to be received and how are contributions to be spent. On the other hand, regulations exist to ensure that the former group are complied with by requiring documentation and disclosures of contributions made and to empower certain institutions to monitor and enforce these regulations.

It is the latter form of regulations which is the focus of this article hence this work extricates other items in the range of political party finance regulations. It therefore falls within the emerging field of study known as electoral management. According to James, electoral management "refers to the organisations, networks, resources, micro anthropological working practices and instruments involved in implementing elections."[11] Notwithstanding the above, the article shall highlight the use of contribution quotas and spending limits if only to acquaint the reader with the gaps in the regulation of political party and campaign finance. The vexed issue of public funding of political parties is however beyond the

9 Prempeh and Asare (n 4) 1.

10 ibid (n 4).

11 Toby S James, 'Comparative Electoral Management: Performance, Networks and Instruments' (1st edn, Routledge 2020) 5.

scope of this work as it has been thoroughly dealt with elsewhere.[12]

The article will proceed as follows: Part 1 will lay out the existing legal framework which governs political party and campaign financing and identify the relevant institutions that monitor and enforce these regulations, the powers of these institutions and the legal basis for them. Part 2 will follow with a comparative analysis of political party and campaign financing in other jurisdictions, particularly the Federal Republic of Nigeria, the United Kingdom and the United States of America. Part 3 will make the case for the establishment of an independent elections ombudsman to consolidate the regulatory and prosecutorial powers of the institutions earlier identified as they relate to political party and campaign financing. It shall conclude by recommending further research into the establishment of an independent election's ombudsman in the short term and the progressive adoption of stringent political party and campaign finance regulations.

12 Rowland Atta-Kesson, 'Reforming Campaign Finance Laws in Ghana: A 'Political Party Bank Proposal' (2021) 1(2) UCCLJ < https://doi.org/10.47963/ucclj.v1i2.417 > accessed 20 March 2023; CDD and Afrobarometer, 'Ghanaians Oppose State Support for Political Parties During Election Campaigns' (2024, Dispatch No. 808) <https://www.afrobarometer.org/wp-content/uploads/2024/05/AD808-Ghanaians-oppose-state-support-for-political-parties-Afrobarometer-29may24.pdf > accessed 18 July 2024; CDD, Ransford E V Gyampo, 'Public Funding of Political Parties in Ghana: an Outmoded Conception?' (2015) 38(2) U:AJAS <https://doi.org/10.5070/F7382025972>' accessed 19 July 2024; Financing Political Parties in Ghana: Policy Guidelines (2005) <ndi.org/sites/default/files/1883_ghcddpolicyguidelines_5.pdf> accessed 18 July 2024; John Dramani Mahama (n 5).

PART ONE
POLITICAL PARTY FINANCE REGULATION IN GHANA: LAWS AND INSTITUTIONS

1.1 NO ADO ABOUT NOTHING: HISTORICAL CONTEXT AND EVOLUTION OF POLITICAL PARTY FINANCE REGULATION IN GHANA

The evolution of political party finance regulation in Ghana has been snail-paced and has, in some instances, regressed. In the period after independence, the flow of money into politics virtually went unchecked and government after government were embroiled in corruption scandals as a result of the legislative inertia.[13]

It was not until the dawn of the Third Republic that major legislation was introduced on the matter by the enactment of the Political Parties Decree, 1979 (SMCD 229) by the Akuffo-led Supreme Military Council (SMC-II). The Decree was enacted in anticipation of the return to multi-party politics via the promulgation of the 1979 Constitution of the Republic of Ghana within several weeks of the coming into force of the Decree.[14] SMCD 229 thus fulfilled, in advance, the requirement of Article 42(6) of the 1979 Constitution that:

> '(6) Subject to the provisions of this Constitution, and in furtherance of the preceding provisions of this article, Parliament shall, by law, regulate the functioning of political parties.'

As far as political party financing was concerned, the relevant provisions of SMCD 229 were between sections 19-22 of the Decree with the penalties contained in section 30. SMCD 229 mandated the keeping and auditing of financial records,[15] an annual contribution limit of ¢1,000.00 for every Ghanaian citizen[16] and a total ban on contributions by companies and foreigners.[17] It further provided for penalties for the violation of these provisions in section 30.

SMCD 229 was eventually repealed by section 34 of the Political Parties Law, 1992 (PNDCL 208). Like SMCD 229, PNDCL 208 was made in

13 Ayee (n 2) 246-248.

14 SMCD 229 was assented to on 26 March 1979, three months before the intended 1 July handover to civilian rule. However, events were overrun by the successful coup of the Armed Forces Revolutionary Council (AFRC) on 4 June. The AFRC would eventually promulgate the 1979 Constitution on 19 September with the only major change being the indemnity granted to AFRC officers under the transitional provisions.

15 SMCD 229 s 19.

16 ibid s 20.

17 ibid s 21 and 22.

furtherance of a return to democratic rule, this time under the incumbent 1992 Constitution of the Republic of Ghana. In a marked improvement over its predecessor, the 1992 Constitution itself contained some provisions on political party and campaign financing in Article 55. The relevant provisions are reproduced below.

> 55(11) The State shall provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the State-owned media.
>
> (12) All presidential candidates shall be given the same amount of time and space on the State-owned media to present their programmes to the people.
>
> (14) Political parties shall be required by law
>
> (a) to declare to the public their revenues and assets and the sources of those revenues and assets; and
>
> (b) to publish to the public annually their audited accounts.
>
> (15) Only a citizen of Ghana may make a contribution or donation to a political party registered in Ghana.
>
> (17) Subject to the provisions of this Chapter, Parliament shall by law regulate the establishment and functioning of political parties.

Thus, like SMCD 229, PNDCL 208 satisfied the requirement for Parliamentary action in Article 55(17) of the 1992 Constitution. The statutes themselves were similar with the latter reenacting several useful provisions in the 1979 law. Consequently, asset declaration provisions,[18] contribution limits[19] and the prohibition of corporate bodies[20] and non-Ghanaians[21] from making contributions were maintained in PNDCL 208. However, PNDCL 208 ushered in some changes on its own. For instance, section 20 of PNDCL 208 increased the threshold for maximum contributions of individuals to ¢200,000.00 from the ¢1000.00 in SMCD 229 and a later amendment vested the power to set the maximum threshold in the then Interim National Electoral Commission.[22]

18 PNDCL 208, s 13.
19 PNDCL 208, s 20.
20 PNDCL 208, s 21.
21 PNDCL 208, s 22 echoing Article 55(15) of the 1992 Constitution
22 Political Parties (Amendment) Act, 1992 (PNDCL 283); Ayee (n 2) 250

Moreover, there were points of complete divergence between the laws. Thus, while section 19 of SMCD 229 mandated certain disclosures, section 14 of PNDCL 208 imposed additional disclosure requirements specifically related to elections thus, marking for the first time in election regulation, a distinction between political party finance regulation and campaign finance regulation.

1.2 THE STATE OF POLITICAL PARTY AND ELECTION FINANCING IN MODERN GHANA: THE STATUTORY FRAMEWORK

The principal legal framework for campaign finance is the 1992 Constitution, thus, the provisions provided above are equally applicable to the current regime of political party and election finance. For ease of reference, the relevant provisions of Article 55 are reproduced below.

> **Article 55 – Organization of Political Parties**
>
> 55(11) The State shall provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the State-owned media.
>
> (12) All presidential candidates shall be given the same amount of time and space on the State-owned media to present their programmes to the people.
>
> (14) Political parties shall be required by law
>
> > (a) to declare to the public their revenues and assets and the sources of those revenues and assets; and
> >
> > (b) to publish to the public annually their audited accounts.
>
> (15) Only a citizen of Ghana may make a contribution or donation to a political party registered in Ghana.
>
> (17) Subject to the provisions of this Chapter, Parliament shall by law regulate the establishment and functioning of political parties.

The statutory regime for the organisation of political parties has however been the subject of change. The Political Parties Act, 2000 (Act 574) is, at present, the law in place to satisfy Article 55(17) of the 1992 Constitution. Section 34(1) accordingly repeals PNDCL 208 and PNDCL 283. The provisions of Act 574 in connection with the relevant question are as follows:

13. Declaration of assets and expenditure by political parties

(1) A political party shall, within ninety days after the issue to it of a final certificate of registration under section 11 or a longer period allowed by the Commission, submit to the Commission a written declaration giving details of all its assets and expenditure including contributions or donations in cash or in kind made to the initial assets of the party by its founding members.

(2) A declaration submitted to the Commission under subsection (1) shall state the sources of the funds and the other assets of the political party.

(3) The declaration shall also contain any other particulars directed by the Commission in writing. (4) The declaration shall be supported by a statutory declaration made by the national treasurer and the national or general secretary of the political party.

(5) The Commission shall, within thirty days after receipt of the declaration required under subsection (1), publish the declaration in the *Gazette*.

(6) Without prejudice to any other penalty prescribed by this Act or any other enactment, where a political party,

(a) refuses or neglects to comply with this section, or

(b) submits a declaration which is false in a material particular,

the Commission may cancel the registration of that political party.

14. Declaration of assets, liabilities and expenditure in relation to elections

(1) A political party shall, within twenty-one days before a general election, submit to the Commission a statement of its assets and liabilities in the form directed by the Commission.

(2) A political party shall, within six months after a general or by-election in which its has participated, submit to the Commission a detailed statement in the form directed by the Commission of all expenditure incurred for that election.

1. (3) A statement required to be submitted under this section shall be supported by a statutory declaration made by the general or national secretary of the political party and the national treasurer of that party.

(4) Without prejudice to any other penalty provided in this Act or any other enactment, where a political party,

2. (a) refuses or neglects to comply with this section, or
3.
4. (b) submits a statement which is false in a material particular,

the Commission may cancel the registration of the political party.

21. Returns and accounts of political parties

(1) A political party shall, within six months from 31st December of each year, file with the Commission

(a) a return in the form specified by the Commission indicating,

(i) the state of its accounts,

(i) the sources of its funds,

(ii) membership dues paid,

(iii) contributions or donations in cash or kind,

(iv) the properties of the party and the time of acquisition,

(iv) any other particulars reasonably required by the Commission, and

(a) the audited accounts of the party for the year.

(2) A person may, on payment of a fee determined by the Commission, inspect or obtain copies of the returns and audited accounts of a political party filed with the Commission under this section.

(3) Despite this section, the Commission may at any time on reasonable grounds order the accounts of a political party to be audited by an auditor appointed by the Commission whose fees and expenses shall be paid by the Commission, and request the political party to file with the Commission the audited accounts at a time specified by the Commission.

23. Contribution by citizens

(1) Only a citizen may contribute in cash or in kind to the funds of a political party.

(2) A firm, partnership, or enterprise owned by a citizen or a company registered under the laws of the Republic at least seventy-five percent of whose capital is owned by a citizen is for the purposes of this Act a citizen.

24. No contribution by non-citizens

A non-citizen shall not directly or indirectly make a contribution or donation or loan whether in cash or in kind to the funds held by or for the benefit of a political party and a political party or person acting for or on behalf of a political party shall not demand or accept a contribution, donation or loan from a non-citizen.

25. Contraventions of sections 23 and 24

(1) Where a person contravenes a provision of section 23 or 24, in addition to any other penalty imposed under this Act, the amount whether in cash or in kind paid in contravention of the section shall be forfeited to the Republic and the amount shall be recovered from the political party as debt owed to the Republic.

(2) The political party or person in whose custody the amount is for the time being held shall pay it to the Republic.

(3) A non-citizen found guilty of contravention of a provision of section 24 shall be deemed to be a prohibited immigrant and be liable to deportation under the Immigration Act, 2000 (Act 573).

(4) Sections 23 and 24 do not preclude the government of any other country or a non-governmental organisation from providing assistance in cash or in kind to the Commission for use by the Commission for the collective benefit of registered political parties.

30. Penalty

(1) A person who contravenes a provision of this Act commits an offence.

(2) A person who in furnishing particulars or information required to be furnished by a political party or by that person under this Act makes a statement which that person knows is false or which that person does not believe is true or makes a false statement recklessly whether it is true or not commits an offence.

(3) An offence under this Act, unless otherwise specifically provided for, is punishable with a fine not exceeding ten million penalty units

> or to a term of imprisonment not exceeding two years or to both the fine and the imprisonment.
>
> (4) Where an offence under this Act is committed by a political party, every executive officer of that party shall be deemed to have committed that offence.
>
> (5) Where an offence under this Act is committed by a body of persons, other than a political party, then
>
> > (a) in the case of a body corporate, every director and the secretary of the body corporate shall be deemed to have committed that offence; and
> >
> > (b) in the case of a partnership, every partner shall be deemed to have committed that offence.
>
> (6) A person shall not be convicted of an offence by virtue of subsection (4) or (5) if it is proved to the satisfaction of the Court that the act in respect of the charge was committed by another person and without the consent or connivance of, and that due diligence was exercised by that person to prevent the commission of that act having regard to the circumstances.

The current statutory regime admits of several flaws. Prempeh and Asare identify the following to be the gaps in the current regime:[23]

1. There is no provision under current law for direct (cash) public funding of political parties. However, under a longstanding arrangement that has yet to be enshrined in law, Members of Parliament receive a portion of the District Assemblies Common Fund allocated to districts within their constituencies. Also, in past elections, the Government, acting through the Electoral Commission, has allocated vehicles to qualified political parties for use in election campaigns.[24]
2. There is some ambiguity or uncertainty whether the constitutional restriction of party contributions or donations to a "citizen of Ghana" also restricts donations or contributions only to natural persons and, therefore, prohibits all corporate donations or whether donations by Ghanaian-registered companies are permitted. It is common knowledge that businesses and business owners, including foreign business

23 ibid (n 4) 5, 6.

24 Whether the lack of public funding is a shortfall of the regime is the subject of controversy. See ibid n (12).

operators in Ghana, make donations to the campaigns of the main political parties, although political contributions do not enjoy tax-deductible treatment under the tax laws.[25]

3. There is no limit to the amount of money a permissible donor can contribute to a political party.
4. Regular dues from rank-and-file membership are a negligible source of finance for political parties in Ghana. In general, political parties in Ghana are funded primarily from large, irregular donations by wealthy party members and supporters, including those holding key appointments in the public corporate sector. Overseas branches and Ghanaians living abroad have also been an important source of party funding, especially for the NPP when it is in opposition. In the 2016 election season, the NPP also launched, for the first time, a "Go Fund Me"-style "Adopt-a-Polling Station" fundraising platform, which enabled supporters of the party all over the world to contribute online to its 2016 election campaign.
5. There is no limit to the amount of money a political party or candidate can spend in a given election or in a given election cycle.
6. Other than the usual criminal prohibition against vote buying, which is routinely disregarded by all parties and candidates, there is no law prohibiting certain uses of party or campaign funds.[26]
7. There is no law expressly prohibiting the use of public funds or resources by government officials for party or campaign activities. In practice, abuse of incumbency is widespread during election campaign season.[27]
8. The statutory disclosure and reporting regulations do not require disclosure of the identity of donors or a disaggregation of donations or contributions into amount per donor.
9. The statutory disclosure and reporting regulations are expressly and exclusively addressed to political parties, not to presidential or parliamentary candidates or campaigns.

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25 It is submitted that the express definition of citizens to include legal persons in section 23(2) of Act 574 resolves the ambiguity and precludes foreign companies from making contributions relying on the perceived ambiguity. The maxim *expressio unius est exclusion alterus* therefore applies. See *Ghana Industrial Holding Corporation v Vincenta Publication* [1971] 2 GLR 24 CA.

26 The Criminal Offences Act, 1960 (Act 29), s 256 and the Representation of the People Law, 1992 (PNDCL 284) s 34 criminalise vote buying.

27 See also: Magnus Ohman, 'Regional Studies of Political Finance: Regulatory Frameworks and Political Realities; Africa' in Elin Falguera, Samuel Jones and Magnus Ohman (eds), *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (International Institute for Democracy and Electoral Assistance, 2014); Alban S K Bagbin and Albert Ahenkan, 'Political Party Financing and Reporting in Ghana: Practitioner Perspectives' in K Mensah (ed) *Political Marketing and Management in Ghana* (Palgrave Macmillan, Cham., 2017) < https://doi.org/10.1007/978-3-319-57373-1_6 > accessed 21 July 2024.

This article associates itself with these findings, save as otherwise excluded above. It will however not dwell on the merits of the findings as this is not the focus of the article.

1.2.2 THE STATE OF POLITICAL PARTY AND ELECTION FINANCING IN MODERN GHANA: INSTITUTIONS

Having situated the subject of inquiry under electoral management above, it is necessary to identify the bodies responsible for such management. 'Electoral management bodies (EMBs) are the individual or collection of organisations or bodies that are tasked with 'managing some or all the elements that are essential for the conduct of elections.'[28] The essential elements were identified to include 'boundary delimitation, voter and candidate registration, campaign media and **finance monitoring**, voter education, to post-election dispute adjudication.[29]

The Ghana Center for Democratic Development (CDD) identifies several stakeholders in election management in Ghana including the Public Accounts Committee of Parliament, National Commission on Civic Education (NCCE), Commission on Human Rights and Administrative Justice (CHRAJ), Audit Service /Auditor-General, Economic and Organised Crime Office (EOCO), Financial Intelligence Center (FIC), Ghana Revenue Authority (GRA), Ghana Immigration Service (GIS), Ghana Police Service (GPS) and National Investigations Bureau (NIB).[30] According to the study:

> "This category of state-side stakeholders has varying mandates ranging from regulating political parties and election management (Electoral Commission); enforcing laws and regulations related to aspects of campaign financing (Ghana Immigration Service deporting non-citizens who finance parties; EOCO, NIB, GPS – investigating and on the authority of the AG prosecuting SOC) and conducting public education (NCCE)."[31]

However, the principal EMB in Ghana is the Electoral Commission. The Electoral Commission is a creation of the 1992 Constitution and reinforced

28 Toby S James and others, 'Electoral management and the organisational determinants of electoral integrity: Introduction' (2019) 40(3) International Political Science Review < https://doi.org/10.1177/0192512119828206> accessed 22 July 2024

29 ibid (emphasis added).

30 Ghana Center for Democratic Development (CDD), 'Understanding How Dirty Money Fuels Campaign Financing in Ghana: An Exploratory Study' (2021) 41 < https://cddgh.org/wp-content/uploads/2022/02/Final-Report-CDD-Campaign-Financing-FC-DO-11th-June-2021.pdf > accessed 18 July 2024.

31 ibid.

by the Electoral Commissions Act, 1993 (Act 451). Article 43 of the Constitution provides that:

> **43. The Electoral Commission**[32]
>
> (1) There shall be an Electoral Commission which shall consist of,
>
> (a) a Chairman,
> (b) two Deputy Chairmen, and
> (c) four other members.
>
> (2) The members of the Commission shall be appointed by the President under article 70 of this Constitution.

Article 45 of the 1992 Constitution provides the functions of the Commission to be as follows:[33]

> The Electoral Commission has the following functions:
>
> (a) to compile the register of voters and revise it at such periods as may be determined by law;
> (b) to demarcate the electoral boundaries for both national and local government elections;
> (c) to conduct and supervise all public elections and referenda;
> (d) to educate the people on the electoral process and its purpose;
> (e) to undertake programmes for the expansion of the registration of voters; and
> (f) to perform such other functions as may be prescribed by law.

The Committee of Experts, which provided the draft 1992 Constitution, defined the duty of the Commission to organise public elections as including "functions that are incidental to the electoral process."[34] Consequently, the regulation of political party and campaign finance can be situated within the Commission's function to conduct and supervise all public elections and referenda under Article 45(c) of the 1992 Constitution and Section 2(c) of Act 451 as same is incidental to the electoral process. Further, the various powers and functions vested in the Commission under Act 574 as outlined above are given effect by virtue of Article 45(f) of the Constitution and Section 2(h) of Act 451.

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32 Act 451, ss 1 and 4 reinforce this provision.

33 Act 451, s 2 reinforces this provision.

34 Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, (1991) paragraph 221.

Upon scrutiny of Act 451, it appears that the main tools at the disposal of the Commission in executing its regulatory mandate are the rejection of applications for registration of political parties where the relevant disclosures are not made and the cancellation of the registration of prior registered parties.[35] The Commission may further cause an audit of the records and accounts of a political party upon reasonable grounds and apply to the High Court to wind up and dissolve a political party whose registration has been cancelled where it is equitable and just to do so.[36]

The Commission however has no prosecutorial powers on its own and must rely on the Office of the Attorney-General or some other body acting on the authority of that office to investigate and prosecute election crimes and enforce electoral laws.[37] The combined effect of section 42 of PNDCL 284 and section 30 of Act 574 essentially subject the enforcement powers of the Electoral Commission and all the other bodies identified in section 1.22 above in respect of criminal violations of campaign finance regulations to the pleasure of the Attorney-General or upon the authorisation of his office.

1.2.3 LIMITATIONS IN THE REGULATORY STRUCTURE IN GHANA

The current structure of regulatory bodies invites some scepticism as to their capacity and efficacy in implementing the regulations on political party and campaign finance. These concerns mainly relate to the independence and fairness of the process of implementation as well as questions of capacity. These would be addressed in turn.

Article 46 of the 1992 Constitution provides that:

> **46. Independence of the Commission[38]**
>
> Except as provided in this Constitution or in any other law not inconsistent with this Constitution, in the performance of its functions, the Electoral Commission, is not subject to the direction or control of any person or authority.

Notwithstanding this constitutional requirement, the independence of the Electoral Commission has been the subject of controversy amongst political party officials and faithful, especially when their party of choice

35 Act 574, ss 13 and 14.

36 Act 574, ss 21 and 31.

37 Report of the Constitutional Review Commission: From a Political to a Developmental Constitution, (2011), 365 para 174, 176(a).

38 Emphasised in Act 451, s 3.

is in opposition.[39] There further exists some evidence that the Commission is not personnel independent.[40] This is largely attributed to the mode of appointment of the Commissioners.

As stated above, the appointment of the Commissioners of the Electoral Commission is to be done in accordance with Article 70 of the 1992 Constitution which provides thus:

> **70. Appointments by the President**
>
> (1) The President shall, acting in consultation with the Council of State, appoint
>
> (a) the Commissioner for Human Rights and Administrative Justice and his Deputies;
>
> (b)the Auditor-General;
>
> (c)the District Assemblies Common Fund Administrator;
>
> (d) the Chairmen and other members of,
>
> (i) the Public Services Commission;
>
> (ii) the Lands Commission;
>
> (iii) the governing bodies of public corporations;
>
> (iv) a National Council for Higher Education howsoever described; and
>
> (e) the holders of such other offices as may be prescribed by this Constitution or by any other law not inconsistent with this Constitution.
>
> (2) The President shall, **acting on the advice of the Council of State**, appoint the Chairman, Deputy Chairmen, and other members of the Electoral Commission.[41]

The Supreme Court took the opportunity to define what it means to be "acting on the advice of the Judicial Council" in relation to Article 144(2) of the 1992 Constitution in the case of *Ghana Bar Association & Ors v Attorney-*

39 ibid (n 34) 367, para 178 (b).

40 Akpeko Agbevade, 'Ghana's 2020 Electoral Politics: An Assessment of the Electoral Commission' (2024) 10(1) Cogent Social Sciences 13-14 < https://doi.org/10.1080/23311886.2024.2361533 > accessed 28 July 2024.

41 Emphasis added.

General & Judicial Council; Richard Sky v Attorney-General; Kwasi Danso-Acheampong v Attorney-General (consolidated).[42] The majority of the court held per Dotse JSC:

> When the two words and phrases e.g. acting on the advice are put together, a clearer meaning of the role of the Judicial Council giving an advisory opinion is apparent and this therefore in my opinion makes such an advice in the true meaning of the words not binding. Therefore, a simple, ordinary and common sense reading of these provisions indicates that the President must at all cost have this advice from the Judicial Council and if he does not have this advice, the appointments of the Justices will not be valid. But at all times, this remains an advice and the President, in my opinion is not bound to follow it.

For our purposes, it follows that whereas the President must seek the advice of the Council of State before appointing the Commissioners of the Electoral Commission, he is not bound to follow same. This accords the President an incredible degree of latitude in making these appointments and the potential for a conflict of interest is exacerbated by the fact that affiliation to political parties is no bar to appointment as a Commissioner, a matter many an opposition have been eager to point out.[43] The Constitutional Review Commission therefore recommended that the appointment of members of the Electoral Commission should be subject to prior parliamentary approval.[44]

Another hotspot in the structure of EMBs in Ghana is the restriction of the enforcement powers of the Electoral Commission. As indicated earlier, the Electoral Commission may only enforce election rules by cancelling or refusing the registration of a political party or causing it to be audited. Consequently, the Commission is disabled from exacting a range of civil sanctions including fines, warnings and cautions amongst other measures in cases of minor infringements or where the circumstances of a matter so require. Coupled with its inability to prosecute offenders, the limited nature of the civil sanctions the Commission can enforce renders it a toothless bulldog.

The challenge is further compounded by the fact that the only body capable

42 Consolidated Writs: J1/21/2015; J2/22/2015; J1/26/2015 dated 20th July 2016.

43 Evans Annang, 'NDC will go into the 2024 elections with its own referee – Mahama' *Pulse Ghana* (20 June 2024) <NDC will go into the 2024 elections with its own referee - Mahama | Pulse Ghana> accessed 28 July 2024.

44 ibid (n 34) 338 para 61(a).

of prosecuting electoral offences, the Office of the Attorney-General is an entirely political office whose occupant is a minister of the President. Consequently, the potential for only political opponents to be pursued for electoral crimes is significant. Indeed, the most notable cases of prosecution for electoral offences have only been instituted against members of the opposition. Thus, in *The Republic v Adamu Daramani Sakande*,[45] the Mills-led National Democratic Congress administration pursued the accused, who was elected MP of the Bawku Central Constituency whilst being a dual citizen, on several counts including election fraud and perjury which resulted in his conviction and sentence. Similarly, following the 2020 general election, the present New Patriotic Party administration has commenced *The Republic v James Gyakye Quayson*[46] who was elected as the MP for Assin North Constituency while not having renounced his Canadian citizenship. The seeming use of the Office of the Attorney-General to settle political scores is a cause for concern and has been the subject of commentary.[47]

Consequently, the structure of EMBs in Ghana, specifically the mode of appointment, their competencies and the independence of these EMBs impede their ability to effectively implement the regulations of political party and campaign financing.

45 Case No. ACC 45/2009.

46 Case No. CR/O264/2022.

47 'Martin Kpebu explains 4 major differences between the case of Adamu Sakande and Gyakye Quayson' *Myinfogh* (12 July 2023) < Martin Kpebu explains 4 major differences between the case of Adamu Sakande and Gyakye Quayson – www.myinfo.com.gh > accessed 28 July 2024.

PART TWO

A COMPARATIVE ANALYSIS OF THE STRUCTURE OF ELECTION MANAGEMENT BODIES IN SOME JURISDICTIONS

This article has earlier highlighted the challenges that the structure of EMBs presents to the efficient enforcement of campaign finance regulation in Ghana. This part will explore the structure and competencies of EMBs in three jurisdictions, namely the Federal Republic of Nigeria, the United Kingdom and the United States of America. The selection of these jurisdictions is influenced in part by their use of the common law system. Further, they represent the most pronounced of the liberal democratic systems with Nigeria and the United States being purely presidential and the United Kingdom being the quintessential parliamentary democracy. Consequently, desirable elements of the structures in the respective jurisdictions may be easily replicated within the hybrid, common law system which obtains within our jurisdiction.

2.1 FEDERAL REPUBLIC OF NIGERIA

The main statutes which govern elections and EMBs in Nigeria are the 1999 Constitution of the Federal Republic of Nigeria and the Electoral Act 2022. As far as campaign finance regulations are concerned, Nigeria prohibits anonymous campaign contributions, contributions from foreign sources and corporations and imposes limits on contributions to campaigns by individuals as well as expenditures by candidates and political parties based on the type of election to be contested.[48]

The Independent National Electoral Commission (INEC) is the principal EMB in Nigeria. Section 153(1)(f) of the 1999 Constitution establishes INEC as one of several Federal Executive Bodies. The composition of INEC is provided in paragraph 14 of the Third Schedule of the 1999 Constitution as follows:

> 14. (1) The Independent National Electoral Commission shall comprise the following members -
>
> (a) a Chairman, who shall be the Chief Electoral Commissioner; and
> (b) twelve other members to be known as National Electoral Commissioners, who shall be persons of unquestionably

48 The 1999 Constitution of the Federal Republic of Nigeria, s 225; Electoral Act 2022 (FNG), pt 5; Olakanye Oluwatobi, '#234Vote: What the Law says about Campaign Financing' (*Borg Legal and Policy Research,* 2022) < https://www.borg.re/articles/234votes/234vote-what-the-law-says-about-campaign-financing> accessed 28 July 2024.

integrity and not less than fifty years and forty years of age, respectively.

The Commissioners are appointed by the President upon the advice of the Council of State[49] and subject to the confirmation of the Senate.[50] To accommodate the Federal Structure of Nigeria, the President is further empowered to appoint a Resident Electoral Commissioner for each state of the Federation.[51] The functions of INEC are provided in the Constitution as follows:[52]

15. The Commission shall have power to -

(a) organise, undertake and supervise all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a State, and to the membership of the Senate, the House of Representatives and the House of Assembly of each State of the Federation;
(b) register political parties in accordance with the provisions of this Constitution and an Act of the National Assembly;
(c) monitor the organisation and operation of the political parties, including their finances;
(d) arrange for the annual examination and auditing of the funds and accounts of political parties, and publish a report on such examination and audit for public information;
(e) arrange and conduct the registration of persons qualified to vote and prepare, maintain and revise the register of voters for the purpose of any election under this Constitution;
(f) monitor political campaigns and provide rules and regulations which shall govern the political parties;
(g) ensure that all Electoral Commissioners, Electoral and Returning Officers take and subscribe the Oath of Office prescribed by law;
(h) delegate any of its powers to any Resident Electoral Commissioner; and
(i) carry out such other functions as may be conferred upon it by an Act of the National Assembly.[53]

In pursuance of these functions and specifically in its monitoring of party finances, INEC is vested with a range of powers. Amongst these are the

49 The 1999 Constitution of the Federal Republic of Nigeria, para 6(a)(iv), sch 3.
50 ibid, s 154(1).
51 ibid, para 15, sch 3.
52 ibid.
53 Emphasis added.

refusal of registration of political parties for failure to make adequate disclosures, deregistration of parties and investigation into the finances of political parties.[54] However, in *Action Congress & Anor. v Independent National Electoral Commission*,[55] the Supreme Court of Nigeria held that these powers did not extend to disqualifying candidates without a court order.

A distinguishing feature of INEC's powers from that of their Ghanaian counterparts is that the former is vested with prosecutorial powers of electoral offences.[56] Section 145 provides:

> **145 - Trial of offences.**
>
> (1) An offence committed under this Act shall be triable in a Magistrate Court or a High Court of a State in which the offence is committed, or the Federal Capital Territory, Abuja.
>
> (2) A prosecution under this Act shall be undertaken by legal officers of the Commission or any legal practitioner appointed by it.

It had been argued that the prosecutorial power of INEC was limited to prosecutions recommended by an Election Tribunal but in the case of *Ibrahim Mohammed Umar v Federal Republic of Nigeria & Ors*,[57] the Nigerian Court of Appeal per Uwa JCA held that:

> An Election Petition Tribunal may recommend (for the purpose of prosecution) to the Independent National Electoral Commission (INEC) for the prosecution of offenders under the Act but, INEC could initiate such proceedings especially where the election in question was not challenged. Section 149 provides thus: 149. "The commission shall consider any recommendation made to it by a Tribunal with respect to the prosecution by it of any person for an offence disclosed in any election petition." The above provision makes it mandatory for the commission to consider any recommendation made to it by an election tribunal for the prosecution of

54 ibid (n 47), s 226; Electoral Act 2022 (FNG), pt 5.

55 (2007) LLJR (SC).

56 A complete list of electoral offences is provided by INEC at < inecnigeria.org/wp-content/uploads/2019/02/ELECTORAL-OFFENCES-AND-PENALTIES-latest-FEBRUARY-2019.pdf > accessed 28 July 2024. NB. These relate to offences under the previous Electoral Act 2010.

57 (2021) LPELR-53936 (CA).

> offenders under the Act, this is only when and where a recommendation is made, by the clear wordings of Section 149 of the Act. This does not mean that the commission cannot initiate proceedings where a recommendation is not made, for instance where the election is not contested as in the present case. The above Section did not limit the investigation and prosecution to only cases where a recommendation has been made by an election petition tribunal. The appropriate agency or body may investigate and prosecute in appropriate cases without a recommendation from an election Tribunal.

Additionally, the Act provides for finances that are contributed or expended in contravention of it to be forfeited to the Commission upon conviction for that offence. This indubitably motivates INEC to prosecute offenders.[58]

2.5 THE UNITED KINGDOM

The main laws which regulate elections and EMBs in the United Kingdom are the Representation of the People Act, 1983 (RPA), Political Parties, Elections and Public Referendums Act, 2000 (PPERA) (as amended by the Political Parties and Elections Act, 2009). While the United Kingdom does not impose contribution limits on the amount an individual or corporate body may donate to a political party, it requires that donations must come from a "permissible source" which is invariably restricted to electorates of the UK and UK corporations. Further, there exist stringent reporting requirements involving the identity of the donor once the contribution exceeds certain thresholds and other disclosures.[59] The law further regulates the accrual of loans by political parties as well as imposes restrictions on campaign expenditure.[60] The United Kingdom goes further to regulate independent election expenditure thus in *Bowman v the United Kingdom,*[61] a majority of the European Court of Human Rights (ECtHR) found that the £5 limit imposed on publications promoting a candidate by section 75 of the RPA violated the right to freedom of expression of the applicant as enshrined in Article 10 of the European Convention on Human Rights (ECHR) spurring an increment to £500 under PPERA.

58 Abiodun Sanusi, 'INEC, EFCC appoint 18 lawyers to prosecute electoral offenders' *Punch* (16 April 2023) <INEC, EFCC appoint 18 lawyers to prosecute electoral offenders (punchng.com)> accessed 31 July 2024.

59 PPERA, pt 4.

60 ibid, pt 5.

61 [1998] ECHR 4.

The principal EMB in the United Kingdom is the Electoral Commission. The Commission is established by section 1 of PPERA which provides that it shall have 9 or 10 commissioners who shall be appointed by the Monarch upon an Address from the House of Commons.[62] Crucially, four (4) of the Commissioners are nominated by the leaders of dominant parties in the House of Commons.[63]

Section 146 of PPERA (as expanded in Schedule 19B) avails several tools to the Electoral Commission in its enforcement of the regulations on campaign finance. The enforcement policy[64] of the Commission divides these powers into supervisory powers, investigatory powers and other powers and provides details about the circumstances under which these powers would be exercised. As the enforcement remit of the Commission is narrower than its remit, it collaborates with other agencies such as the police to address breaches which do not fall under its remit.

Section 147 (as expanded in Schedule 19C) allows for the Commission to impose civil sanctions for a majority of offences in the Act. These sanctions include a fixed monetary penalty of £200 or a discretionary requirement which may include a variable monetary penalty of up to £20,000. Other means of enforcement include the issuance of stop notices, compliance notices, restoration notices, enforcement undertakings and forfeiture of illegally acquired donations.

2.6 THE UNITED STATES OF AMERICA

The main law that governs federal elections in the United States is the Federal Election Campaign Act (FECA) of 1971,[65] as amended. FECA requires the registration of federal political committees. These include candidate committees, party committees and political action committees (PACs) which are all required to make financial disclosures at regular intervals. FECA prohibits corporations and unions from making direct contributions to the elections of candidates and imposes limits on the contributions individuals can make. Previously there were limits on how committees could expend their funds, however, in *Buckley v Valeo*,[66] the Supreme Court of the United States (SCOTUS) held that the overall limitations on expenditures by candidates and committees violated their rights to free speech under the First Amendment to the Constitution of the

62 The Speaker's Committee on the Electoral Commission, *Appointment and re-appointment of Electoral Commissioners* (HC 2022-23, 353) < Appointment and re-appointment of Electoral Commissioners - The Speaker's Committee on the Electoral Commission (parliament.uk)> accessed 31 July 2024; ibid (n 56), s 3.

63 ibid s 4.

64 The Electoral Commission, 'Enforcement Policy' <Enforcement Policy | Electoral Commission> accessed 24 July 2024.

65 52 USC § 30101 *et seq.*

66 424 US 1 (1976).

United States and struck the limitations down. The Bicameral Campaign Reform Act (BCRA), 2002 amended FECA by closing loopholes which allowed parties to use so-called "soft money" which are contributions meant for the general administration of parties and are not subject to FECA regulation as well as the use of issue ads by corporations and unions to skirt the ban on their use of their funds for advocating for the election or rejection of candidates. However, in *Citizens United v FEC*,[67] SCOTUS found the latter restriction to be a violation of the First Amendment.

Due to the decentralised nature of the organisation of elections in the United States, electoral boards of each state are the EMBs with each state granting these boards varying degrees of power in the conduct of their monitoring functions. Consequently, the Federal Election Commission (FEC) was set up by section 30106 of FECA to disclose campaign finance information, enforce the law on campaign finance and oversee the public funding of presidential elections.[68] Section 30106 of FECA provides that the President of the United States shall appoint the six members of the FEC with "[n]o more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.[69] Traditionally, this has meant that the Commission has been composed of 3 members each from the Democratic and Republican parties respectively. The Commission makes decisions by a simple majority of its members.

In furtherance of its objectives, sections 30107-30109 vests several powers in the FEC. These powers may be broadly classified as supervisory, advisory and investigatory. When the Commission is satisfied that a person has or is about to violate campaign finance laws, it may engage such a person informally either by conference, persuasion or conciliation in order to correct or prevent the violation. It may in addition to or in default of this apply civil money penalty. Failing the above, the FEC may initiate actions seeking an injunction, declaratory relief, a civil penalty or some other appropriate order. It may also defend or appeal civil actions.

2.7 OBSERVATIONS

It is evident from the above discussion that the relevant regulatory frameworks across the jurisdictions considered the matters of independence and competence of the relevant regulatory authorities which have been

67 558 US 310 (2010).

68 'Mission and history' (*Federal Election Committee*) < https://www.fec.gov/about/mission-and-history/> accessed 11 July 2024.

69 52 USC § 30106 (a)(1).

highlighted herein as limitations of our current regime. The approaches taken by these jurisdictions to address these concerns shall be compared subsequently.

As far as independence is concerned, two central questions arise namely the appointments and impartiality of commissioners. With regards to appointments, the Federal Republic of Nigeria, like Ghana, empowers the President to appoint commissioners of the Electoral Commission however in the Nigerian case, these appointments are subject to the confirmation of the Senate of Nigeria. Similarly, the President of the United States appoints the members of the FEC "by and with the advice and consent of the Senate". The United Kingdom vests this power in the Monarch upon receipt of an Address from the House of Commons after they have endorsed the recommendations of the Speaker's Committee for the appointments of the commissioners. It is noted that in all of the above cases, the nominations for the appointment of Commissioners are made by the legislature or with their final confirmation. In this respect, the framework of all the relevant jurisdictions goes further than Ghana in ensuring the personnel independence of their respective regulatory bodies.

Concerning the question of impartiality, the United States allows, if mandates, persons with political affiliations to become members of the FEC. However, both parties having an equal number of members on the Commission mitigates the potential for it to be exploited by any party while engendering bipartisan buy into the efficient running of the Commission. In contrast, both Nigeria and the United Kingdom require the Commissioners appointed to be non-partisan however the latter enables a minority of the Commissioners to be nominated by a leader of a qualified party in the House of Commons which allows the political parties to have confidence that the Commission will be run fairly. In this respect also, the lack of an explicit requirement for non-partisanship or in the alternative, a counterbalancing mechanism like in the case of the United States exposes a weakness in Ghana's regulatory regime.

Regarding the competence of the bodies, all the relevant jurisdictions allowed a range of powers including civil sanctions such as monetary penalties. Both the United Kingdom and the United States promote conciliatory approaches to resolving violations with the issuance of enforcement undertakings and conciliation agreements respectively. Further, in both jurisdictions, the relevant bodies are able to block anticipated violations of the law. A unique feature of the American system is the advisory role of the FEC which allows interested persons to enquire whether a transaction may be in violation of campaign finance laws and indemnifies such persons when they rely on the advice given in good faith.

However, INEC is the only regulatory body with a prosecutorial mandate thus enabling it to pursue both civil and criminal modes of enforcing campaign finance laws.

Consequently, this Part has shown that Ghana lags behind comparable legal systems as far as the competencies and the independence of its principal regulatory body on campaign finance, the Electoral Commission is concerned.

PART THREE

THE CASE FOR AN INDEPENDENT ELECTIONS OMBUDSMAN

This article has previously juxtaposed the regulatory power of the Electoral Commission of Ghana with specific respect to campaign finance with similar bodies in other common law jurisdictions and highlighted the shortfalls with the Electoral Commission in this respect. This section shall make a case for the establishment of an independent elections ombudsman to monitor and enforce the laws on campaign finance.

3.1 ON THE NEED FOR AN INDEPENDENT ELECTIONS OMBUDSMAN

It has been earlier noted that the composition of the Electoral Commission as well as the reliance on the Office of the Attorney-General for the enforcement of electoral laws open the enforcement process to political manipulation or the perception thereof. This potential for political manipulation is neutralised with the establishment of an Independent Elections Ombudsman whose membership is determined by the legislature or with its approval.

Relatedly, an Independent Elections Ombudsman presents an opportunity for bipartisan cooperation and enforcement of campaign finance laws. Whereas the presence of known partisan figures on an EMB is undesirable since its core mandate is to facilitate free and fair elections, an Independent Elections Ombudsman will allow for the various interests of the relevant parties to be represented and allow them to serve as checks on one another. Indeed, the dividends of bipartisan cooperation in regulating elections are known in Ghana through the work of the Inter Party Advisory Committee (IPAC) since its formation in 1994. An Independent Elections Ombudsman will cement these benefits while safeguarding our elections.

Further, the establishment of an Independent Elections Ombudsman will be consistent with best practices on the introduction of electoral reform. Whereas it is generally accepted that the regime for campaign finance regulation is in need of an overhaul, the International Institute for Democracy and Electoral Assistance (IDEA) advises policymakers thus:

> Do not attempt to move directly from no regulations to a highly controlled system. Focus instead on the most important rules and ensure that they are implemented. Control of political finance must not lead to limitations

on political competition.[70]

Thus, whereas introducing new provisions imposing limits on the collection and expenditure of contributions may have to be introduced progressively to avoid causing instability, the establishment of an Independent Elections Ombudsman to efficiently enforce the existing law does not carry the potential for instability while providing immediate solutions to a number of the violations of campaign laws.

Finally, an enhanced sanctions regime which anticipates, mitigates and enforces the laws on campaign financing with a range of sanctions has better prospects of coaxing compliance from political parties and candidates. It is argued that the current sanctions regime has a chilling effect on the enforcement mandate of the Electoral Commission as the cancellation of the registration of a major political party will indubitably lead to chaos notwithstanding that the sanction has been applied justly. It is submitted that the establishment of a body with a range of appropriate sanctions will enable such a body to act freely and shore up a culture of compliance amongst the relevant stakeholders.

3.2 WHY NOT THE ELECTORAL COMMISSION?

It is conceded that a number of the benefits associated with an Independent Elections Ombudsman may be realised through the existing Electoral Commission. Indeed, it has been noted earlier that other jurisdictions such as the Federal Republic of Nigeria and the United Kingdom have EMBs with enforcement mandates. It is argued here that the orientation and institutional capacity of the Electoral Commission renders this approach untenable in our jurisdiction.

It has been suggested that the ineffective enforcement of election finance laws is attributable to inertia by the Electoral Commission. Thus, the Constitutional Review Commission found in paragraph 181 of its report that "one critical aspect of the problem has been the administrative under-enforcement of the laws. The blatant disregard for the laws is not a question of the lack of power by the EC to enforce the laws. Rather it is the inaction of the EC and other relevant authorities that seems to perpetuate the breaches of the laws."[71]

A likely explanation for this inertia is the orientation of the Electoral Commission in terms of its core mandate. Indeed, the enforcement power of the Electoral Commission is not explicitly stated in law and can only be

70 ibid (n 24) 65.
71 ibid (n 35) 369.

inferred as being incidental to its mandate to conduct and supervise public elections. Hence, the Ghana Center for Democratic Development notes:

> According to participants, the regime of financial accountability for political parties lies exclusively in the realm of the Electoral Commission, which often relegates this responsibility in favour of its primary responsibility to facilitate free and fair elections in the country.[72]

Consequently, taking into account the dire role financial accountability of political parties and candidates plays in safeguarding our democracy, it is imperative that an independent body with the specific mandate of enforcing campaign finance laws is established.

The enforcement mandate of the Electoral Commission has been relatedly impugned on the basis that it lacks the institutional capacity to carry out this mandate.[73] Prempeh and Asare observe that:

> [I]t is not clear that the Electoral Commission is the appropriate body to enforce compliance. The EC arguably lacks the institutional capacity to perform the tasks assigned it under the law. Perhaps a multi-agency approach to enforcement might work better…At the minimum, the EC must have a dedicated unit and professional staff to enforcement of the political finance laws and regulations.

Consequently, an independent elections ombudsman set up in the like of the FEC to specifically enforce campaign finance laws without ancillary mandates will allow for the recruitment of staff whose expertise is geared specifically towards that mandate such as auditors, lawyers amongst others.[74]

CONCLUSION AND RECOMMENDATIONS

This article has traced the evolution of campaign finance regulation in Ghana, discussed the current regulatory regime and suggested that it

72 ibid (n 6) 37.

73 Benjamin Seel, 'Developing International Norms of Political Finance: Prospects for Increased Compliance in Ghana' (2016) 23 Va J Soc Pol'y & L 351, 366; ibid (n 4) 37.

74 The FEC has an audit division specifically dedicated to auditing financial reports submitted by relevant parties. < fec.gov/resources/cms-content/documents/audit_process.pdf> accessed 30 July 2024.

is inadequate when contrasted with the regulatory regimes of other commonwealth jurisdictions. The remedy the article advocates is the establishment of an independent elections ombudsman to enforce the existing and prospective campaign finance regulations with more efficiency. However, more research is needed to determine the viability of such a proposal, to examine the constitutional and statutory implications of such an action, to suggest the optimal structure of such a body to avoid duplicity of roles and finally to project its ability to achieve the stated objectives, especially in light of similar bodies set up for specific functions such as the Office of the Special Prosecutor. Consequently, it is recommended that civil society and academia take further steps to answer these questions.

OF DIRECTORS AND PRESUMPTION OF INNOCENCE

By Redeemer Kwaku Agbanu

ABSTRACT

The efforts of daring Ghanaian lawyers and citizens have over the years extended the borders of constitutional law vis-à-vis other areas of law with wide-reaching implications on various sectors of the economy.

In recent times, the actions of perfidious managers and owners of banks and other institutions which led to the financial sector collapse have called into question the laws regulating the management of these entities and the competence of regulatory agencies. This necessitated the Bank of Ghana to tighten regulations regarding managers and directors of financial entities over which it exercises oversight.

Conversely, others have felt that of these policies and laws unfairly restrict persons who may otherwise be qualified in one respect, from assuming the office, of perhaps, a company director. That is why the recent decision in Adu Gyamfi v. The Attorney-General is quite fortuitous.

Even before that decision, there had been disquiet about certain provisions in the Companies Act, 2019 (Act 992) which effectively barred persons who have been merely charged with a criminal offence involving fraud, dishonesty or relating to the promotion, incorporation or management of a company within the preceding five (5) years from assuming the position of company director.

This position was patently in contrast to the presumption of innocence as found in the 1992 Constitution. The decision in the Adu Gyamfi case, therefore, has vacated that legislative barrier stipulated in Act 992 to ensure a fair and just playing field for potential directors who would have ordinarily qualified to occupy such a position but for the fact that they had merely been charged with the aforementioned offences.

This article constitutes a commentary on the decision,

its effect on similar provisions in other enactments and corporate governance practice in Ghana.

INTRODUCTION

At the height of class discussions in the drab GIMPA Group A (Part 1) classroom on the 2nd floor of the GIMPA Law Faculty, Accra, on the appointment and qualifications of company directors, a sly course mate (name withheld) in an effort to slow down the mundane discussions on management of companies, and trigger an exciting discourse in class asked a question that even beforehand had been nagging at the back of my mind.

The question posed to the inimitable Mr. Alexander Buabeng, a longtime lecturer of Company and Commercial Practice at the Ghana School of Law, was whether or not the provisions of section 172 of the Companies Act, 2019 (Act 992) constitute a breach of the Constitution, 1992, particularly article 19(2)(c) which guarantees an accused person's right of presumption of innocence until she is proved guilty of an offence or has pleaded guilty to a crime.

Section 172 of Act 992 which is titled, *Appointment of directors and filling of vacancy*, places certain fetters in the path of a potential company director. The impugned section essentially provides that before a person is appointed as a director of a company, she must make a statutory declaration averring that in the previous five (5) years of the application for incorporation, she has not been charged or convicted of an offence involving dishonesty, fraud or any offence relating to the promotion, incorporation or management of a company otherwise she is disqualified from acting as a company director. Sections 13 and 177 of the Companies Act also contain similar provisions.

After a short debate on the subject with Mr. Buabeng, there was a general consensus in class on the constitutional impropriety of the stated limitations, specifically on the automatic disqualification of a person for merely being charged with the stated offencesfrom assuming the position of a company director, and the learned lecturer advised us to take up a legal campaign and have the said sections declared unconstitutional and struck out from the statute books by the apex court. It was therefore a pleasant surprise to learn of the recent decision of the Supreme Court regarding the same discussions we had in class.

On 8th November, 2023 the Supreme Court in a landmark decision in

the case of ***Derick Adu-Gyamfi v. The Attorney-General***[1] once again expatiated and expanded the boundaries of Ghana's constitutional law in respect of corporate governance structures when it declared portions of the provisions of the Companies Act as being in contravention of the Constitution and therefore void, and accordingly struck down the words that rendered these provisions unconstitutional.

This paper is both a commentary and a critique of the decision of the apex court of the land.

THE PLAINTIFF'S CASE

The Plaintiff in the matter, a private legal practitioner, on the 25th day of March, 2022 invoked the exclusive original jurisdiction of the Supreme Court under Articles 2(1)(a) and 130(1) of the Constitution, 1992 by a writ of summons for the following reliefs, inter alia:

1. *A declaration that the first part of subsection 2(h)(i) of section 13 of the Companies Act, 2019 (Act 992) which makes a proposed director on an application for incorporation to deliver to the Registrar a statutory declaration indicating that within the preceding five years, that proposed director has not been charged with a criminal offence involving fraud or dishonesty is inconsistent with the letter and spirit of articles 19(1), 19(2)(c) and 15(3) of the Constitution 1992.*

2. *A declaration that the first part of subsection 2(h)(ii) of section 13 of the Companies Act, 2019 (Act 992) which makes a proposed director on an application for incorporation to deliver to the Registrar 'a statutory declaration indicating that within the preceding five years, that proposed director has not been charged with a criminal offence relating to the promotion, incorporation or management of a company' is inconsistent with the letter and spirit of articles 19(1), 19(2)(c) and 15(3) of the Constitution 1992.*

3. *A declaration that the first part of subsection 2(a)(i) of section 172 of the Companies Act, 2019 (Act 992) which prohibits a person 'charged with a criminal offence involving fraud or dishonesty' from becoming a director of a company is inconsistent with the letter and spirit of articles 19(1), 19(2)(c) and 15(3) of the Constitution 1992.*

1 (2023) (J1/18/2022) dated 8th November,2023

4. *A declaration that the first part of subsection 2(a)(ii) of section 172 of the Companies Act, 2019 (Act 992) which prohibits a person 'charged with a criminal offence relating to the promotion, incorporation or management of a company' from becoming a director of a company is inconsistent with the letter and spirit of articles 19(1), 19(2)(c) and 15(3) of the Constitution 1992.*

5. *A declaration that subsection 1(c) of section 177 of the Companies Act, 2019 (Act 992) which restrains a person who has been culpable of a criminal offence, whether convicted or not in relation to a body corporate or of fraud or breach of duty in relation to a body corporate' from being a director except with leave of court is inconsistent with the letter and spirit of articles 19(1), 19(2)(c) and 15(3) of the Constitution 1992.*

The remaining reliefs are similar in tenor to the above stated claims, including any other orders that the Honourable Court deemed fit in the circumstances. The Plaintiff's arguments as captured in the erudite judgment of Ackah-Yensu JSC was that the disputed provisions actually and potentially can deny a qualified person who can otherwise assume the directorship of a company from occupying that position and deny them their constitutional right of presumption of innocence until proven guilty which is recognized the world over and guaranteed by Article 19(2)(c) and further buttressed by Article 19(1) of the 1992 Constitution of Ghana.

To further expound on the premise of the Plaintiff's case, it is important for our own elucidation to provide the full text of the laws considered by the apex court at the behest of the claimant.

Articles 19(1) and 19(2)(c) of the 1992 Constitution state as follows:

(1) ***A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.***

(2) ***A person charged with a criminal offence shall –***
(c) be presumed to be innocent until he is proved or has pleaded guilty.

Article 15(3) of the Constitution also states that;
"A person who has not been convicted of a criminal offence shall not be treated as a convicted person and shall be kept separately from convicted persons."

On the other hand, sections 13(2)(h)(i) and (ii) of the Companies Act detail the following:
(2) The application shall include

(h) a statutory declaration by each proposed director of the proposed company
indicating that within the preceding five years, that proposed director has not
been
(i) charged with or convicted of a criminal offence involving fraud or
dishonesty;
(ii) charged with or convicted of a criminal offence relating to the promotion,
incorporation, or management of a company;

Moreover, sections 172(2)(a)(i) and (ii) of Act 992 are outlined below;
(2) A person shall not be appointed as a director of a company unless the person has,
before the appointment
(a) ***made a statutory declaration submitted to the company and subsequently filed with the Registrar to the effect that, the person has not within the preceding five years of the application for incorporation been***
(i) charged with or convicted of a criminal offence involving fraud or dishonesty;
(ii) charged with or convicted of a criminal offence relating to the promotion,
incorporation, or management of a company;

Again, sections 177 (1)(c) and (e) of Act 992 provide that:

(1) ***Where***
(c) A person has been culpable of a criminal offence, whether convicted or not, in
relation to a body corporate or of fraud or breach of duty in relation to a body
corporate; or
(e) there is an ongoing investigation by a criminal investigating body or by the
Registrar or the equivalent in a foreign jurisdiction regarding the matters in
paragraphs (a) to (d);
the Court, on its own motion or on the application of a person referred to in
subsection (6), may order that that person shall not, without the leave of the
Court, be a director of, or in any way, whether directly or

indirectly, be
concerned or take part in the management of a company or act as auditor,
receiver, or liquidator of a company for the period specified in the order.

The Plaintiff's contention therefore was that these statutory limitations established by the provisions of Act 992 should not be allowed to stand in the teeth of the clear and imperative constitutional texts to the contrary thereby undermining the original intent of the drafters of the Act which could culminate in the emergence of onerous corporate regulatory policies.

THE DEFENDANT'S CASE

The Defendant on his part contended that since the challenged provisions have been enacted under the authority of the legislature into law, they are sound in both law and fact. That, to the extent that these provisions were enacted under the legislative authority of Parliament pursuant to Article 93(2) of the Constitution, they are appropriate and proper in law.

Citing the banking and financial sector crisis between 2017 and 2018, the Defendant further contended that it was necessary to put in place measures that would protect investors and ordinary Ghanaians from collusion between banks and other financial institutions. The Defendant prayed the apex court to adopt the purposive approach to interpretation, making reference to measures put in place by the Bank of Ghana to protect investors and the general public from unscrupulous directors and officers of companies.

THE DECISION

The Supreme Court speaking through the learned Ackah-Yensu JSC. delved into the principles governing the invocation of its exclusive original jurisdiction to interpret and enforce the Constitution relying on cases like ***Ghana Bar Association v. Attorney General***[2] and ***Aduamoa II & Others v. Adu Twum II***.[3]

After disposing of the issue of whether or not the Supreme Court's exclusive original jurisdiction had been properly invoked, the court settled

2 (2003-2004) 1 SCGLR 259
3 (1998-99) SCGLR 753

on the single issue that encapsulated the entirety of the cases put forward by the parties to the action, to wit;

"WHETHER OR NOT SECTIONS 13(2)(h)(i), 13(2)(h)(ii), 172(2)(a)(i), 172 (2)(a)(ii), 177(1)(c) and 177(1)(e) OF THE COMPANIES ACT, 2019 (ACT 992) ARE INCONSISTENT WITH ARTICLES 19(1); 19(2)(C) AND 15(3) OF THE 1992 CONSTITUTION."

Making reference to the ***Justice Abdulai v. The Attorney General case***[4], the apex court reiterated the well-established doctrine of separation of powers among the 3 arms of government (executive, legislative and judicial branches), holding that Parliament like every arm of government is subject to the Constitution. It was further stressed that the violation in question is not only limited to the letter of the Constitution but the spirit as well (***New Patriotic Party v. Attorney-General, 31st December case***[5]). An illustration was given ***in Adjei Ampofo v. Attorney-General and Anor***[6] where the Supreme Court struck out section 63(1)(d) of the Chieftaincy Act, 2008 (Act 759) as unconstitutional as it sought to criminalize refusal to obey a summons from a chief.

The court again reaffirmed the supremacy of the Constitution referencing article 2(1) of the 1992 Constitution and the case of ***Adofo and Others v. Attorney-General & COCOBOD***[7] wherein it was stated that the supremacy of Parliament within Ghana's jurisprudence is limited and that Parliamentary enactments are subject to the supremacy of the Constitution.

The Supreme Court then restated the principles on fair trials and presumption of innocence as guaranteed by the Constitution, 1992 per Articles 19(1) and 19(2)(c) respectively, holding that ***"...it is only when a person has been convicted of an offence, in the sense of having being pronounced guilty by a court of competent jurisdiction, that the person will be subject to the necessary penalties prescribed under our laws."***

Consequently, the constitutional presumption of innocence mandates that a person accused of the commission of a crime cannot be condemned before he has been heard or given a fair hearing in a court of competent jurisdiction.

It was also highlighted that the Companies Act made a distinction between persons who are undergoing investigations; those who have been charged

4 (J17 of 2022) GHASC 1 (9 March 2022)
5 (1993-94) 2 GLR 35
6 (2011) 2 SCGLR 1104
7 (2005-2006) SCGLR 42

with criminal offences and others convicted of criminal offences.

The court took particular note of sections 177 (1) (c) and (e) of Act 992 and noted that similar provisions are contained in section 186(1)(c) of the repealed old Companies Act, Act 179. The case of ***In Re West Coast Dyeing Industry Ltd; Adams and Anor v. Tandoh***[8] was acknowledged where the Court of Appeal was called upon to make pronouncements on section 186 of the repealed Companies Code, 1963 (ACT 179) and it was concluded that section 186(1)(c) did not require conclusive proof of criminal offence in line with the test of the said repealed Act.

The Supreme Court surmised that sections 177(1)(c) and (e) of the new Companies Act (Act 992) does not erode the constitutional rights of prospective directors to be heard and consequently, concluded that the words ***"charged with or"*** which appear in sections 13(2)(h)(i); 13(2)(h)(ii) and; 172(2)(a)(i) and (ii) of Act 992 are inconsistent with the letter and spirit of articles 19(1) and (2)(c) of the 1992 Constitution, declaring same as void and accordingly struck them down.

In his concurring opinion, Pwamang JSC. held that article 15(3) was not germane to the issues before the court for consideration and the learned justice also concluded that the effect of the words ***"charged with"*** contravene the intention of the framers of the Constitution as stated in articles 19(1) and 19(2)(c) because, basically a person merely charged under the disputed provisions albeit not convicted, is effectively barred from becoming a company director.

That Parliament has arrogated to itself power to disqualify a person merely because she has been charged with a criminal offence contrary to what is expressed in articles 19(1) and (2)(c) of the Constitution. The court expatiating on the doctrine of separation of powers discarded the Attorney-General's contention that there is the need to balance individual freedom with public interest in the legislature putting these limitations in the Act. The learned justice held that on a true and proper interpretation of articles 19(1) and 19(2)(c) of the 1992 Constitution, sections 13(2)(h)(i) and (ii) and 172(2)(a)(i) and (ii) of Act 992 are inconsistent with the letter and spirit of the aforementioned provisions of the constitution.

Sections 177(1)(c) and (e) of the Companies Act were distinguished from sections 13(2)(h)(i) and (ii) and 172(2)(a)(i) and (ii) of Act 992 because when construed as a whole, it would not erode the right of a person to

8 (1984-1986) 2 GLR 561-606

fair hearing – by calling witnesses and adducing evidence to disprove her criminal culpability and fitness or otherwise to assume the position of company director - and therefore same is constitutionally valid.

Asiedu JSC. in his concurring opinion came to the same conclusion as the two learned Justices above (Pwamang JSC and Ackah-Yensu JSC).

ANALYSIS OF THE DECISION

Directors, especially executive and managing directors, who usually occupy key positions within a company and have conferred on them fiduciary duties should be without dirt and have an unadulterated employment and management record. It is necessary that members of the company, investors and the general public are protected by restraining dubious and unscrupulous characters from occupying such important positions within the corporate structure.

The question to ask is whether it is legally prudent that a prospective director who has been charged with an offence and cannot defend himself until legal proceedings have commenced should be restrained or is automatically disqualified from occupying the position of a company director? Another question to pose in this instance, is whether members of a company, investors, other directors and officers of a company would be comfortable with a company director who is defending himself before the courts? It may perhaps be hard to find someone in this camp no matter how innocent such a director or prospective director may be at the end of the day.

The decision in ***Adu-Gyamfi***[9] supra could potentially portend a situation where the general public (who usually form a substantial portion of the company's customer base) would be ambivalent and hesitant about subscribing to the company's services and purchasing its products if a director of such an entity has been caught in the crosshairs of some law enforcement agency such as the Police and is undergoing investigations or prosecution.

Perception, particularly public perception, can move the thoughts and actions of the body politic. Also, public opinion can sway societal reception to the fortunes of a stated company. As the former emperor and military leader of France, Napoleon Bonaparte puts it:

9 Ibid.

> *"Public opinion is a mysterious and invisible power, to which everything must yield. There is nothing more fickle, vaguer, or more powerful; yet capricious as it is, it is nevertheless much more often true, reasonable, and just, than we imagine."*

Leaning on the Attorney-General's contentions on the fallout from the 2017-2018 banking and financial crisis, one cannot but shudder at the thought of a former employee, officer, director or board member in some of these collapsed companies caught up in the crisis taking up the directorship of a new or different company, especially within the same industry.

The sentiment may not be different depending on the tolerance level of each observer, were the person to be merely charged, but not convicted for their role in the disintegration of their former companies were they to assume directorship positions in different companies in spite of the objections of other directors, members, officers and even customers of these different entities.

Hovering back to the context of the financial crisis, there would no doubt be ineluctable misgivings regarding such a character closely connected to probably the most significant economic event to hit the banking and finance industry in Ghana. A very truculent and fractious environment may even be created where the prospective character is merely charged (not yet convicted) of any of the offences captured in the impugned sections supra which would inexorably lead to a depleted corporate governance environment with rippling effects on the organization, members, employees, customer base and in extreme circumstances, the country's economy as a company's output and finances may be affected in both the short and medium terms.

Moreover, if sections 177(1)(c) and (e) of the Companies Act do not take away the individual's right to be heard; do the words ***"charged with"*** erode such a constitutional right? One could argue that a person charged with an offence under the said provisions would be given a (fair) hearing anyway as proceedings would have already been instituted or likely to be commenced sometime in the future. The substantive and procedural laws of Ghana would not allow a person to be forever charged without legal proceedings being brought to pronounce on the guilt of the accused person neither would any court in Ghana allow the permanent threat of prosecution to hang over such potential company director.

The patent distinguishing element is that under section 177(1)(c) and (e),

the said person would be heard forthwith because the disputed provisions require a hearing by the court to decide whether a particular individual should act as a director or otherwise, whilst sections 13(2)(h)(i) and (ii) and 172(2)(a)(i) and (ii) of Act 992 are not premised on an immediate hearing. In the case of the latter, it would be up to the affected prospective director to wait until legal proceedings have been commenced before ventilating her right by adducing exculpatory evidence in proof of her innocence.

The pervasive ramifications that this judgment could potentially have on the corporate governance structures of companies in Ghana cannot be overstated. Perception and appearances are as important within company structures as they are within domestic settings in Ghanaian households and there is no doubt that directors with blemished records should be anathema rather than the norm in any new/different entity.

The *raison d'etre* of the judgment is very much understandable because as a constitutional democracy, the supremacy of the Constitution is a foremost principle that should be upheld in any circumstance.

However, does this decision give leave to suspicious and feckless persons who know very well they lack the moral and ethical values to take up such fiduciary positions? Would such characters focus rather on their parochial interests to benefit from these posts to the detriment of the fortunes and prospects of the companies they are called to serve?

One should also ask whether the constitutional rights of an individual director should override the complex decision-making process at board level and organizational structure of a company which could have extensive effects on society? It is respectfully submitted that the Attorney-General was right to argue on the need to balance individual freedoms and liberties and public interests, especially factoring in the context of the recent financial services and investment sector crisis.

There is no one-size-fits-all solution in balancing the public interest and protection of the populace against the constitutionally-guaranteed freedoms of an individual. A very tactful and meticulous case-by-case approach must be adopted to ensure that the pros outweigh the cons in such a legal maelstrom.

If care is not taken, however, there may be a repeat of the circumstances that led to the institution of the action in ***Redco v. Montero***.[10] An aspect

10 (1984-86) 1 GLR 710-718

of the case bordered on the criminality of the Spanish managing director of Redco Ltd who had been involved in alleged criminal activities with other companies for which he was incarcerated at the James Fort Prison for weeks and eventually granted bail.

The board who had suspended him without quorum contended that it was becoming more and more difficult for the managing director to attend to the business of the company as required of him because he was still under intensive investigation by the law enforcement agencies in the country and could be picked up again at any moment. He was also alleged to have been engaged in rival businesses inimical to the interests of Redco Ltd. It was not denied that the activities the M.D. had involved himself in were likely to "jeopardize" the interests of the company and there was also the danger that he may be picked up again by security services and incarcerated as he had only been granted a transitory bail. It was noted that a case like this called for the necessity to protect the interests of the company by the shareholders. The trial High Court Judge put it in these terms:

> *"Must the directors or for that matter any of the shareholders, stand aloof when it finds that the company's interest is being jeopardized? It is my opinion that it would be a breach of commonsense not to act immediately. If the directors find the position of the managing director to be such that it is not possible for him to act in the interest of the company, they have a duty to have him removed. But before then it would be naive on their part to stand by and see to the happening of the damage before they act."*

The trial court and Court of Appeal refused the interim injunction the Plaintiff director was seeking, holding that his suspension was not done maliciously with intent to injure him but done in an emergency situation with the ultimate aim of safeguarding the interest of the shareholders (members) although there was no quorum. The courts were satisfied that the Plaintiff would not suffer any hardship if he was not allowed to manage Redco whilst facing possible criminal charges. It was again noted that in light of the conduct of the managing director and its potential impact on the company, the procedural irregularities should be overlooked and the courts therefore held that he had been properly suspended.

Situating the above scenario within the context of the judgment under review, would the current decision protect such a director who is at all times amenable to police invitation, arrest and incarceration? Although articles 19(1) and 19(2)(c) guarantee fair trial and protect the presumption

of innocence in favour of an individual respectively, the impact and influence such a director would have on the fortunes of a company cannot be overemphasized.

As highlighted by the courts above, members of the company, other directors and officers cannot just sit by to allow a seemingly unscrupulous character, no matter that she may be found innocent in the long term, to have such a dire impact on the perception and motivations of the company. Should a character as the one illustrated above be allowed to assume the position of a director in a new or different firm on account of her constitutionally guaranteed right of presumption of innocence?

While that may be understandable in the context of constitutional supremacy and other principles undergirding Ghana's constitutional democracy, it may be untenable and indefensible for an appointment of this character in a different firm. Undoubtedly other members, officers, directors, employees and even the public may kick up a fuss about a person of dubious character holding a position of importance in the upper echelons of a corporate establishment.

Nonetheless, the supremacy of the Constitution must be regarded highly at all times.

SUPREMACY OF THE CONSTITUTION

It is trite learning that the 1992 Constitution is the supreme law of Ghana and any other law that is found to be inconsistent or in contravention with any provision of the Constitution, shall to the extent of the inconsistency be deemed to be void and struck out accordingly.

There is therefore established in Ghana, constitutional supremacy, unlike the United Kingdom which has set in its jurisprudence parliamentary sovereignty. All acts, enactments, statutes and other legislations emanating from the legislature are therefore subservient to the constitutional provisions in Ghana. Under the Constitution, it is within the gamut of the Supreme Court to enforce and interpret the Constitution.

Articles 2(1) and 130(1) of the 1992 Constitution confer on the Supreme Court, exclusive original jurisdiction to enforce and interpret the Constitution (subject to the enforcement of the fundamental human rights of the Constitution by the High Court).

Additionally, the Supreme Court alone is given the power to strike out a

law for being inconsistent with or in contravention of the Constitution. This power has been wielded and applied in a number of cases like ***Mensima and Others v. Attorney-General***[11] and ***Adofo and Others v. Attorney-General v. COCOBOD.***[12] In the latter case, section 5 of the Ghana Cocoa Board (Reorganization and Indemnity) Law, 1985, PNDCL 125 which sought to oust the jurisdiction of the courts in contravention of Articles 125(5) and 140(1) of the Constitution which grants unimpeded access to courts was struck down as unconstitutional.

In the case of ***Centre for Juvenile Delinquency v. Ghana Revenue Authority and Attorney-General***,[13] the apex court reaffirmed one of the cardinal principles underpinning judicial review of legislations, to wit, the presumption that every enactment by the legislature is presumed to be valid or constitutional until the contrary is proven.

In that case, the court held that the requirement under paragraphs 1(9) and 2(8) of the 1st Schedule of the Revenue Administration Act, 2016 (Act 915) that a person shall not be permitted to file a case in court unless he quotes his TIN (tax identification number) is an unjustified interference with the right of an individual to access the court for justice. The court weighed the individual's right to court access against the state's duty (acting through the GRA) to collect revenue and held that the contended paragraphs sinned against the letter and spirit of the Constitution, 1992 and accordingly struck same down.

Whenever the apex court of the land is therefore called upon to review the validity or constitutionality of provisions of an enactment, this balancing act has to be undertaken to ensure that the more beneficial interest is advanced on a stringent case-by-case basis.

CONCLUSION

No matter how one perceives the implications of the decision in ***Adu-Gyamfi v. The Attorney-General***[14] it can be universally agreed that the provisions in question are as unconstitutional as they are obsolete and should not even have been contemplated in the first place, let alone been incorporated into our statute books in these recent times. The effect of this can be seen in similar provisions in other enactments including the

11 (1996-97) SCGLR 678
12 (2005-2006) SCGLR 42
13 (2019) 143 GMJ 121 S.C.
14 Ibid.

Incorporated Private Partnerships Act, 1962 (Act 152) specifically section 5(2)(d) thereof which empowers the Registrar of Companies to refuse registration of a partnership where;

> *(d) any of the partners is an infant or of unsound mind or a person who, within the*
> *preceding five years, has been guilty of fraud or dishonesty,* ***whether convicted or***
> ***not****, in connection with any trade or business or is an undischarged bankrupt; or*
> (Emphasis added).

The decision would therefore have an impact on provisions which are *in pari materia* with the disputed sections brought before the Supreme Court.[15]

It is also undeniable that the impugned provisions are anachronistic within the context of modern constitutional governance. In the United Kingdom for instance, the Company Directors Disqualification Act of 1986 which regulates the disqualification of company directors makes no mention of a person being disqualified from occupying the position of a director based on being charged or arraigned for an offence relating to the promotion, formation, management or liquidation of a company or with the receivership or management of a company's property (section 2 of CDDA 1986).[16]

The statute only calls for an actual conviction for which a maximum period of five (years) where the order is made by a court of summary jurisdiction, and 15 years in any other case[17].

The judgment heralds a watershed moment for Ghana in the interpretation and enforcement of the 1992 Constitution vis-à-vis qualifications and capacity of persons to qualify and act as company directors. The import and impact of this seismic decision goes beyond the scope of the corporate world, especially in this era of purposive approach to interpretation which is the preferred recourse to the construction of the Constitution and other domestic statutes.

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15 Adadzi, Ferdinand D., "*Implications of the judgment in Derick Adu-Gyamfi v. the AG on the Companies Act*" (https://thebftonline.com/2023/11/implications-of-the-judgment-in-derick-adu-gyamfi-v-the-ag-on-the-companies-act), accessed 15th July, 2024.

16 ACCA, Company directors disqualification act 1986 (https://www.accaglobal.com/gb/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-artciles/Company-directors.html

17 Ibid.

This type of interpretation calls for the court to take into account the purpose, scope and subject matter of the text under construction. It also factors in the values of modern society and the need to interpret the Constitution to meet the dynamic and changing needs of a growing body politic.

For the time being, whenever statutory provisions offend the letter and spirit of the Constitution, the corollary is for the Supreme Court to strike same down and the court in this instance, adeptly fulfilled this constitutional duty albeit with far-reaching consequences on company and commercial practice in the coming years.

OF LOWER COURTS & SUPERIOR COURTS: GUARDING THE ADMINISTRATION OF JUSTICE AGAINST CONTEMPT. A BEFITTING BURIAL TO *REPUBLIC V DISTRICT COURT GRADE I, DUNKWA-ON-OFFIN; EX PARTE OWUSU*

Oswald K. Azumah[1]

ABSTRACT

"An inferior court which attempts to punish a contempt committed out of court is clearly a usurper trying to clothe itself with a jurisdiction its very nature or origin denies it; or is assuming an authority its very constitution bereft it of" – so says Kpegah J (as he then was) in Republic v District Court Grade I, Dunkwa-On-Offin; Ex Parte Owusu. The case draws a stark line between contempt of court which takes place in the face of the court known as contempt in facie curiae and contempt which takes place outside the court known as ex facie curiae. According to the holding, lower courts can only punish the former as an inherent right but the latter is only inherent in superior courts. The author traces the underlying reasons for the regime of contempt of court in a bid to assess Kpegah J's holding. The literature and judicial development in other Common Law territories reveal that the respected judge was behind his time by some one hundred years. The present writer thus urges the Legislature to atone for the wrong done to lower courts by conferring this all-important power on them.

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INTRODUCTION

Brethren, with little or perhaps no dispute, the administration of justice would ground to a halt should parties and counsel be at liberty to decide whether or not to obey the orders of the courts before whom they appear. Likewise, the courtrooms will no doubt be no different from the marketplace or worse, a noisy fighting arena, if judges had no powers to enforce quiet and order in their courts. This is the bedrock on which the law of contempt of court rests.[2] Resultantly, the Common Law has always held the position that the power to commit a person for direct contempt of court was inherent in the tribunals. They did not need an external authority to confer that power on them.[3] The essence of this power is captured in the dictum of Akufo-Addo CJ in ***Republic v Liberty Press Ltd and Others***[4] where the learned judge says:

> The courts must not only enjoy the respect and confidence of the people among whom they operate, but also must have the means to protect that respect and confidence in order to maintain their authority. For this reason, any conduct that tends to bring the authority and the administration of the law into disrespect or disregard or to interfere in any way with the course of justice becomes an offence not only against the courts **but against the entire community which the courts serve.** Such conduct constitutes the offence of contempt of court…[5] (Emphasis mine).

The need to uphold the above-mentioned respect for the courts is so crucial and time is of the essence in restoring the dignity of any court whose authority has been smeared by a recalcitrant. This authority is exercised through the court's powers to punish for contempt or to allow the contemnor to purge himself of the said contempt. In ***Republic v Mensa-Bonsu,***[6] Bamford Addo JSC underscored the need to waste no time

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2 See: dictum of Bamford Addo JSC in *Republic v Mensa-Bonsu [1995-96] 1 GLR 377: the purpose of contempt is not to vindicate any particular judge but to protect the whole system of administration of justice.*

3 Per Kweku T. Ackaah-Boafo: Contempt of court is part of a court's inherent jurisdiction and, as it is not precisely prescribed or enacted... See: The Republic v Francis L.A. Brown and Francis Kpakpo Brown Ex Parte: Victor Aggoe Briandt. - Suit No. CR/517/2018

4 [1968] GLR 123 at page 135

5 Ibid

6 [1995-96] 1 GLR 377

in asserting the court as a citadel of respect among the community which it serves.

Per Bamford Addo:

> The public must have confidence in the law and the courts and any attempt by anyone to erode such confidence must be viewed very seriously **and must be punished swiftly to restore the integrity of the court which administer the law.**[7] (Emphasis mine)

Despite the provisions mentioned above, (i.e.) the communion between the courts and the communities they serve as well as the need for *swift* restatement of the court's integrity as an enforcer of law and justice, the prevailing position of the law is that the closest courts to the people, the District Courts and Circuit Courts lack the capacity to enforce the orders they give to litigants who appear before them; the prevailing authorities also shun the ability of these courts to punish any slander committed against them, in so far as such slander was committed outside of the court. The excuse for this is that these are lower courts and they wield no powers except those that are expressly given them by statute unlike the superior courts of judicature which wield all powers except those expressly taken away by statute.[8]

It is the submission of the present writer that this distinction between superior courts of judicature and lower courts in relation to the powers to punish for contempt of court has become obsolete and is an anachronism serving no useful purpose to the administration of justice and the need to keep the said process of justice delivery sacred as espoused by Akufo-Addo CJ in the Liberty Press case. To discharge the burden of proving this assertion, this paper examines the scope and nature on contempt of court as applied by the Ghanaian judiciary. Next, the paper discusses the relevance of the two types of contempt—civil and criminal and whether the said distinction is relevant to the current trends. The essay also looks into detail why the courts punish the identified types of contempt and who may institute such contempt proceedings and the courts with the power to entertain the procedure. This part challenges the present law which denies lower courts the power to punish contempt committed outside of court, taking into account the overriding importance of the law itself and draws comparisons from other jurisdictions and how they have developed the law through legislation. Based on the discussed inferences, this paper

7 Republic v Mensa-Bonsu [1995-96] 1 GLR 377

8 Re: A County Court Judge; Ex Parte Jolliffe (1873) 28 LT 132.

proposes the best means of consolidating the law on contempt of court in Ghana, having regard to the desires of the Ghanaian people to enact laws which ensure justice, probity and accountability.[9]

THE NATURE OF CONTEMPT OF COURT AND ITS TYPES

The fundamental principle of criminal law is captured in the Latin maxim *nullum crimen, nulla poena sine lege praevia lege poenali,* meaning simply: *no punishment without law.* In the Constitution 1992, the principle is reflected in Article 19 (5) and 19 (11). Which provide that:

> (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

Like most legal concepts, the principle of legality stated above is not without exception and the surviving lone wolf which defies the bar against common law offences in Ghana's criminal jurisprudence is contempt of court.

The power to punish contempt of court is thus, a power possessed by the courts by their very existence. And for superior courts, the laws on any sort of contempt need not be written anywhere for the courts to apply them. Coussey JA in the West African Court of Appeal case of ***Timitimi v Amabebe***[10] described the nature of these powers saying:

> Want of jurisdiction is not to be presumed as to a court of superior jurisdiction; nothing is out of its jurisdiction but that which specially appears to be so.[11]

The term itself, due to its undefined nature, suffers a widely accepted definition. Many conducts can constitute contempt. To streamline the exercise of that power, many jurisdictions have legislated to put some semblance of definition on the regime. In Ghana however, the courts still wield absolute discretion on what sort of conduct constitutes contempt. It ranges from disobeying an order of the court, insulting an officer of the court—especially a judge, engaging in riotous or otherwise unruly behavior

9 See: The Preamble to the 1992 Constitution of Ghana

10 (1953) 14 WACA 374 at 376

11 Ibid

in the courtroom in a manner as to disrupt proceedings or maligning the court in the media. In all circumstances, the guiding principle is that the contemnor intends to undermine the justice administration process. The power is not to be exercised as a judge's personal score with someone who undermines him personally. Perhaps the most cogent definition of contempt of court is found in the opinion of Acquah JSC in *In Re: Effiduase Stool Affairs (No.2); Ex Parte Ameyaw II*[12] where the respected Justice of the Supreme Court says:

> In brief, contempt is constituted by any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority.

In the Merriam-Webster's Dictionary of Law, contempt of court is defined as follows:

> Wilful disobedience or open disrespect of the orders, authority, or dignity of a court or a Judge acting in a judicial capacity by disruptive language or conduct or by failure to obey the court's orders.

In his book Contempt of Court (2nd Ed.) (1895) at page 6, Oswald states as follows:

> Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, or their witnesses during the litigation.

Justice Acquah's and these other definitions lend credence to the discussion thus far on the nature on contempt. The next issue to consider is its classification by the Courts into criminal and civil contempt. The relevance or otherwise of this classification will soon be brought to fore.

CIVIL CONTEMPT

Civil contempt interferes with a party's right to enjoy their victory in court. This happens when a party to a litigation refuses or neglects to follow or obey the orders made by the court. The affected party must draw the attention of the court to arrest and deal with the said contempt. The elements of civil contempt, thus constitute:

12 (1998-99) SCGLR 639

a. The existence of a judgment or order made by the court
b. The order directs a party to do an act or refrain from doing an act
c. The order must be specific as to show exactly what the party is to do or refrain from doing
d. A failure to comply by the affected party
e. It must be shown that the failure was willful[13]

CRIMINAL CONTEMPT

On the other hand, criminal contempt relates to scandalizing the court. It is a direct affront to the power of the court in a manner calculated to thwart the course of justice. **See:** ***Ackah v Acheampong & Another.***[14] In the cited case, Atuguba JSC described the entire contempt regime as quasi-criminal and indeed, since its application by the Common Law courts to present day, it is evident that the judiciary never intended to pat a contemnor on the back and simply say "*you may go*" after slapping them with some amount to pay as would be done in an entirely civil matter. The punishment of contempt is severe. In Ghana, the punishment may carry a fine or imprisonment or both.[15] The punishment for the two identified types of contempt diminishes their classification and in fact, in ***Home Office v Harman,***[16] Lord Scarman pointed out 'the distinction between the two may have less relevance today.'[17]

The story is no different elsewhere as seen in the opinion of USA writers JUSTIA who state while writing on the topic that:

> In *Shillitani v United States*[18] defendants were sentenced by their respective District Courts to two years imprisonment for contempt of court, but the sentences contained a purge clause providing for the unconditional release of the contemnors upon agreeing to testify before a grand jury. On appeal, the Supreme Court held that the defendants were in civil contempt, notwithstanding their sentence for a definite period of time, on the grounds that the test for determining whether the contempt is civil or criminal is what the court primarily seeks to accomplish by imposing

13 See: The Republic v Roger Edward Gillman and Another Suit No. CR 250/2017
14 [2005-2006] SCGLR 1
15 The Republic v The Acting Chief Labour Officer, Ex Parte Blue Skies Staff Association Suit No. INDLM/7/2010
16 [1983] 1 AC 280, p. 310
17 Elikplim Agbemava v Attorney-General Consolidated Writ Nos. J1/20/2016J1/21/2016J1/23/2016
18 384 U.S. 364 (1966)

> sentence. Here, the purpose was to obtain answers to the questions for the grand jury, and the court provided for the defendants' release upon compliance; whereas, "a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence.[19]

This latter power, to enforce criminal contempt, the US courts have held, includes the power to nominate or to appoint special counsel who would prosecute the said criminal contempt.[20]

Although authorities such as ***O'shea v O'shea***[21] firmly insist on the classification of contempt into civil and criminal, due to the former not being a crime or offence but the latter being an offence or crime, the present writer aligns with the more contemporary thinkers; asserting that the difference between the two serves nothing more than mere cosmetic effect. Afreh JA, one of the torchbearers for this position states in ***Republic v The Governor, Bank of Ghana and Others; Ex Parte Gavor***[22] thus:

> The difference between civil and criminal contempt should not be exaggerated. A contempt of court is an act or omission calculated to interfere with the due administration of justice. Since the case of Attorney-General v Newspaper Publishing Plc. [1987] 3 All ER 276, CA the widespread acceptance of classification of contempt as being either civil or criminal has become less important. As Sir John Donaldson MR said: Despite its protean nature, contempt has been classified under two heads, namely 'civil contempt' and 'criminal contempt'. Whatever the value of this classification in earlier times, I venture to think that it now tends to mislead rather than assist, because the standard of proof is the same, namely

19 JUSTITIA, 'The Contempt Power' https://law.justia.com/constitution/us/article-3/11-the-contempt-power.html Accessed on 20th July 2024

20 Young v. United States ex rel. Vuitton, 481 U.S. 787, 793–801 (1987). However, the Court, invoking its supervisory power, instructed the lower federal courts first to request the United States Attorney to prosecute a criminal contempt and only if refused should they appoint a private lawyer. Id. at 801–802. Still using its supervisory power, the Court held that the district court had erred in appointing counsel for a party that was the beneficiary of the court order; disinterested counsel had to be appointed. Id. at 802–08. Justice Scalia contended that the power to prosecute is not comprehended within Article III judicial power and that federal judges had no power, inherent or otherwise, to initiate a prosecution for contempt or to appoint counsel to pursue it. Id. at 815. See also United States v. Providence Journal Co., 485 U.S. 693 (1988), which involved the appointment of a disinterested private attorney. The Supreme Court dismissed the writ of certiorari after granting it, however, holding that only the Solicitor General representing the United States could bring the petition to the Court. See 28 U.S.C. § 518.

21 [1890] 15 PD 59

22 [2001-2002] 1 GLR 112

the criminal standard, and there are now common rights of appeal[23].

CONTEMPT IN FACIE CURIAE VERSUS EX FACIE CURIAE – WHY THE DISTINCTION?

Perhaps, the most prevailing distinction in the law of contempt in Ghana is contempt *in facie curiae* and contempt *ex facie curiae*. The former refers to an attack on the authority of the court in the face of the court as discussed while the latter refers to what happens outside. This distinction is still relevant to Ghana as it regulates which court can entertain the proceedings for contempt notwithstanding the court which suffers the attack.

Kpegah J *(as he then was)* in ***Republic v District Court Grade I, Dunkwa-On-Offin; Ex Parte Owusu***[24] passed probably the most damning sentence on the power of lower courts to guard against contempt against themselves. The facts of the case are that:

> The applicant was alleged to have violated an order embodied in a judgment of the District Court in a land case which was before the said court. The adversary of the applicant then brought a motion in the District Court seeking to have the applicant committed for contempt of the District Court in not obeying its express, orders. The magistrate demonstrated a determination to proceed with his investigations into the allegations of contempt. The applicant, therefore, brought an application for an order of prohibition against the said court on grounds of lack of jurisdiction.

After narrating the holding in some long abandoned English cases,[25] Kpegah restrained the District Court from proceeding to hear the contempt case.

The ratio decidendi probably influenced then drafters of the Constitution 1992. In Ex Parte Owusu, Kpegah posits:

> When, therefore, it comes to the consideration of contempt proceedings in the inferior courts,

23 Ibid

24 [1991] 1 GLR 136

25 The Ex Parte Owusu case came before Kpegah J at the High Court in 1988 by which time legislation in England and elsewhere had been passed to confer the power of contempt on lower courts.

> a distinction must be made between contempts committed in the face of the court during proceedings, and contempt committed outside court. **For the power to commit for contempt committed outside the court never belonged to inferior courts** and they can only seek protection from the superior courts in such cases. An inferior court which attempts to punish a contempt committed out of court is clearly a usurper trying to clothe itself with a jurisdiction its very nature or origin denies it; or is assuming an authority its very constitution bereft it off. It is inferior precisely because it has no more jurisdiction than is expressly granted it. (Emphasis mine).[26]

Essentially, the holding in ***Ex Parte Owusu*** was dead at birth as would soon be seen.

Be that as it may, Constitution 1992 will later go on to endorse the capacity of the superior courts to punish contempt against them[27] but go silent on contempt against lower courts which by name, (i.e.) *lower courts*, may mislead one into undermining their role but who in fact and by statute are fully fledged courts of competent jurisdiction only bereft of powers which have not been conferred on it by the statutes creating them, a power of creation given by the Constitution itself.

In order to guard against contempt *ex facie curiae* against lower courts, Kpegah J *(as he then was)* says the lower courts should seek the protection of superior courts of judicature but the respected judge neglects to mention how the said protection of the superior courts is to be sought. The Constitution 1992 while saving the powers of the courts to punish for contempt, follows suit in restricting same to superior courts as mentioned above. How then should the administration of justice be kept sacrosanct and be revered by litigants and the public at large when dealing with the so-called inferior courts? As is usually the case, when municipal law is lacking in a certain respect among Common Law countries, the safety net is to look at what goes on in other Common Law territories.

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26 Ibid

27 Clause (11) of this article shall not prevent a Superior court from punishing a person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty is not so prescribed. AND The Superior Courts shall be superior courts of record and shall have the power to commit for contempt to themselves and all such powers as were vested in a court of record immediately before the coming into force of this Constitution. See: Article 19 (12) AND Article 126 (2) of the 1992 Constitution. The provisions are repeated in the Court Act, 1993 (Act 459) at Section 36.

'PRACTICE DIRECTION' FROM THE CANADIAN JUDICIAL COUNCIL

The Canadian law on contempt of court, deriving its roots from England, just as Ghana, is not entirely different from the provisions in Ghana— which require that for the lower courts to enforce contempt *ex facie curiae,* they must seek the protection of the superior courts. In a *'practice direction'* from the Canadian Judicial Council in 2001 lower courts are to register their decisions with the superior courts of judicature in order to have them protected from being contemptuously disregarded. These superior courts with whom these decisions are registered will then wield the power to punish those who deliberately flout them, committing the offence of contempt *ex facie curiae.*

The guideline goes on:

> In United Nurses of Alberta v. Alberta (Attorney General), it was decided by the Supreme Court of Canada that such enforcement was constitutional and permissible under Canadian law. Of particular note in this decision is the finding that this sort of enforcement does not constitute the exercise by a provincial tribunal of powers only exercisable by a Section 96 court. In enforcing the order of the inferior tribunal, the superior court is exercising powers within its own jurisdiction. Furthermore, the provincial legislation that provides for the registration of the order with the superior court does not invade the exclusive federal jurisdiction over criminal law – such legislation engages but does not create criminal law.[28]

The Canadian law further echoes what Kpegah says in ex parte Owusu:

> In C.B.C. et al. v Cordeau et al. it was decided that inferior tribunals do not have jurisdiction to punish contempt not in the face of the court. Beetz, J., speaking for the majority, said: Accordingly, I think it is fair to conclude that the Anglo-Canadian authorities on the power to punish for contempt committed ex facie curiae have been firmly established for more than two hundred years. According to these authorities, **this power**

28 Some Guidelines On The Use Of Contempt Powers - Page 21

> **is enjoyed exclusively by the superior courts.**
> (Emphasis mine)

How does such a cumbersome system provide for ***"swift"*** dropping of the axe on persons who undermine the orders made by these lower courts? The present writer queries.

To reiterate the underlying reasons for the law on contempt and its overriding importance as a mechanism for justice delivery and protecting the justice system, the dictum of Justice Wilmot in ***Rex v Almon***[29] is of the essence:

> And whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice and…calls out for a more **rapid and immediate** redress than any obstruction whatsoever, not for the sake of the Judges as private individuals but because they are the channels by which the King's justice is conveyed to the people. (Emphasis mine).[30]

This writer submits that the distinction between the superior courts and the lower courts vis-à-vis the power to commit contemnors to punishment be it *ex facie curiae* or *in facie curiae* be washed away. In pre 20th Century England when these rules developed, the county courts were made subordinate to the crown courts because the latter more represented the authority of the King and contempt of the King's Court was disdain to the monarch himself. The powers to punish such disdain were thus bestowed on the King through his court which had more experienced practitioners.[31] Of what use does this distinction do to us today? Our courts are all creatures of enactment—be it the Constitution or Acts of Parliament, they all represent the power of the state and thus require the attendant power to enforce such representation. Unlike the earlier times in England and Ghana where the lower courts were manned by non-legal practitioners which created fear of abuse—justifying the restriction of their powers of contempt, Ghana, like England, now has lawyers with a number of years under their belt at the Bar presiding over these courts.[32] The beleaguered holding on to an outmoded reasoning that some courts can enforce an insult unto themselves and some cannot is therefore a travesty of the spirit

29 (1965) Wilm 243

30 Law Commission of India, 274th Report, Review of the Contempt of Courts Act, 1971, April 2018

31 Rahul Agarwal, 'Contempt of Court viz-a-viz Restriction on Freedom of Speech and Expression - A Critical Analysis' (2021) 9

32 See: The Courts (Amendment) Act, 2004 (Act 674),Section 46

of justice which binds the entire judicial and justice administrative system.

Interestingly, my position is not a novelty. The decision of the Federal Court of Appeal in Chrysler *Canada Ltd. v Canada (Competition Tribunal)*[33] suggests that legislation can confer upon a tribunal the power to punish for contempt committed ex facie. Per: Gonthier J:

> In order for the tribunal to have the power to punish for contempt committed ex facie, it is therefore necessary that there be a statutory provision giving it that power. He then holds: quoting from the reasons of Dickson J. in Cordeau, that any such statutory provisions must be strictly interpreted. In the absence of clear, unambiguous and express language investing a tribunal with broader powers, legislation will be interpreted as conforming to the common law, and under the common law, an inferior court or tribunal can only punish for contempt committed in facie.[34]

More so, the mother of the Common Law Tradition, England, now permits Magistrate Courts to punish persons who flout their orders,[35] a contempt *ex facie curiae*.

> **Disobedience to certain orders of magistrates' courts.**
>
> (1) The powers of a magistrates' court under subsection (3) of section 63 of the Magistrates' Courts Act 1980 (punishment by fine or committal for disobeying an order to do anything other than the payment of money or to abstain from doing anything) may be exercised either of the court's own motion or by order on complaint.
>
> (2) In relation to the exercise of those powers the provisions of the Magistrates' Court Act 1980 shall apply subject to the modifications set out in Schedule 3 to this Act.

In the United States, all courts have the power to punish for contempt without discrimination as to superior courts or inferior courts. They all wield the power by virtue of their being courts of competent jurisdiction. Justitia writes:

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33 [1992] 2 SCR 394

34 Ibid, See: note 25

35 See the Contempt of Court Act 1981 *(As amended)* https://www.legislation.gov.uk/ukpga/1981/49 <date of access>

> An Inherent Power.—The nature of the contempt power was described Justice Field, writing for the Court in Ex parte Robinson,[36] sustaining the act of 1831: The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. Expressing doubts concerning the validity of the act as to the Supreme Court, he declared, however, that there could be no question of its validity as applied to the lower courts on the ground that they are created by Congress and that their "powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction.[37] With the passage of time, later adjudications, especially after 1890, came to place more emphasis on the inherent power of courts to punish contempts than upon the power of Congress to regulate summary attachment.[38]

The opinion continues:

> By 1911, the court was saying that the contempt power **must be exercised by a court without referring the issues of fact or law to another tribunal or to a jury in the same tribunal**.[39] (Emphasis mine)
>
> In Michelson v. United States,[40] the Court intentionally placed a narrow interpretation upon those sections of the Clayton Act[41] relating to punishment for contempt of court by disobedience of injunctions in labor disputes.

36 86 U.S. (19 Wall.) 505 (1874).

37 86 U.S. at 505–11.

38 JUSTITIA, 'The Contempt Power' https://law.justia.com/constitution/us/article-3/11-the-contempt-power.html Accessed on 20th July 2024

39 Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). See also In re Debs, 158 U.S. 564, 595 (1895).

40 266 U.S. 42 (1924).

41 38 Stat. 730, 738 (1914).

> The sections in question provided for a jury upon the demand of the accused in contempt cases in which the acts committed in violation of district court orders also constituted a crime under the laws of the United States or of those of the state where they were committed. Although Justice Sutherland reaffirmed earlier rulings establishing the authority of Congress to regulate the contempt power, he went on to qualify this authority and declared that **"the attributes which inhere in the power [to punish contempt] and are inseparable from it can neither be abrogated nor rendered practically inoperative."**
>
> The Court mentioned specifically "the power to deal summarily with contempt committed in the presence of the courts or so near thereto as to obstruct the administration of justice," **and the power to enforce mandatory decrees by coercive means.**[42] (Emphases mine).

The need to balance this seemingly unbridled power with judicial restraint and decorum cannot be overemphasized. The power to commit for contempt is to protect justice delivery and not to bandage the wounded egos of one judge and thus, the power must be exercised only in blatant and rare cases no matter the court wielding same.[43] This was stressed in ***Spallone v United States***[44] where the court held that a district court had abused its discretion.

Per Justitia, it did this

> …by imposing contempt sanctions on individual members of a city council for refusing to vote to implement a consent decree remedying housing discrimination by the city. The proper remedy, the Court indicated, was to proceed first with contempt sanctions against the city, and only if that course failed should it proceed against the council members individually.

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42 266 U.S. at 65–66. See Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts: A Study in Separation of Powers, 37 Harv. L. Rev. 1010 (1924).

43 Suit No. CR 250/2017

44 493 U.S. 265 (1990). The decision was an exercise of the Court's supervisory power. Id. at 276. Four Justices dissented. Id. at 281.

THE GHANAIAN NARRATIVE

The foregoing comparisons from India, Canada, The UK, and the United States unravel that unlike Ghana which still leaves the entire development of the law on contempt of court to the judges, our Common Law brethren have long abandoned this. The protection of justice delivery and upholding the courts as a beacon of respect is too much a task to leave to judges alone and the present writer fully endorses the need to develop the law in Ghana via legislation; and posits that this legislation would in no way infringe on the doctrine of Separation of Powers espoused by Baron de Montesquieu[45] and reflected in the Constitution, 1992. This will streamline the regime and better educate the public on what to expect and to have a better appreciation of which conduct may constitute the offence of contempt of court and also advice judges on which should not constitute contempt.

Firstly, such legislation should prioritize arriving at a nearest estimate definition of contempt of court. This will reduce the attacks the courts face in politically charged cases where justices of the superior courts face the daunting task of holding politicians to account for their besmirching of the court or to kowtow to some public opinion which refers to these comments as justified criticism.

From the authorities already discussed, this author proposes that such a legislation should define contempt of court to include

a. Any unjustified verbal or written attack on the court or officers of the court in the media or elsewhere

b. Any conduct which interferes or is calculated to or is likely to interfere with smooth court proceedings

c. Any deliberate or negligent disregard for a court judgment or order or ruling

The proposed definition, the writer submits, incorporates the so called civil and criminal contempts, a distinction already submitted as unnecessary.

In a solemn tribute to Article 19 (11)[46] of the Constitution 1992, I submit that the punishment for contempt of court be defined in the proposed legislation. Such punishment regime should embody the existing tenets which govern punishment which include reformation and the need to serve a warning and deter the offender and like-minded people from

45 Sunny Agu, 'Separation of Powers in Baron de Montesquieu: Philosophical Appraisal' (2024) 2 Indonesian Journal of Interdisciplinary Research in Science and Technology 37.

46 Article 19 (11) No person shall be convicted of a criminal offence unless the defined and the penalty for it is prescribed in a written law.

engaging in acts which constitute contempt of court.

In *Isaac Amaniampong v The Republic,*[47] the majority of the Supreme Court, speaking through Owusu (Ms.) JSC held:

> Punishment is justifiable as a deterrent not only to the criminal himself, but also, and even more importantly, to those who may have similar criminal propensity. A way must be found to protect society from the activities of these criminals and to me, this way is confinement for a considerable length of time.[48]

As a guide the UK makes extensive laws which regulate punishment for contempt of court. The UK Act states in part:

> **Proceedings in England and Wales.**
>
> (1)In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court.
>
> (2)In any case where an inferior court has power to fine a person for contempt of court and (apart from this provision) no limit applies to the amount of the fine, the fine shall not on any occasion exceed £2,500.[49]

BALANCING OF RIGHTS: THE FREEDOM OF SPEECH NARRATIVE

As argued by this writer in a previous article[50], those who wield office must be ready for the accountability that attends the role. In a democratic society like Ghana, the judiciary is not beyond criticism and any legislation which seeks to protect the courts from vilifying attacks which impede its

47 J3/10/2013

48 Ibid

49 Contempt of Court Act, 1981 (UK), section 14

50 The Battle of Rights: Silence versus Fear & Panic. Dissecting Ghana's Regime on Freedom of Speech, Expression and Media Freedom - https://oswaldazumah.com/2023/03/the-battle-of-rights/

ability to be a fountain of justice must also be weary of the tendency of making demigods out of the courts. They are institutions of the people and must be ready to endure just criticism no matter how harsh. This can be summed up in the opinion of the European Court of Human Rights in *Handyside v The United Kingdom*[51] when it melodiously observed:

> Freedom of expression…is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, **but also to those that offend, shock or disturb the state or any sector of the population.** (Emphasis mine).

PREROGATIVE OF MERCY AND PUNISHMENT FOR CONTEMPT OF COURT

I now deal with the question as regards the President's powers of pardoning convicts by exercising his prerogative of mercy under the Constitution[52] vis-à-vis the courts' powers to punish for contempt. There are two prevailing schools of thought here. The first is that the president wields the executive power to pardon any convict as spelt out in the Constitution. The Supreme Court faced this question after the president exercised his powers under Article 72 of the Constitution 1992 in relation to some contemnors. The majority of the bench upheld the President's powers that he was entitled to pardon any criminal including those against whom the superior courts of judicature commenced contempt proceedings and incarcerated after finding them guilty. Anin-Yeboah JSC *(as he then was)* dissented alongside Dotse JSC. The learned Anin-Yeboah in his dissent, opined that the proper interpretation of the law would not permit the president to pardon contemnors who were punished on the court's own motion. Per Anin-Yeboah:

> …If contempt proceeding is initiated by the

51 Handyside v. The United Kingdom, 5493/72, Council of Europe: European Court of Human Rights, 4 November 1976, < https://www.refworld.org/cases, ECHR, 3ae6b6fb8.html > accessed 20 July 2024. The European Court of Human Rights held that Handyside's conviction constituted an interference with the right to freedom of expression which had been 'prescribed by law' and pursued the legitimate aim of protecting morals; at issue was whether the interference had been 'necessary in a democratic society'.

52 Article 72 of the Constitution provides that: (1) The President may, acting in consultation with the Council of State—
(a) Grant to a person convicted of an offence a pardon either free or subject to lawful conditions; or
(b) Grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him for an offence; or
(c) Substitute a less severe form of punishment for a punishment imposed on a person for an offence; or
(d) Remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.

> Attorney-General who is the principal legal adviser and a Minister of State under Article 88(1) of the 1992 Constitution, the President, upon the conviction of the contemnor can exercise his powers under Article 72 of the constitution as the initiation of the proceedings would be deemed to have been done on his behalf.
>
> However, under Article 126(2) where the initiation of the criminal contempt proceeding is done by the Superior Court ex proprio motu, the powers of the President, in my respectful opinion is ousted. For Article 126(2), beyond the fact that it is an acknowledgment of the Superior Court's inherent power to commit for contempt, it is in my opinion superfluous for it to be even stated in the constitution. It is indeed inherent in every Superior Court to convict for contempt of court.

I agree!

Endorsing these views as well, Boakye[53] writes:

> The rationale being that, this power of the Superior Courts should not be subjected to any interference from the President and other organs of state when it convicts any person for contempt summarily under it. This will safeguard the dignity and confidence of the ordinary Ghanaian in our law courts, being able to utilize its inherent contempt powers to quench the worst terrors of the oppressors that tend to obstruct the course of justice and bring the entire administration of justice to its knees.[54]

I liken the power of the courts to punish for contempt and the inability of the President to forgive such contemnors to the Holy Bible which teaches that 'all manner of sin and blasphemy shall be forgiven unto men: but the blasphemy against the Holy Ghost shall not be forgiven unto men'.[55] In this analogy, the courts of competent jurisdiction serve as the Holy Ghost,

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53 Charles Boakye, 'Dignity and Confidence in Our Courts: The Scope of Contempt of Court as Wrought by Ghanaian Precedential Laws' (2021) 12 International Journal of Scientific and Engineering Research 746, 746-764

54 Ibid

55 The Gospel According to Matthew: 12:31-32

guarding justice delivery and grace for the realm of mankind, a sin against this spirit is thus unforgivable.

OF LOWER COURT AND SPEEDY DELIVERY OF JUSTICE – THE NEW DAWN

As has been painstakingly repeated in this brief, the purpose of the contempt powers of the court is to protect justice delivery. The wheels of justice will clog should we allow this power atrophy. Similarly, jurisprudence will become stagnant and decay should we watch on while the anachronistic mischief created by *Ex Parte Owusu* remains in our laws. We must update the regime on contempt and the time for change is now! To quote the revered jurist and ex Justice of the Supreme Court of Ghana; Date-Bah JSC, in his book Reflections on the Supreme Court of Ghana:

> Change has thus been a dominant feature of Ghana's judicial history. The response by those with responsibility for tasks within the court system whose chequered history, with its discontinuities, has been outlined above should therefore be to adopt a flexible outlook that is willing to adapt to change.[56]

The need for speedy and effective dispensation of justice cannot be any less undermined as denying some courts the power to uphold their integrity as competent courts of jurisdiction.

CONCLUSION

This brief has detailed the law on contempt of court in Ghana. The writer first identified the types of contempt (i.e.) criminal and civil contempt and argues, as some judges have, that due to the consequences which follow both types of contempt, the distinction between the two has become merely syllabic. The paper then appraises the overriding principles, importance and basis on which the courts wield their powers to punish contempt against them. This reason is captured poetically by Bamford Addo JSC in the *Mensa-Bonsu*[57] case where the renowned judge writes:

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56 Samuel Kofi Date-Bah, Reflections on the Supreme Court of Ghana, (Windy Simmonds and Hill Publishing 2015) 9

57 [1994-95] GLR 130

> The Constitution gives the court the power to ensure that they are able to maintain their dignity and aura of respect, which dignity and respect is important in the courts performing their primary function as the bastion of justice. The atoning language of Article 125 is so solemn. It says Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to the constitution…The sacred role of the judiciary cannot be sacrificed on the altar of ridicule, scorn, opprobrium or impudence of any individual to the disadvantage of society at large.[58]

The essay also describes the interference in judicial independence by the Executive in pardoning contemnors punished by the court on its own motion.

Drawing parallels from other Common Law territories including England itself, the writer posits that the leading case in Ghana, *Ex Parte Owusu* which bars lower courts from exercising the court's powers of contempt in relation to contempt *ex facie curiae* is outdated. The Constitution persisted in this relic and left out the lower courts when it rationed out the powers to commit contemnors to punishment. The general principle of law is that superior courts have all powers except those expressly taken away and lower courts have no powers except those specifically conferred—it is the submission of this author therefore that the lower courts also represent the state's judicial power and are now being manned by experienced hands; thus, need the power of contempt in all forms to guard this glory and hence same ought be bestowed onto them *ex debito justitiae.*

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58 Ibid

PAYMENT SYSTEMS AND SERVICES ACT 2019; LICENSES AND RESULTANT REGULATORY ISSUES

By Godslove Wesley Etornam Gomado

ABSTRACT

Years after its introduction, the adoption of electronic payment services in Ghana surged in 2014 with a record transaction volume of 7.17 million Ghana Cedis. In response to this growth and in a bid to create a fostering and up-to-date regulatory landscape, Parliament passed the Payment Systems and Services Act 2019 (Act 987). The Act's main aim is to amend and consolidate the laws relating to payment systems and services, regulate institutions which carry on payment service and electronic money business, and provide for related matters. Despite the passage of this Act, critical issues in the electronic payment industry remain unresolved, such as the regulation of cryptocurrency and the protection of customer funds under Act 987. This article aims to achieve a dual goal of analyzing the various licenses under the Payment Systems and Services Act 2019 in terms of their permissible activities, while simultaneously discussing the resultant regulatory issues attached to these individual licenses or arising from the Act in general. It will make reference to the regulatory regimes of other Sub-Saharan African countries and global trends in the electronic payments industry.

SECTION I
THE HISTORY OF DIGITAL FINANCIAL SERVICES IN GHANA

For most of humanity's history, the provision of financial services has been a mixture of face-to-face interactions coupled with paper and pen methods of accounting as well as the physical/object store of value (cowries, cash etc.). This generally changed when the provision of financial services was intermarried with the use of technology in the delivery of the former. This almagamtion is often referred to as fintech. Some factions refer to this as digital financial services (DFS). The author will henceforth adopt the term

digital financial services (DFS). [1]

Thus, the earliest examples of digital financial services in the world can be traced back to the introduction of money transfers by Western Union in 1871 and the introduction of the automated teller machine (ATM) by Barclays Bank nearly a century later in 1967. Slowly, what could be regarded as the earliest forms of DFS spread around the globe and enjoyed worldwide adoption.

However, in modern times, when the average person refers to DFS or fintech, they are not typically thinking of wire transfers or the use of ATMs. Most often, they have in mind the use of their mobile devices to access financial services whether through traditional banks or non-bank financial service providers such as credit facilities and insurance service providers.

In this regard, the earliest form of DFS adopted in Ghana is Scancom PLC Ltd's Mobile Money (Momo) service which was rolled out in the year 2009 in collaboration with nine banks.[2] This was on the heels of the success enjoyed by Safaricom Ltd's M-Pesa in Kenya, when it launched in 2007 with the aim of solving the issue of delivery of internal remittances between urban and rural areas. Since then, this innovation has been widely adopted, with as many as 270 mobile money services active as at 2015.[3]

The innovative mobile money service was subsequently and quickly adopted by other mobile network operators in Ghana: Airtel in 2010, Tigo in 2012 and Vodafone in 2015.[4] However, the adoption of mobile money by these operators did not see much positive reception from the general public until 2015. The subsequent mass adoption was facilitated by factors such as mobile network operators' already existent strong network, vast number of subscribers, ability to recruit agents, and the steps taken by the regulator to foster easy adoption.

Steps taken by the regulators to encourage mass patronage included the adoption of the Electronic Money Issuers Guidelines (EMIG) and the Agent Guidelines (AG), which saw the value of mobile money transactions rise from 3.78 million Ghana Cedis in 2012 to 7.17 million Ghana Cedis in 2014[5]. Additionally, the launch of an interoperability platform in 2018 allowed for the subscribers of the various mobile network operators to send and receive cash to one another without extra cost.

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1 Whilst the author appreciates that the term "fintech" is more popular, the author would rather adopt the use of the term "digital financial services (DFS)" throughout the article as the latter term is more self-explanatory.

2 Cal Bank, Ecobank, Fidelity Bank, Guarantee Trust (GT) Bank, Intercontinental Bank, Merchant Bank, Universal Bank of Africa (UBA), Stanbic Bank, and Zenith Bank.

3 GSMA 2015 State of the Industry Report Mobile Money - Page 32

4 The first two, Airtel and Tigo, would later merge to be AitelTigo while Vodafone would become Telecel.

5 The Evolution of Bank of Ghana Policies on the Ghanaian Payment System – Page 4

SECTION II

THE LEGISLATIVE AND POLICY HISTORY OF THE REGULATION OF DIGITAL FINANCIAL SERVICES IN GHANA

The Bank of Ghana has oversight responsibilities over the general economic wellbeing of the nation. Pursuant to performing this role, it regulates all financial institutions in the country via its various sub-groups and existing regulatory legislation.

The regulation of DFS has a long history in Ghana. In 2003, the Payment Services Act (Act 662) was passed to provide for the digitalization of the interbank payment ecosystem. This Act achieved its aim, reducing clearing time and establishing the basis for customers to use debit and credit cards in retail settings.[6]

This was followed by the Branchless Banking Guidelines in 2008, which aimed to capitalize on the growing popularity of mobile phones to provide financial services to subscribers. The guidelines envisioned a collaborative environment where banks and mobile network operators worked together.

Unfortunately, this did not yield the expected results, as the policy did not encourage investment in the sector. A change in policy direction occurred with the introduction of the Electronic Money Issuers Guidelines (EMIG) in 2012 and Agent Guidelines (AG) in 2015. These guidelines successfully attracted investors and led to a significant increase in subscribers to DFS, particularly in the form of mobile money services.[7]

Ghana would subsequently join global initiatives in line with financial inclusion and developing digital financial services.[8] Beginning in 2012, the state of Ghana signed the Maya Declaration; a global initiative aimed at promoting responsible and sustainable financial inclusion with the goals of reducing poverty and ensuring financial stability for all persons.

This would be followed in 2014 by Ghana's joining of the Better than Cash Alliance; a UN-based global partnership between states, companies, and international organizations aimed at accelerating the transition from cash to responsible digital payments.

In 2018, the Ministry of Finance would develop a National Financial Inclusion and Development Strategy (NFIDs) (2018 - 2023) with the ultimate goal of increasing financial inclusion from fifty-eight percent (58%) to eighty-five percent (85%) through a series of actions with five major pillars. Pillars two and three are Access, Quality and Usage of Financial Services and Financial Infrastructure respectively. The former focuses on expanding digital financial services and implementation of the

6 Ibid
7 Ibid
8 The Ghana Demand Side Survey 2021 (Overview – Page III)

DFS policy (2018-2020) and the latter focuses on supporting innovation and efficient delivery of financial services, including strengthening payment systems oversight.

As at 2024, media reports suggest that Ghana has exceeded its ultimate objective in the NFIDs by driving financial inclusion up to ninety-six percent (96%).

In the same year as the launch of the NFIDs, there was the launch of an interoperability platform which allowed for the subscribers of the various mobile network operators to send and receive cash to one another without extra cost.

The latest attempt at providing an enabling regulatory environment has resulted in the main regulatory piece of legislation; the Payment Systems and Services Act, 2019. Passed and assented to in 2019, the Act aims to amend and consolidate the laws relating to payment systems and services, to regulate institutions that provide payment services and electronic money business, and provide for related matters.

The implementation and the compliance with this legislation, including the licensing of entities falling under it, are ensured by the Fintech and Innovation Office of the Bank of Ghana which was established in 2020.

To ensure consumer protection and facilitate the easy adoption of DFS, the Bank of Ghana launched a sandbox program in 2023. This program provides a controlled space for creators of innovative and disruptive DFS products and technologies to test them under regulation before being publicly rolled out. The latest cohort of companies accepted into the regulatory sandbox program consists of four companies, including Zeepay, which is testing its outbound money transfer innovation.[9]

SECTION III

THE CURRENT LICENSE REGIME UNDER THE PAYMENT SYSTEMS AND SERVICES (PSS) ACT 2019

BROAD STROKES AND FINER DETAILS

The current licensing regime for the provision of digital financial services in Ghana is governed by the Payment Systems and Services Act 2019 (Act 987), which provides the broad foundation for the regulation of DFS. The Bank of Ghana, through the Fintech and Innovation Office, further regulates the ecosystem by issuing notices and directives that provide detailed guidance.

9 Update on the Bank of Ghana Regulatory Sandbox

The reasons for this choice of regulation strategy include the rapidly evolving nature of the DFS landscape and the need to keep pace with it. Notices and directives, which can be issued by the Fintech and Innovation Office as needed, are more effective for regulating such a dynamic landscape than statutes or subsidiary legislation. The latter are subject to debate and scrutiny by parliament before being passed and assented to by the President, or surviving 21 sitting days, respectively.

The legal basis for this approach to regulation is provided in section 101 of the Payment Systems and Services Act 2019, which allows the Bank of Ghana to use notices to make rules for various purposes, including the effective implementation of the Act. This approach to regulation is further backed by the Supreme Court ruling in the case of *Associated Finance Houses v. Bank of Ghana & Attorney General*.[10]

In this case, the Supreme Court held that the Bank of Ghana had the right to regulate the corporate governance of banks through notices and directives without requiring parliamentary approval. The Court reasoned that requiring parliamentary approval would "*undermine the independent nature of the 1st Defendant (Bank of Ghana) while placing unnecessary fetters on the efficiency with which the 1st Defendant (Bank of Ghana) can work and take steps to create an enabling financial and economic environment.*"

Thus, by virtue of this provision and the supporting case law, the Bank of Ghana is empowered to regulate the DFS sector through rules issued in notices. This approach allows it to keep pace with the rapid developments in the DFS world while maintaining its independence.

Licensing and Consequences

Corporate entities interested in providing payment services are licensed under the Payment Systems and Services Act, 2019 and are not required to acquire banking licenses from the Bank of Ghana. Treating DFS providers as mere corporations with stringent regulatory and compliance requirements has its benefits. It facilitates easier market entry, especially in the Sub-Sahara region, compared to treating DFS providers as banks. Therefore, for purposes of market penetration and financial inclusion, the non-bank approach may yield benefits more quickly.

However, a question to consider is whether deposit protection of customer funds is applicable to consumers of services offered by entities regulated under the Payments Systems and Services Act..

This is because the current deposit protection scheme in Ghana, as outlined in the Deposit Protection Act 2016 (Act 931), applies to only banks and specialized deposit-taking institutions. Once a bank or specialized deposit-taking institution acquires a banking license, it becomes a member of the

10 Writ No J1/04/2021 28th July 2021

scheme and is required to pay premiums on customer deposits, thereby guaranteeing deposits up to the maximum insured limit[11] in the event of an insured occurrence, such as the bank going into liquidation.

However, by virtue of section 46 of the Payment Systems and Services Act 2019 (Act 987), an electronic money holder is eligible for deposit protection under Act 931 if the balance of the account falls within the prescribed threshold. It is unclear whether this approach to deposit protection follows the pass-through approach or the direct approach[12], as Act 987 is silent on whether it requires the electronic money issuer to become a member of the deposit protection scheme.

Both the pass-through and direct approaches to deposit insurance recognize electronic money accounts as eligible for protection. The direct approach requires the Electronic Money Issuer (EMI) to join a deposit insurance scheme, whereas the pass-through approach does not. In the pass-through approach, deposit protection is provided through a float account held by a deposit-taking institution (DTI), which identifies individual electronic money account holders and caters to situations where the DTI holding the float money undergoes liquidation.[13]

Electronic money issuers under Act 987 are required to hold float accounts with deposit-taking institutions. In addition to being held in trust, customer funds are recognized as being owned by the customers. However, there is no explicit requirement for electronic money issuers to join the deposit protection scheme. The combination of these factors could support the argument that the regulator may prefer the pass-through approach for ensuring deposit protection.

Consumer protection under the Payment Systems and Services Act 2019 extends beyond deposit protection to include fund safeguarding. Fund safeguarding encompasses both fund segregation and ring-fencing. Fund segregation simply refers to the practice of not co-mingling customer funds with other assets while ring-fencing refers to protecting customer funds from creditors of the electronic money issuer in liquidation scenarios.

Fund segregation under Act 987 is addressed in section 36(3), which stipulates that an electronic money issuer's electronic float cash balances must be held separately from balances related to their other operations. For example, customer funds from mobile money should be held separately from balances from a Mobile Network Operator's (MNO) internet connectivity business.

Regarding ring-fencing, Section 45(4)(c) of Act 987 recognizes that funds

11 Six thousand two hundred and fifty Ghana Cedis (GHC 6,250.00) for bank depositors and one thousand two hundred and fifty Ghana Cedis (GHC 1,250.00) for specialized deposit-taking institution depositors(according to section 20(3)(a) & (b) of Act 931)
12 Izaguirre, Juan Carlos, Denise Dias, and Mehmet Kerse. 2019. "Deposit Insurance Treatment of E-Money: An Analysis of Policy Choices." Washington, D.C.: CGAP
13 Ibid

held by Payment Service Providers (PSPs) belong to the customer. Additionally, sections 23(b) and 36(2) of Act 987 require that customer funds remain unencumbered and they are held in trust for the customer. It remains uncertain whether this establishes a formal trust relationship between the Electronic Money Issuer (EMI) and its customers or necessitates customer funds being kept in trust accounts managed by third parties. However, trusts are a key method of ring-fencing customer funds in common law jurisdictions.[14]

Similarly, countries such as Nigeria, Brazil, Chad and the Philippines have explicit ring-fencing provisions for customer funds.

Types of DFS Licenses under PSS Act, 2019

There are generally three types of DFS licenses in Ghana:

1. Dedicated Electronic Money Issuer (DEMI) License
2. Payment Service Provider (PSP) License
3. Payment and Financial Technology Service Providers (PFTSP) License

Dedicated Electronic Money Issuer (DEMI) License

The Dedicated Electronic Money Issuer (DEMI) License is the highest license a DFS provider can acquire, considering the range of permissible activities and licensing fees. This distinction arises from the unique activity it permits: the issuance of electronic money to customers. This key permissible activity sets the DEMI license apart from the other types of DFS licenses.

Electronic money is defined in section 102 of the Payment Systems and Services Act 2019 as;

> *"Monetary value which is stored electronically or magnetically, and represented by a claim on the issuer which is issued on receipt of funds, redeemable against cash and may be accepted by a person"*

Thus, electronic money refers to the electronic value that a subscriber's funds receive[15] after being deposited with an agent of the electronic money issuer.[16] This electronic value then comes with a bundle of rights,

14 Ibid

15 Perhaps represented by the SMS you receive after depositing your money and the account balance which is displayed any time a USSD code or an application is used to access one's account.

16 It is essential to not confuse electronic money with actual currency and thus arrive at the erroneous conclusion that issuance of e-money is a usurpation of the central bank's role under article 183(1) of the 1992 Constitution. While the central bank issues national currency, electronic money issuers only provide an electronically stored value of the currency issued by the central bank.

including the right to redeem it for cash at any place and time with an agent of the electronic money issuer, and the right to transfer it to another party, subject to the fees agreed upon in the contract.

One may also note the use of the words ***"electronically or magnetically"*** in the definition of electronic money. This is intended to highlight and encompass the various mediums through which money may be stored electronically. An electronic store of the value of money refers to the storage of money in digital formats, using devices such as mobile phones with SIM cards, or in broader contexts, storage devices such as hard disks with cryptocurrency tokens.

On the other hand, a magnetic store of value refers to the use of various card technologies that operate magnetically to store the value of money. Magnetic storage of value typically involves the use of some credit or debit (whether open loop or closed-loop) cards used in the payments industry.

Thus, under the Payment Systems and Services Act 2019, it is possible to conclude that electronic money is not limited to those on electronic storage mediums but also includes those on magnetic stripe cards. However, the explicit mention of "magnetic" to the exclusion of other card technologies (such as plain, smart-contact, contactless & dual interface cards) may raise questions about whether these other technologies will be considered electronic stores of value under the law. It is submitted that other card technologies, apart from the magnetic stripe technology, will still fall under the electronic arm of the definition of electronic money, provided they are issued by non-bank DFS providers.

For instance, on 29th February, 2024, MTN announced its collaboration with MasterCard to provide a prepaid companion virtual and physical MasterCard for every Momo account.[17] Such a physical card, upon its introduction, will be regarded as storing electronic value of money, even if it uses a technology other than magnetic, since it is linked to an electronic money account.

Additionally, the definition of electronic money in Ghana's Payment Systems and Services Act 2019, which closely mirrors that of the European Union, [18] is notably broad compared to definitions in other jurisdictions. While this may initially seem like an oversight, it also presents an opportunity for the regulation of unforeseen and disruptive technologies that may later emerge in the Ghanaian regulatory landscape.

To illustrate the breadth of the definition and its potential to encompass

17 https://www.mtn.com/mastercard-and-mtn-group-fintech-partner-to-drive-acceleration-of-mobile-money-ecosystem-in-africa-across-13-markets/

18 Article 2.2 of DIRECTIVE 2009/110/EC "'electronic money' means electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer;"

future disruptive technologies, consider cryptocurrency, which has recently gained prominence in the payments landscape and has puzzled regulatory agencies globally. An issue that may arise arise from the broad definition of electronic money is whether Ghanaian laws on payment systems provide for the regulation and adoption of cryptocurrency. The predominant perception has been that Ghana lacks clear regulation for cryptocurrency.

In line with this perception, and in an effort to address it, the Bank of Ghana has previously issued notices warning the public against engaging in cryptocurrency-related activities or investments. These warnings cited the absence of regulatory oversight by relevant laws and authorities. Such notices were first issued in 2018 under the previous Payment Systems Act 2003 (Act 662), where the Bank of Ghana highlighted the lack of regulation and promised that the Payment Systems and Services Act 2019 (then a bill under consideration by Parliament) would address uncertainties regarding cryptocurrency.

Four years later, in 2022, after the Payments Systems and Services Act had been enacted, the bank of Ghana issued a similar notice against a rumored "Freedom Coin" and crypto currencies in general. In this notice, the Bank of Ghana reaffirmed its position that;

> *"Cryptocurrencies such as Bitcoin are not regulated under any laws in Ghana"*[19].

However, it is submitted that the broad definition of electronic money provided by the Payment Systems and Services Act 2019 implicitly permits the use and adoption of certain forms of cryptocurrency in Ghana. It must be noted that the Bank of Ghana issued draft regulations for cryptocurrencies and other digital assets in mid-August of 2024, aimed at regulating virtual asset service providers (VASPs) with a bid to protect consumers, ensure stability of the financial sector and guard against financial crimes among others. The draft guidelines hints that VASPs may be required to register with the Bank of Ghana or Securities and Exchange Commission. Nigeria also licensed its first 2 VASPs in the same month.

Cryptocurrencies are a digital store of monetary value that operate using decentralized ledger technology (DLT). They were designed to revolutionize the current financial system, which relies heavily on central banks to regulate the financial landscape and act as intermediaries in transactions.

As a result of this aim, transactions are carried out on the decentralized ledger and are managed by various nodes (computers) on the network. Once a transaction is successfully processed, the node responsible for it receives a token as a reward. This token is then transferable on the

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network, in a manner similar to the earlier transaction, with additional coins being generated as rewards for subsequent transactions and records of all transactions being centralized.

Unfortunately, this concept has not surpassed fiat currency and is primarily used for speculative purposes due to its volatile value, which is a result of incomplete acceptance and adoption by the general populace.

Adrian and Mancini-Griffoli[20] categorize cryptocurrency into 4 different types: unbacked assets, stable coins, utility tokens and security tokens. Of these categories, it is submitted that stablecoins are most likely to fit the broad definition of electronic money as regulated by the Payment Systems and Services 2019 Act in its current form. Thus, stablecoins could be considered regulated stores of value and potentially legal means of exchange.

According to Sections 102 and 29(2)(b) of the Payment Systems and Services Act 2019, electronic money must:

1. Store monetary value electronically or magnetically.
2. Represent a claim on the issuer.
3. Be redeemable for cash at par value by the subscriber, subject to agreed fees.
4. Be accepted as payment by at least one other legal person.

Thus, to determine whether any form of cryptocurrency, such as stablecoins, qualifies as electronic money under Ghanaian law and is therefore permissible, it must satisfy all four criteria outlined above.

Stablecoins are a type of cryptocurrency designed to maintain a stable value relative to a specific asset, such as a fiat currency (like the US dollar), a commodity (like gold), or another cryptocurrency. Unlike traditional cryptocurrencies, which often exhibit high price volatility, stablecoins aim to provide a more stable store of value.

Stablecoins primarily achieve this stability through;

1) Algorithms

Under this method, algorithms are used to control the redemption and issuance of coins to maintain a stable coin value at all times.

2) Legal Asset Backing

This method involves the issuer backing stablecoins with legal asset typically fiat currency or commodities. The asset value often exceeds the issued stablecoins value. This ensures stablecoins value remains

20 The Rise of Digital Money

consistent, even during redemptions or market downturns.

3) Crypto-currency backing

This third method is similar to the previously-mentioned one. Here, instead of using fiat currency or commodities, other cryptocurrencies are used for this purpose. Issuers of stablecoins may opt to back their coins with just one type of cryptocurrency or a variation of cryptocurrencies.

Having established the rudimentary nature of stablecoins, an attempt will be made to show a link between their nature and the key elements required in the Payment System and Services Act 2019 to be regarded as electronic money.

Firstly, electronic money is required by the Payment Systems and Services Act 2019 to be a store of monetary value either in the electronic form or magnetic form. By "monetary value" as used in the definition of electronic money, it can be presumed that the Act primarily refers to fiat currency or central bank currency. This assertion is supported by the fact that the Act requires electronic money accounts to be denominated in Ghana Cedis (which is fiat currency). Without much contention, stablecoins are clearly an electronic store of monetary value, as they are generally purchased with central bank currency on cryptocurrency exchanges and assigned an electronic value on the blockchain or other technological medium used.

Secondly, a claim must be imposed on the issuer in favour of the holder to qualify as electronic money. This means that the mere deposit of funds with an issuer in exchange for electronic form (stablecoins) must create a relationship where the holder of the electronic value has a right to demand initially deposited money back. This relationship clearly exists between a holder and an exchange from which he may acquire stablecoins, subject to contractual terms agreed upon and market conditions.

The third requirement is that the claim be redeemable against cash at par value, subject to any existing fees agreed upon between the parties under a contract. Clearly, holders of stablecoins are capable of redeeming their stablecoins held from the exchange for cash. The important aspect of being at par value is reinforced by the nature of stablecoins themselves, which are designed to provide a stable value for the cryptocurrency via the methods touched on earlier.

Finally, the electronic money must be accepted by another legal person. At first glance, this suggests that any transaction involving stablecoins between two willing parties would automatically classify it as electronic money. If that were the case, it would mean that stablecoins would constitute electronic money immediately it is used for its first transaction in Ghana by two willing parties.

Surely, the framers of the statute would not have sought to rest the legality of a novel technology on two random parties, even if they were malicious actors. Perhaps, the intention behind this requirement, if stablecoins are to be electronic money, is to gauge the level of acceptance and adoption. From that perspective, acceptance by another person may not necessarily mean another solitary person willing to transact in cryptocurrency but rather a general acceptance by a relevant class of the economy such as a subsection of the business community.

This issue of acceptance of electronic money arose when a local regulator in the European Union denied a credit institution a license because they believed that recipients in transactions must receive and hold electronic money itself. The credit institution posed a question to the European Banking Authority regarding the meaning of electronic money in Directive 2009/110/EC, which is in *pari materia* with Act 987's definition of electronic money.[21]

The credit institution argued that for the requirement of acceptance, there were a range of possible models. One model could be where the recipient in the transaction becomes the holder of the electronic money by accepting and holding it as a mean of payment. For instance, the popular Bitcoin transaction where a Florida pizza shop accepted payment in Bitcoin for two pizzas. Another possible model is that the recipient only accepts the claim that the holder of the electronic money has on their issuer, thus not accepting and holding the electronic money itself.

It appears that acceptance as found in the PSS Act 2019 deals with the latter model more as a close look at the defining provision reads as follows;

> *"…represented by a claim on the issuer which is issued on receipt of funds, redeemable against cash and may be accepted by a person."*

Therefore, the acceptance of stablecoins in Ghana may be via acceptance and holding of tokens or the redemption of claims against an issuer.

Thus, having regard to the definition of electronic money in the PSS Act 2019, the argument can be made that cryptocurrency in certain forms (such as stablecoins) is loosely regulated under Ghanaian law as part of the DEMI class of fintech licenses.

Also, compared to Kenya's definition of electronic money, which specifies that electronic money must be issued against Kenyan currency, Ghana's refusal to state the currency against which electronic money must be issued would appear to be, once again, a leeway for the regulation of multi-currency financial service providers such as cryptocurrency exchanges when the PSS Act 2019 is read in conjunction with the Foreign Exchange

21 Though submitted on 12/01/2022, the status of the question on the Authority's official website reads "Question under review"

Act, 2006 (Act 723).

Sections 29(1) and (3) of the Payment Systems and Services Act 2019, however, go ahead to address these lapses and point out the regulator's intentions:

"29. (1) Electronic money accounts and transactions shall be denominated in Ghana Cedis.

29. (3) Despite subsection (1), an electronic money account which is denominated in foreign currency shall be in compliance with the Foreign Exchange Act, 2006 (Act 723)."

A combined reading of these provisions suggests that while subsection (1) mandates Ghana Cedis as the currency for electronic money accounts and transactions, subsection (3) introduces an exception, potentially allowing for an electronic money ecosystem where foreign currencies can be used, subject to compliance with the Foreign Exchange Act, 2006 (Act 723).

Having clarified the unique permissible activity of issuing electronic money and its definition, the additional activities permitted for entities holding a Dedicated Electronic Money Issuer (DEMI) license under the Payment Systems and Services Act, 2019 will be examined.

The permissible activities of a Dedicated Electronic Money Issuers license in Ghana are detailed in Section 30 of the Payment Systems and Services Act, 2019. Generally, these permissible activities can be divided into two (2) categories.

The first category comprises permissible activities a DEMI can undertake independently, hereinafter known as "solo-permissible activities." These are operations a DEMI license holder can execute without a mandatory collaboration with any third party.

Solo-permissible activities outlined in Bank of Ghana notices include facilitating;

1. Domestic payments
2. Domestic money transfers (including transfers to and from bank accounts)
3. Bulk transactions
4. Cash-in and cash-out transactions, and
5. Over the counter transactions

The second category encompasses permissible activities that DEMI license holders must undertake in partnership with other financial institutions. These are termed "partnered-permissible activities" and typically involve collaborations with banks, insurance providers, and other relevant entities to deliver digital financial services. Partnered-permissible activities under

the DEMI license include;

1. Inward international remittances in partnership with banks
2. Savings products in partnership with a bank or specialized-deposit taking institution authorized by the Bank of Ghana
3. Credit products underwritten by a licensed bank or specialized deposit-taking institution
4. Insurance products under-written by a licensed insurer

The possible rationale behind partnered-permissible activities is that these services often mirror those exclusively reserved for banks under the Banks and Specialized Deposit-Taking Institutions Act 2016 (Act 930) and may involve significant risks. To mitigate these risks, regulations typically mandate partnerships with banks or require bank underwriting for such activities.

Another rationale for partnered-permissible activities is to expand financial inclusion beyond the basic services offered by DEMIs. By collaborating with traditional financial institutions, DEMIs can provide additional products and services, such as loans and insurance, to previously underserved populations. MTN's "*qwikloan*" and AYO insurance services exemplify this approach, offering credit and insurance products to a customer base with limited access to traditional banking services.

In addition to issuing electronic money, DEMIs can open electronic money wallets for subscribers and recruit agents across geographic locations for the provision of its services. These capabilities, combined with the large customer base often associated with MNOs who dominate the DEMI landscape, have enabled DEMIs to achieve significant market penetration and drive financial inclusion more effectively than traditional banks.

The ability to issue electronic money, combined with the ability to engage in both solo and partnered-permissible activities, as well as ancillary operations such as wallet creation and agent recruitment, differentiates Electronic Money Issuers (EMIs) from other payment service providers under the Payment Systems and Services Act 2019.

Payment Service Providers (PSP) License

To the average person, the "Fintech", is synonymous with the visible company providing digital financial services. These companies often have strong brand recognition linked to their services, as exemplified by the association of USSD-based money transfers with telecommunication companies in Ghana.

However, behind these visible companies there are often backend service providers facilitating payment services through settlement, reconciliation,

software solutions and other critical functions. The operations of these entities do not easily come to the attention of consumers.

These background entities, primarily operate under the Payment System Providers (PSP) and Payment and Financial Technology Service Providers (PFTSP) licenses granted under the Payment Systems and Services Act 2019. They are therefore classified as payment service providers.

A payment service provider is defined by Section 102 of the Payment Systems and Services Act 2019 as;

> *"a body corporate licensed or authorized under this Act to provide payment service"*

Payment service is further defined by the same section to mean;

> *"The provision of service to facilitate transfer of funds from a payer to a payee using various forms of payment instruments or electronic money"*

While the Payment Systems and Services Act 2019 categorizes the Payment Service Provider (PSP) license as a single entity with permissible activities outlined in Section 7(2), the Bank of Ghana has introduced a tiered licensing system through its notices, classifying PSPs into four distinct levels based on the complexity and scope of their operations. These tiers of PSP licenses in descending order[22] are;

1. PSP Scheme
2. PSP Enhanced
3. PSP Medium
4. PSP Standard

It is important to note that except for the PSP Scheme license, the remaining PSP licenses build on each other with regard to their permissible activities. The PSP Medium license includes all activities of the PSP Standard license plus additional ones, and the PSP Enhanced license encompasses all activities of the PSP Medium license with further additions.

Ultimately, a PSP Enhanced license holder can perform all activities permissible under the PSP license category, except those reserved for PSP Scheme licenses. Similarly, PSP Medium license holders can perform all activities except those for PSP Scheme and Enhanced licenses. Therefore, the choice of PSP license for a potential licensee hinges on the desired range of activities and available capital, as each license level requires specific financial and operational capabilities including having to connect with other PSPs, DEMIs, or even banks.

22 The order is based on the licensing fees and minimum capital requirements for the PSP category of licenses.

Meaning of "Connecting to"

DEMI license holders are not the only class of license holders required to form partnerships with other entities for specific permissible activities. PSP and PFTSP category license holders are similarly required to "connect" with other entities (mostly PSP Enhanced) to deliver permissible activities. For instance, PSP Standard and Medium must connect with PSP Enhanced license holders while PFTSP license holders can connect with DEMIs, PSPs, or banks. International card brand associations might connect with PSP Scheme or Enhanced licensed holders.

In simple terms, "connecting to" as used in the notices means establishing a partnership relationship between any of two or more entities holding a license under the Payment Systems and Services Act 2019, or between any licensee under Act 987 and another regulated financial institution, with approval from the Bank of Ghana.

This partnership relationship is often established via a partnership agreement.[23] Also, a service level agreement may need to be signed between the parties in order to provide for matters ancillary to the partnership such as setting benchmarks for expected service delivery and consequences in default. Other relevant documents showing capacity to perform the permissible activity being partnered for are also submitted to the Bank of Ghana for approval.

It appears that for most of the situations in which partnership is provided between PSPs, the type of partnership appears to be one of heavy dependence. By heavy dependence, the implication is that the PSP is unable to perform its permissible activities in the absence of this partnership.

This situation is likely to bring about certain operational risks as well as raise questions about the rationale for this arrangement. Starting off with operational risks, the chief concern is that any issues which may affect the partnership-providing PSP (usually the PSP Enhanced) may disrupt the business of the partnership-dependent PSP.

For instance, regulatory compliance issues faced by a partnership provider which may lead to revocation or suspension of their license is going to impact the operations of a partnership-dependent PSP in major ways, leading to consequences such as losing trust with customers. Similarly, technological failures or service delays from a partnership-providing PSP are likely to lead to undesired consequences.

It would be retrogressive to strictly view the above as problems in need of fixing. This is because the requirement of partnerships and the inherent risks serve a greater purpose of creating a payments ecosystem with

23 It must be noted that this partnership is not a reference to partnership under the Incorporated Private Partnership Act as partnership under that Act by implication is reserved for natural persons only.

lower barriers of entry for certain PSPs (medium and standard licensees), encouraging local participation, and allowing for the leveraging of already-existing technologies.

A recommendation to forestall against the uncertainties associated with PSP partnerships would be to develop a framework with industry stakeholders for addressing these situations when they arise. One of these is developing a framework similar to the bandwith sharing approach adopted by telecommunication networks in the 2024 internet outage across Ghana. A framework similar to this should have all PSP Enhanced licensees ready to provide a set of defined basic services to any partnership-dependent PSPs at a moment's notice. Seeing as the ratio of PSP Enhanced licensees (71% of all DFS licensees) to other PSPs (11% of all DFS licensees) is great, this framework is easily achievable.

One of the questions arising out of this arrangement is whether there exists any incentive for a partnership-providing PSP to connect with a partnership-dependent PSP if the former can perform all the permissible activities that the partnership-dependent PSP can perform. The response to this is same as above. Regardless of whether or not partnership-providing PSPs are incentivized to connect businesswise, connection is an imposition by the regulator and it exists to provide lower entry barriers, encourage local participation, and allow for leveraging already-existing technologies.

A final issue surrounding PSPs deals with the question what of regulators should do in situations where the roles or tasks of PSPs expand beyond the permissible activities for which they are licensed.

Firstly, it is suggested that the likelihood of this happening should be drastically reduced by virtue of the license application process and the sandbox programs run by the regulator. In the licensing process, applicants are required to submit business plans focusing on their products offered and market analysis. Applicants are also required to submit five-year financial projections including the assumptions influencing their projection.

These together with other documents submitted during the application stage or observations during the sandbox program, should help the regulator to determine the appropriate license for a prospective licensee in order to avoid these issues of having a PSP's roles expand beyond its permissible activities.

Should any potential for expansion not be captured in the license application or sandbox stage, the last resort would be the provision of a special dispensation by the regulator to enable the PSP become compliant while in operation, similar to what is currently being provided for Money Mobile Limited by the regulators. This special dispensation could

incorporate measures like a modification of the mentorship regime[24] where established PSPs are recruited in helping expanding PSPs become compliant.

PSP Scheme

The PSP Scheme license is limited to two permissible activities; domestic card brand associations and switching & routing of payment transactions and instructions. These activities will be discussed below.

1. Card Brand Associations
   Cards are indispensable in modern day payments, offering convenience and presenting complexities and risks such as fraud. To mitigate these challenges, rules governing verification, authorization of transactions and chargebacks must be established.

   Card brand associations are instrumental in standardizing payment processes. By establishing uniform rules for verification, authorization, chargebacks, and other critical functions, they facilitate seamless transactions for various industry participants like banks and payment service providers. This centralized approach mitigates risks associated with card payments.

   Some of the most recognized global card brands include Visa and MasterCard. However, the PSP Scheme license in Ghana is restricted to domestic card brand associations. This means any card brand established under the PSP Scheme license can only operate within Ghana and be utilized by entities operating domestically.

   Gh-link is a prime illustration of a domestic card brand association in Ghana. This card allows for customers to make purchases online as well as withdraw from any ATM in Ghana. It was established by the Ghana Interbank Payment and Settlement Systems (GhIPSS) with the aim of reducing transaction time and cost as compared to when foreign card brand associations are used.

2. Switching and Routing of Payments
   As stated earlier, background actors known as payment providers play a significant role in the processing of transactions in the payment industry. Switching and routing of payments are core functions that facilitate the completion of payments.
   Switching of payments refers to transferring authorization

24 Bank-Fintech Partnerships, Outsourcing Arrangements and the Case for a Mentorship Regime – Luca Enrique & Wolf-Georg Ringe

requests, approvals, and transaction information to the appropriate receiver via the routing centre.[25] Simply put, this involves the process by which a payment service provider confirms the authenticity of a transaction request, the merchant involved in the transaction, the acquiring bank and the payment service provider involved in the transaction. Once all of these are successfully completed, the next priority may then be the routing of the payment in question.

Routing, on the other hand, is defined as using metrics to determine the optimal path through which transaction information is sent.[26] This simply refers to ensuring that the transaction is completed through the easiest route available once the necessary transaction information has been acquired in the switching process.

There are several points through which a payment may be completed. However, payment routes may sometimes be congested, slowing down transaction processing due to traffic from multiple transactions being attempted simultaneously. When this happens, it becomes key for the payment service provider to ensure that other available routes for the completion of the transaction are utilized to avoid delays which may inconvenience the customer.

Thus, while limited to two activities, the PSP Scheme license is pivotal to enabling seamless digital financial services.

PSP Enhanced

As previously mentioned, the PSP Enhanced license has a wider range of permissible activities compared to the other tiers. This includes all activities permitted under the;

a. PSP standard license,
b. PSP medium license, and
c. The exclusive permissible activities of the PSP Enhanced license.

The unique permissible activities of the PSP Enhanced license, not explained in the notices will be briefly outlined below.[27]

1. Marketplace for Duly Regulated Financial Services
   A PSP Enhanced license holder is allowed to provide a marketplace for financial services offered by duly regulated

25 Bank of Ghana's Licensing Categories with Secretaries Comments 17 JULY 2020
26 Ibid
27 Same will be done for the PSP Medium and Standard licenses

financial service providers. A marketplace in this context refers to a platform that connects potential consumers to financial service providers regarding the various financial services which they offer. This allows for competition between the various financial service providers as the consumer is given ease of access to financial services as well as the ability to compare the costs of accessing services among various providers.

2. Printing and Personalization of EMV Cards
EMV is an acronym for three major card brand associations on the global payments stage. They are Europay, MasterCard and Visa Card. Essentially, the PSP Enhanced license allows the holder to print and personalize cards associated with these brands and issue them to its customers.

3. Limited Use Closed Loop Virtual Cards
Virtual Cards, unlike physical cards, enables consumers to make online purchases using a generated card number, simulating the experience of using a physical card. A closed-loop card differs from an open-loop card in that it can only be used within a specific, enclosed ecosystem. This means that the card is accepted only by designated recipients and not usable in the open market with any and all merchants. An example of a closed-loop card would be gift cards from stores such as Melcom, Amazon, or Starbucks. These virtual cards are only usable with their issuing entities and not accepted elsewhere.
Thus, a limited-use closed-loop virtual card allows the cardholder to make purchases or enjoy promotional offers exclusively from a specific merchant, typically within a particular brand shop.

PSP Medium License

The PSP Medium license is arguably the second most front-facing of the licenses, as it focuses on the technologies that payment service users interact with when conducting transactions, rather than the back-end systems that facilitate the transaction processes.

The permissible activities for a PSP Medium license holder are;

1. Mobile Payment Applications
A holder of a PSP Medium License is permitted to engage in the development of payment applications for mobile platforms. This can include creating applications with interactive user interfaces for smart phones as well as utilizing USSD codes for transactions.

However, it is important to note that the PSP Medium license holder must "connect" to a PSP Enhanced license holder to

provide this service. In this arrangement, the PSP Enhanced License holder assumes liability for any chargeback losses that may occur during transaction processes, rather than the PSP Medium License holder.

In simple terms, the PSP Medium License holder is responsible solely for the creation of the app and related tasks, while the PSP Enhanced License holder manages the switching of payments. Since fraudulent transactions are typically the result of failures during the switching stage, the liability for chargeback losses falls on the PSP Enhanced License holder. The PSP Medium License holder, who only develops the mobile payment application, is not liable for such losses.

2. Printing of non-cash payment instruments

Non-cash payment instruments allow for a customer to make payments for goods and services whether online or in-person without the use of physical cash. Non-cash payment instruments fall into three categories;

a) Paper-based
b) Card-based
c) Electronic money

Some non-cash payment instruments include credit and debit cards, cheques, payment applications etc. Given that PSP Enhanced License holders are authorized to print EMV cards, it raises the question of whether PSP Standard License holders, who are also involved with non-cash payment instruments, might have been implicitly granted similar rights to print such cards due to the broad categorization of non-cash payment instruments.

It is submitted that, since the notice specifically mentions the printing of non-cash payment instruments, PSP Medium license holders are likely limited to printing paper-based non-cash payment instruments.

This is because the only instruments which are printed among the categories are paper-based and the card-based types. Since the right to print card-based non-cash payment instruments is granted exclusively to PSP Enhanced license holders and electronic money methods do not involve physical printing, PSP Medium license holders are left with the printing of paper-based non-cash payment instruments. This includes instruments like cheques, which fall within the narrower subset of the industry of security printing.

Another argument is that since the PSP Enhanced is a license holder only allowed the printing of EMV cards, then any other card may thus be printed by the PSP Medium license holder. In response to this, it is submitted that there are by implication two types of card brand associations in Ghana; domestic card brand associations and global card brand associations (such as EMV).

The printing of domestic card brands like Gh-link is limited to holders of the PSP Scheme license holders whilst global card brands, specifically EMV cards, are limited to PSP Enhanced license holders. Thus, a PSP Standard license holder cannot print any duly-regulated card-based non-cash payment instrument in Ghana.

PSP Standard License

The PSP Standard License has one permissible activity, which is the creation of mobile payment apps. This license places a liability shift on PSP Enhanced licensees to which a PSP standard licensee is required to connect to. The same reasoning as explained above in relation to the PSP Medium licensee for liability shift onto the PSP Enhanced licensee is applicable here.

The PSP Act 2019 in section 8(4) makes provision for at least 30% equity ownership of PSPs by Ghanaians in the following words;

> *"An applicant shall have at least thirty percent equity participation of a Ghanaian"*

However, the "Licensing Requirements for Dedicated Electronic Money Issuers, Payment Service Providers and Payment & Financial Technology Service Providers"[28] states at page 15 to the contrary that the PSP Standard license is "reserved for Ghanaians and wholly-owned Ghanaian entities."

The issue then becomes whether the statement in the notice is an affront to recognition of the hierarchy of laws as espoused in the Association of Finance Houses case because it seeks to change the statutory provision of thirty percent (30%) Ghanaian equity participation in PSP without an amendment to the Payment Systems and Services 2019 Act by parliament?

Payment and Financial Technology Service Provider (PFTSP) License

The Payment and Financial Technology Service Provider (Hereinafter referred to as "PFTSP") license was a recent new addition to the licenses available under the Payment Systems and Services Act 2019 as it was not

28 Issued by the Fintech and Innovation Office on 10th December 2021

part of the initial set of licenses which could be issued by the Bank of Ghana under the Payment System and Services Act 2019.

The PFTSP license was only introduced in 2020 after the Bank of Ghana had come to the conclusion that certain players in the DFS industry were critical service providers and thus needed to be regulated. The establishment of the PFTSP license was done through the issuance of Notice No. BG/GOV/SEC/2020/14 by the Bank of Ghana.

Among the reasons for the widening of the regulatory net, according to the above notice, were that potential PFTSP license holders had basically become extensions of licensed bodies performing roles reserved for supervised bodies, that they provided critical services to the financial industry, they controlled important financial sector data (such as data on DFS subscribers patronizing their products) and thus had become key in determining the direction and growth of the market.

Consequently, the permissible activities of PFTSP license holders are the following;

- Digital product development, delivery and support services (for payment, savings, insurance, investment and loyalty schemes)
- Credit scoring predictive analytics
- Anti-money laundering/ Countering the finance of terrorism centralized platform
- Fraud management services
- Know Your Customer (KYC) and Customer Due Diligence (CDD) authentication services

The introduction of this new category of license raises several issues in need of resolution but which will only be raised here. Firstly, does the Bank of Ghana have the power to create new licenses under Act 987? Its notice introducing the PFTSP license cites Notice No. BG/GOV/SEC/2020/07 which states that updates to licensing requires form part of a broader measure to operationalize the Act. It thus appears to be acting under its powers to ensure the general implementation of the Act under section 101 of Act 987

Again, compared to the PSP Standard license, the PFTSP license appears to be a case of encouraging the creation of local competition gone wrong. One of the key permissible activities of a PFTSP licensee is digital product development, delivery and support system. All the PSP licensees (except PSP Scheme) have the capacity to develop mobile payment apps which are themselves digital products.

It appears PFTSP licensees are unrestricted in the digital products they can choose to create while the PSP licensees (especially those providing for

whole Ghanaian ownership) are restricted to digital payment products. However, it is possible to argue that the omission of a provision on liability shift requirements implies that the regulator did not envisage PFTSPs to be engaged in providing digital products for payments.

Having regard to the sensitive nature of consumer information available to PFTSPs and which is deployed in delivering their permissible activities such as credit scoring and AML platforms it would have been much preferable to entrust such sensitive information in the hands of wholly-owned Ghanaian companies.

Also, while a PSP Standard licensee can only connect to a PSP Enhanced licensee, a PFTSP licensee can connect to a wider range of entities including DEMIs, PSPs, banks, and other financial institutions.

CONCLUSION

In conclusion, this article has explored the evolution of digital financial services (DFS) in Ghana, highlighting the significant role played by regulators in fostering a robust ecosystem that has achieved widespread adoption, particularly among the unbanked population. It has provided an overview of the various licenses under the Payment Systems and Services Act 2019 and discussed emerging issues related to the statute, such as the regulation of cryptocurrency, deposit protection for customer funds, partnership requirements for PSP licensees, and the overall regulation of the payments industry. This article aims to serve as an introductory resource for those interested in the regulation of Ghana's fintech sector and to stimulate a critical examination of the regulatory framework by experts in the field.

THE FUTURE OF CRYPTOCURRENCY IN GHANA: REGULATORY CHALLENGES AND OPPORTUNITIES

Martin Waana-Ang[1] *& Kenneth Atsu Dogbey*[2]

ABSTRACT

The advent of cryptocurrency has significantly impacted global financial systems, and Ghana is no exception. This paper explores the future of cryptocurrency in Ghana, with a focus on the regulatory challenges and opportunities that accompany its growth. It begins by providing an overview of the concept of cryptocurrency and the current state of cryptocurrency adoption in Ghana, highlighting its potential to drive economic growth, financial inclusion, and technological innovation. The paper then delves into the existing regulatory framework, examining how current laws and government policies shape the cryptocurrency landscape. It identifies key challenges such as legal uncertainties, cybersecurity threats, and infrastructural gaps, which hinder the sector's development. Additionally, it assesses the opportunities for leveraging cryptocurrency to enhance investment, foster innovation, and improve financial inclusion. By comparing Ghana's approach with that of other emerging economies, the paper provides strategic recommendations for creating a supportive regulatory environment. These recommendations aim to balance the need for regulation with the potential benefits of cryptocurrency, ultimately guiding Ghana towards sustainable economic and technological advancement. Through a detailed analysis, this paper offers valuable insights into how Ghana can navigate the evolving cryptocurrency space and harness its full potential for national growth.

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1. INTRODUCTION

Cryptocurrency, a form of digital or virtual currency that utilises cryptography for security, has rapidly emerged as a significant force in global financial systems.[3] Since the advent of Bitcoin in 2009, cryptocurrency have proliferated, with numerous coins and tokens now available, each with unique characteristics and use cases.[4] The decentralised nature of cryptocurrency, coupled with their potential for high returns on investment, has garnered significant attention from investors, technologists, and policymakers worldwide.[5] In Africa, and particularly in Ghana, cryptocurrency adoption is gaining momentum, driven by factors such as financial inclusion, technological innovation, mobile operations, tech savvy population, increased access to the internet and the desire for alternative investment opportunities.[6]

In Ghana, the promise of cryptocurrency lies in its ability to revolutionise traditional financial systems, especially, in the face of the major economic downturn that has led to increased inflation and the consequent depreciation of the Ghana cedi; the high rate of unemployment in the country; high cost of living; low returns on investment from traditional financial institutions and the return to the International Monetary Fund.[7]

Ghana, like many others in Sub-Saharan Africa, faces challenges related to financial inclusion, with a significant portion of the population remaining unbanked or underbanked.[8] Cryptocurrency offer a pathway to financial services for these underserved populations, enabling them to participate in the digital economy, access cross-border remittances, and engage in global trade with minimal barriers and low transaction in comparison to traditional payment systems.[9] Moreover, the blockchain technology underpinning cryptocurrency presents opportunities for enhancing transparency, reducing fraud, and improving the efficiency of various

3 Lauretta Otoo, Major Selasie Atuwo (Rtd), Frank Amuh, 'The rise and risks of the cryptocurrency market in Ghana' (2022) <https://www.iflr.com/article/2aox3llmc6qplgcvooao0/sponsored/the-rise-and-risks-of-the-cryptocurrency-market-in-ghana#:~:text=Cryptocurrency%20usage%20and%20ownership&text=It%20is%20also%20estimated%20that,usage%20in%20Ghana%20is%20unclear.> accessed 4 September 2024.

4 Alexandre Olbrecht & Gina Pieters, 'Crypto-Currency and Crypto-Assets: An Introduction' (2023) 49 Eastern Economic Journal 201-205.

5 Lauretta & others (n 1).

6 Bank of Ghana, 'Draft Guidelines of Digital Assets' (2024) <https://www.bog.gov.gh/wp-content/uploads/2024/08/Draft-Guidelines-on-Digital-Assets.pdf> accessed 4 September 2024.

7 Africa Money & DeFi Summit, 'The State of Web3 in Ghana' (2023) < https://africamoneydefisummit.com/the-state-of-web3-in-ghana/> accessed 4 September 2024.

8 Business & Financial Times, 'Bridging the gap: Financial inclusion lags as 68% of Ghanaians remain financially illiterate' (2024) <https://thebftonline.com/2024/02/14/bridging-the-gap-financial-inclusion-lags-as-68-of-ghanaians-remain-financially-illiterate/#:~:text=The%20Challenge%20in%20Ghana&text=Even%20educated%20individuals%20often%20fall,of%20financial%20illiteracy%2C%20extends%20globally.> accessed 4 September 2024.

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

sectors, including finance, agriculture, and supply chain management.[10]

However, the burgeoning cryptocurrency market in Ghana also presents significant regulatory challenges. The decentralised and pseudonymous nature of cryptocurrency complicates the task of regulators who must balance the need to protect consumers and maintain financial stability while fostering innovation.[11] This notwithstanding, the risk associated with cryptocurrency and its role in increased illicit activities and terrorism cannot be lost sight of.[12] This thus necessitates a nuanced approach to developing effective regulatory strategies to ensure innovation and financial inclusion whilst minimising risk. As of now, Ghana's regulatory framework for cryptocurrency is still in its infancy, characterised by a cautious "wait and see" approach from the government and financial authorities.[13] The Bank of Ghana has issued warnings about the risks associated with cryptocurrency trading, yet comprehensive regulations governing the use and exchange of digital currency remain underdeveloped.[14] This regulatory uncertainty poses challenges for the broader adoption of cryptocurrency and the realisation of their potential benefits.

Despite these challenges, the future of cryptocurrency in Ghana holds substantial opportunities. Accordingly, the government and regulatory bodies have the chance to craft a forward-thinking regulatory framework that balances innovation with consumer protection, whilst minimising risks to pave the way for Ghana to become a leader in digital finance within the region. Additionally, the integration of cryptocurrency into the Ghanaian economy could drive technological advancements, create new job opportunities, and position the country as a hub for blockchain innovation in Africa.

This paper will explore the current state of cryptocurrency in Ghana, analyse the existing regulatory environment, identify key challenges, and highlight potential opportunities for leveraging cryptocurrency to achieve national development goals.

2. THE CONCEPT OF CRYPTOCURRENCY

Cryptocurrency are digital assets that are designed and intended to be used as a medium of exchange just like traditional legal tender such as

10 Ibid.

11 Godeon T. Gabor, 'Uncharted Waters: An Exegetical Exploration of Ghana's Regulatory Framework in Relation to Cryptocurrency' (2021) 1(1) UCC FLJ 37-56.

12 Ibid.

13 Bank of Ghana (n 4).

14 Bank of Ghana, 'Digital and Virtual Currency Operations in Ghana' (2018) <https://www.bog.gov.gh/wp-content/uploads/2019/07/Digital-and-Virtual-Currency-Operations-in-Ghana.pdf> accessed 4 August 2024.

the Ghana Cedi or the US Dollar.[15] Cryptocurrency relies on cryptographic techniques to secure transactions, regulate new unit creation, and verify asset transfers. Unlike traditional currency, it operates independently of a central authority, such as a government or bank, and is instead decentralised across a network of computers (nodes).[16] This decentralised nature makes cryptocurrency fundamentally different from fiat currency.[17] The use of cryptography allows the generation of both public and private keys that allows the individual to exercise control over his wallet and transfer assets within the blockchain without any central control.[18] A public key is like an address to which you can send cryptocurrency, and a private key is what allows the owner to access and spend it.[19] These keys, secured by cryptography, protect the integrity and security of the system. These keys are normally generated automatically upon creation of an account. The software device that regulates this process is known as wallet. These software devices are normally regulated by virtual asset service providers (VASP).

Bitcoin is the first invented cryptocurrency in 2009 by an unknown person or entity using the name Satoshi Nakamoto.[20] With this evolution came other forms of alternative coins within a space of time. Bitcoin, however, accounts for 90 percent of the total market capitalisation of all cryptocurrency, making it the default standard.[21] It is pseudonymous rather than anonymous, meaning that transactions are carried out using public key addresses—strings of 27 to 32 alphanumeric characters, functioning similarly to email addresses—rather than using personally identifiable information.[22] These addresses are used to send, receive, and record Bitcoin transactions.

Cryptocurrency uses blockchain technology to record its transactions. A blockchain is a chain of blocks where each block contains records of transactions. These blocks are linked and secured using cryptographic techniques.[23] Every transaction on the blockchain is publicly recorded and transparent, making it difficult to alter past records without modifying all subsequent blocks and gaining consensus from the majority of the

15 Francisco Javier García-Corral & others, 'A bibliometric review of cryptocurrency: how have they grown?' (2022) 8(2) Financial Innovation 1-31

16 Melanie Swan, *Blockchain: Blueprint for a New Economy* (O'Reilly Media 2015) 1.

17 Ibid.

18 Arvind Narayanan & others, *Bitcoin and Cryptocurrency Technologies* (Princeton University Press 2016) 1, 23.

19 Ibid.

20 Melanie (n 14).

21 Ibid 6.

22 Ibid.

23 Gideon (n 9) 41.

network. This is key to the trustless nature of cryptocurrency.[24]

Cryptocurrency is generally created through the process of mining. In the realm of cryptocurrency, mining refers to a two-part process: generating new cryptocurrency by solving complex algorithms and verifying and validating transactions.[25] The first part involves solving intricate codes, allowing miners to add a new block to the blockchain. In return, they receive newly minted cryptocurrency, known as a block reward. The second part is the verification process, akin to a bank checking if a customer has sufficient funds before processing a transaction. Miners address the issue of double spending by verifying transactions, which are then recorded in a block on the blockchain.[26] For this service, they are compensated with a transaction fee.

Cryptocurrency in itself has no intrinsic value and is not real money in the ordinary sense of traditional finance, hence its volatile nature.[27] The value of cryptocurrency is not set by any national or transnational bank. The amounts of cryptocurrency to be created is restricted through the use of complex formulars therefore insulating it from the vagaries of inflation.[28] Cryptocurrency gain their value from the trust and confidence that they can be traded for goods or services or exchanged for a certain amount of fiat currency. This reliance on perceived value has contributed to the volatility in cryptocurrency prices.[29]

The buying and selling of cryptocurrency are normally facilitated by exchanges. Cryptocurrency exchanges are online platforms that facilitate the buying, selling, and trading of cryptocurrency like Bitcoin, Ethereum, and many others.[30] These exchanges function similarly to stock exchanges, where users can trade different assets based on current market prices. They serve as a bridge between buyers and sellers, allowing them to exchange digital assets for other digital currency or traditional fiat money.[31] In other words, exchanges are entities that facilitate the buying and selling of cryptocurrency on the digital market.

Cryptocurrency is normally touted for its numerous benefits compared to traditional fiat currency majorly because no single entity controls the operation of these currencies and thus reduces the risk of corruption or

24 Ibid.
25 Ibid.
26 Ibid.
27 Luke Tredinnick, 'Cryptocurrency and Blockchain,' (2019) 36(1) Business Information Review 39-44.
28 Ibid.
29 Gideon (n 9) 41.
30 Ibid 45.
31 Ibid.

failure since no single entity controls the network. Also, transactional fees are lower compared to traditional banking systems, especially for international transactions and it offers financial services to people without access to traditional banking. Cryptocurrency is built on blockchain technology which ensures that transactions are transparent and secure.

2.1 Cryptocurrency in Ghana: Current State

The cryptocurrency market in Ghana is characterised by a mix of local exchanges and international platforms. Key players include BitPesa, Yellow Card, and local Bitcoin trading groups. Despite its potential, the market is still in its infancy, with limited integration into mainstream financial systems.

Cryptocurrency usage in Ghana has been steadily increasing, driven by a range of socio-economic factors and a growing interest in digital financial tools. Ghana ranks among the top 20 countries for Google searches related to cryptocurrency, indicating strong organic interest among its citizens in digital assets and their applications.[32] As of recent estimates, over 900,000 Ghanaians, or about 3.01% of the country's total population, own at least one type of cryptocurrency.[33]

A significant reason for the popularity of cryptocurrency in Ghana is the potential to "be your own bank" by eliminating third-party intermediaries.[34] This concept has resonated with many Ghanaians as a way to alleviate the financial stress caused by the country's current economic challenges.[35] In an environment marked by currency depreciation and inflation, cryptocurrency is viewed as a potential hedge against these issues.[36]
Although the specific rate of stablecoin usage in Ghana is not well documented, stablecoins are increasingly considered a viable alternative for protecting value. The "State of Crypto: Africa" report suggests that disinflationary crypto assets, which benefit from digital scarcity, offer a means for citizens to shield themselves from economic instability.[37] The report further indicates that stablecoins pegged to fiat currency, such as the US dollar, have historically outperformed African currency, making them more attractive to African users, including those in Ghana.[38]

32 Lauretta (n 1).
33 Ibid.
34 Greenviews, 'The rise of cryptocurrency in Ghana' (2023) < https://greenviewsresidential.com/cryptocurrency-in-ghana/> accessed 5 September 2024.
35 Ibid.
36 Triple A, 'Cryptocurrency Market Sentiment in Ghana' (2022) <https://www.triple-a.io/cryptocurrency-ownership-data/cryptocurrency-ownership-ghana-2021> accessed 5 September 2024,
37 Ibid.
38 Ibid.

Despite this steady increase in the adoption and use of cryptocurrency, uncertainty around online transactions, both behavioural (fear of fraud, privacy risks) and environmental (unpredictability of technology), also hinders adoption.[39] For users to become repeat customers, cryptocurrency must foster emotional connections and positive user experiences.[40] However, in developing countries, there is hesitation due to concerns about security, unfamiliarity with digital currency, and a tendency toward risk aversion.[41] Limited infrastructure and internet access further contribute to the slow adoption in these regions, unlike in developed countries, where adaptation is more common.[42]

There is also the concern that the anonymous nature of cryptocurrency makes it a hub for illicit criminal activities such as money laundering, terrorism and fraud.[43]

3. REGULATORY FRAMEWORK FOR CRYPTOCURRENCY IN GHANA

There is currently no law in Ghana that expressly regulates the use of cryptocurrency in Ghana. According to the Bank of Ghana, cryptocurrency is not recognised by any legislation in Ghana and thus, is not a recognised legal tender in Ghana.[44] This constitutes a significant regulatory gap in the legal landscape for the operations of cryptocurrency within the country further confounding uncertainty for investors in this sector. **The Anti-Money Laundering Act 2020 (Act 1044)**, however, contains provisions wide enough to cover instances where cryptocurrency transactions are used for money laundering. Be that as it may, the current laws will be explored to ascertain the extent of their applicability to virtual currency such as cryptocurrency.

3.1 The Payment Systems and Services Act, 2019 (Act 987)

The Payment Systems and Services Act is designed to regulate payment systems, payment services, and electronic money businesses.[45] The Act establishes a comprehensive legal framework to enhance financial inclusion, protect consumers, and ensure the safety and soundness of Ghana's financial ecosystem.

The Act applies to banks, specialised deposit-taking institutions, electronic

39 Murugappan Murugappan, 'Global Market Perceptions of Cryptocurrency and the Use of Cryptocurrency by Consumers: A Pilot Study' (2023) 18(4) *J. Theor. Appl. Electron. Commer. Res.* 1955-1970.

40 Ibid.

41 Ibid.

42 Ibid.

43 Gideon (n 9).

44 Bank of Ghana (n 12).

45 Payment Systems and Services Act, 2019 (Act 987), preamble.

money issuers, payment service providers, and their affiliates or agents.[46] Any entity that offers payment services or engages in electronic money business must comply with the regulations set by the Bank of Ghana.[47] The Act does not explicitly mention cryptocurrency or provide specific regulations for their operation. It focuses primarily on traditional financial institutions and payment service providers that deal with electronic money. Electronic money is defined by the Act to mean, 'monetary value, which is stored electronically or magnetically, and represented by a claim on the issuer, which is issued on receipt of funds, redeemable against cash and may be accepted by a person.'[48]
As has been explained, however, cryptocurrency is not an electronic money that can be converted into physical cash although it is a digital asset that may be exchanged for cash or for goods and services. The definition of electronic money, per the Act, is thus narrow in scope and does not cover cryptocurrency.

Further, the Act grants the Bank of Ghana supervisory authority over all entities that carry out payment, clearing and settlement systems. The Bank has authority to issue directives to govern the operation of these entities.[49] Entities that wish to operate as payment service providers or electronic money issuers must apply for a license or authorisation from the Bank of Ghana. The application must include detailed information about the business model, financial health, and compliance with statutory requirements.[50] Entities that have been licensed have authority to engage in diverse activities including:[51]

(a) clearing of payment instructions among financial and non-financial institutions,
(b) settling of obligations arising from the clearing of payment instructions;
(c) transfer of funds from one account to another using any electronic means;
(d) transfer of electronic money from one electronic device to another,
(e) provision of technological services to facilitate switching, routing, clearing and data management;
(f) facilitation of interoperability of payment systems and services among payment systems providers;
(g) provision of electronic payment services to the unbanked and under-banked population;

46 Ibid s 1.
47 Ibid.
48 Ibid s 102.
49 Ibid s 3.
50 Ibid s 7.
51 Ibid.

(h) establishing a payment clearing house;
(i) provision of financial communication network;
(j) issuing of electronic payment instruments;
(k) issuing of prepaid cards, credit cards and debit cards;
(l) payment system aggregation function;
(m) provision of any electronic platform for payment or receipt of funds;
(n) printing of non-cash paper payment instrument; or
(o) any other service prescribed by the Bank of Ghana.

It is apparent that none of these activities directly apply to cryptocurrency, which is without intrinsic value and thus is not a legal tender. For example, bitcoin cannot be used to clear up instructions among financial institutions since it is not a recognised legal tender. Indeed, the European Court of Justice has held that, 'bitcoin' virtual currency is used, principally, for payments made between private individuals via the internet and in certain online shops that accept the currency.[52] According to the Court, the virtual currency does not have a single issuer and instead is created directly in a network by a special algorithm. The system for the 'bitcoin' virtual currency allows anonymous ownership and the transfer of 'bitcoin' amounts within the network by users who have 'bitcoin' addresses. The Court further asserted that virtual asset is different from electronic money.[53]
Accordingly, it is submitted that since cryptocurrency is not expressly mentioned as a form of payment or electronic money in the Act, entities that purely operate as cryptocurrency exchanges or wallet providers may not be required to obtain such licenses. However, if they offer services that involve regulated financial instruments, they may be subject to licensing requirements.

The Act further mandates that payment service providers have adequate governance structures, including a board of directors and proper management controls.[54] The Act also requires maintaining effective security, data management, and internal control systems.[55] Cryptocurrency operations, especially those based on decentralised models, may not align with these governance and operational requirements. Therefore, these provisions likely do not apply directly to purely decentralised cryptocurrency businesses.

52 *Skatteverket v David Hedqvist Case* C-264/14, 6 (July 2015), para 11.
53 Ibid para 12.
54 Ibid s 18
55 Ibid s 20.

3.2 The Income Tax Act 2015 (Act 896) & Value-Added Tax Act 2013 (Act 870)

The Income Tax Act was passed primarily to govern the imposition of income tax in Ghana.[56] The Act governs the imposition of tax in respect of income from employment, business, or investment.[57] Ghana uses both the source and residence rule in determining whether a particular person should be subject to tax.[58] This means that irrespective of whether a person is resident in Ghana, the person is liable to tax provided the income is derived from Ghana. In like manner, a person resident in Ghana is liable to tax even if the source of his income is not from Ghana.

Therefore, by the operation of the source and residence rule, notwithstanding the decentralised nature of cryptocurrency, incomes derived from it could be subject to tax. The problem, however, is whether the Act recognises virtual assets such as cryptocurrency.

The Act defines an asset as follows*: "asset" includes property of any kind whether tangible or intangible, currency, goodwill, know-how, a right to income or future income, a benefit that lasts longer than twelve months, a part of or any right or interest in, to or over an asset*."[59] An intangible asset refers to a non-physical asset that has value but does not have a physical substance. It includes assets such as goodwill, intellectual property, brand recognition, and customer loyalty.[60] Now it is not disputed that cryptocurrency, as a digital asset, does not have intrinsic value that can be converted into physical assets or value although it may be exchanged for fiat money. This therefore means that individuals who transact through the use of cryptocurrency do not fall within tax brackets within the purview of the Income Tax Act. Consequently, the definition of assets as used in the Income Tax Act is not sufficient to cover digital assets such as cryptocurrency.

The question that, however, begs for answer is whether persons who exchange cryptocurrency for fiat money could be subject to tax. There is no clear authority under Ghanaian law on the point. That notwithstanding, it will not be out of place to draw inspiration from the jurisprudence of other countries. According to the European Court of Justice, the exchange of cryptocurrency for fiat money for consideration by a service provider constitutes a supply of service by that service provider.[61] This means that the consideration thus received should be subject to tax within the

56 Income Tax Act 2015 (Act 896)
57 Income Tax Act s 1.
58 Ibid s 3.
59 Ibid s 133.
60 Bryan A. Garner, *Black's Law Dictionary* (9th Edn West Publishing Co. 2004)
61 *First National Bank of Chicago* (C-172/96, EU:C:1998:354); *Skatteverket v David Hedqvist Case* C-264/14, 6 (July 2015).

meaning of the Value-Added Tax.[62] The first schedule to the Act, however, provides exemptions to the supply of services that are liable to tax. One such exempted service is financial services including the provision of insurance; issue, transfer, receipt of, or dealing with money whether in domestic or foreign currency or any note or order of payment of money; provision of credit; or operation of a bank account or an account with a similar institution.

The definition of exemption, however, does not seem to be applicable to the exchange of digital asset for money. In that respect, it is conceptually accurate to argue that since the exemptions provided by the Act do not recognise transactions in the nature of exchange of digital assets for money, transactions in that nature, being a service, fall within the purview of the supply of service which can legitimately be taxed. This submission is consistent with the European Court of Justice's decision in the ***Skatteverket v David Hedqvist*** case.[63] The problem, however, is that digital service providers, according to the Bank of Ghana are not licensed to engage in digital currency. The Bank of Ghana, in its 2018 directive, also prohibited all financial institutions from having dealings with digital assets such as cryptocurrency. Accordingly, it stands to reason that it may not be possible, realistically, to even engage in the exchange of digital currency for fiat currency in Ghana for them to be liable to tax.

3.3 The Anti-Money Laundering Act 2020 (Act 1044)

Cryptocurrency, such as bitcoin, are decentralised and often operate without the oversight of traditional financial institutions, making them attractive tools for illegal activities, including money laundering. Criminals exploit the anonymity and global reach of these digital assets to obscure the origins of illicit funds, transferring them across borders with little regulatory scrutiny. The Anti-Money Laundering Act seeks to combat money laundering, terrorist financing, and other related unlawful activities by first making it an offence, and secondly imposing an obligation on accountable institutions to report suspected transactions likely to be money laundering.

The Act criminalises money laundering stating that:

'A person commits an offence if they know or ought to have known that a property is, or forms part of, the proceeds of unlawful activity and the person:[64]

62 Value Added Tax 2013 (Act 870) s 1.

63 *Skatteverket v David Hedqvist Case* C-264/14, 6 (July 2015).

64 Anti-Money Laundering Act 2020 (Act 1044) s 1.

i. Converts, conceals, disguises, or transfers the property to conceal its illicit origin or to assist any person involved in the unlawful activity to evade legal consequences.
ii. Acquires, uses, or takes possession of the property, knowing or suspecting at the time of receipt that it is the proceeds of unlawful activity.

The Act defines an unlawful activity to include any actions considered offenses under Ghanaian law or under the laws of another jurisdiction, if such actions would also be offenses in Ghana. It specifically targets activities such as tax evasion, financing of terrorism, and the proliferation of weapons of mass destruction, trafficking of human beings, piracy, forgery, kidnapping, environmental crime, just to mention a few.[65] This broad definition allows for the prosecution of money laundering and related crimes, even if the underlying offense occurs outside Ghana, aligning with international standards and reinforcing Ghana's commitment to combating financial crimes and enhancing global security.

Therefore, to constitute money laundering, there must be established, a predicate 'serious offence' that had been committed and thereafter, it must be proved that the Accused person converted, concealed, acquired, used or possessed proceeds of that offence.[66]

Act 1044 also defines property as any asset of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible. This broad definition includes rights, interests, or proceeds from such property, encompassing digital assets such as cryptocurrency. The definition by the Act is wide enough to cover transactions involving digital assets. Therefore, by this wide definition of property by Act 1044, any transaction involving cryptocurrency suspected of being tied to unlawful activity is subject to the provisions of the Act, such as customer due diligence and reporting requirements by accountable institutions.

Act 1044 further imposes an obligation on accountable institutions to take various steps and measures that aim at combating terrorism. The Act defines accountable institutions as entities such as banks, financial institutions, virtual asset service providers, real estate providers, law firms, and other specified organisations that are subject to regulatory requirements to prevent money laundering.[67] The Act imposes obligations on accountable

65 Ibid s 63.
66 *Republic v. Nana Appiah Mensah & 2 ors*. [TLP-HC-2024-30].
67 Anti-Money Laundering Act, first schedule.

institutions in respect of customer due diligence. Accountable institutions are not to establish or maintain anonymous accounts and are required to apply due diligence measures for all transactions above a certain threshold or whenever there is suspicion of money laundering or terrorist financing.[68] Accountable institutions must report any suspicious transactions to the Financial Intelligence Centre (FIC) within 24 hours.[69] They are equally required to maintain records of all transactions for at least five years, ensuring that these records are available to the FIC and other relevant authorities.[70] Most importantly, institutions are expected to develop and implement internal rules and policies to prevent money laundering, train their employees on compliance, and appoint an Anti-Money Laundering Reporting Officer to oversee adherence to the Act.[71] The Act establishes the Financial Intelligence Agency to work closely with law enforcement agencies, supervisory bodies, and foreign counterparts to enhance the detection, prevention, and prosecution of financial crimes.[72]

Although the definition of unlawful activity and accountable institutions are wide in scope to cover cryptocurrency and VASPs, the real problem lies in the implementation of the law. First, cryptocurrency provides anonymity to protect those who engage in in transactions in the digital market. It may be possible that although a VASP may suspect that a particular transaction is irregular, it may be difficult to identify the real identity of the person responsible for the transaction. The situation may be further confounded where there is a network of persons behind the transactions who span across different jurisdictions beyond the territory of Ghana. This may pose a significant challenge to fighting Anti-money laundering and terrorism despite the expansive scope of the Act.

3.4 Overview of the Position and Actions of the Ghanaian Government and Financial Authorities on Digital Assets

The Bank of Ghana is the Central Bank of Ghana with authority for the issuance and maintenance of the Ghana cedi.[73] The Bank is also to implement policies for the stability of the cedi and to promote economic growth and innovation.[74] To this end, the Bank is the sole regulator of the financial and credit systems in Ghana.[75] The Bank holds significant regulatory authority over banks, specialised deposit-taking institutions (SDIs), and financial holding companies to maintain the integrity, stability,

68 Ibid s 30.
69 Ibid s 38.
70 Ibid s 32.
71 Ibid s 49 & 50.
72 Ibid s 6-8.
73 The 1992 Constitution, art 183.
74 Ibid.
75 Ibid.

and proper functioning of the financial system.[76] Under the provisions of the Banks and Specialised Deposit-Taking Institutions Act, the Bank is empowered to issue directives when necessary to achieve several key objectives that ensure the sound management of these financial entities and protect the interests of depositors, other stakeholders, and the overall financial system.[77]

The Bank of Ghana may intervene to secure the effective and sound management of a financial institution to prevent mismanagement that could harm the institution or the wider economy. If the Bank of Ghana determines that the affairs of banks or SDIs are being conducted in a way that could harm depositors, other stakeholders, or the institutions themselves, it has the authority to issue corrective directives. One of the Bank's core mandates is to maintain financial stability in Ghana. This gives the bank the right to act pre-emptively by issuing directives that ensure systemic stability.

The Ghanaian government, through the Bank of Ghana has acknowledged the growing importance of digital assets, particularly cryptocurrency like Bitcoin and stablecoins, and their increasing use in the country. As part of its regulatory response, the Bank initially adopted a cautionary "wait and see" approach to survey the developing of this new technology. In a notice issued in 2018, the Bank noted that cryptocurrency operations were currently not licensed under the then **Payment Systems Act 2003 (Act 662)**.[78] The Bank thus cautioned the public to deal with only licensed institutions recognised by the Bank. The Bank further indicated that a new Payment Systems Bill was to be passed to consider this new technology. It must be stated, however, that the Payment Systems and Services Act, as reviewed, does not still deal expressly with cryptocurrency operations. Accordingly, considering the increasing adoption of cryptocurrency in the country, the BoG released draft guidelines in August 2024 aimed at managing the benefits and risks associated with digital assets. The BoG's position is proactive but cautious. While recognising the potential of digital assets to enhance financial inclusion and facilitate activities like cross-border payments and international remittances, the government is equally focused on addressing associated risks. These include concerns around money laundering, fraud, cybersecurity, and consumer protection.

76 Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930), s 92.

77 Ibid.

78 Bank of Ghana (n 12).

4. A COMPREHENSIVE REGULATORY FRAMEWORK

The draft guidelines propose a comprehensive regulatory framework intended to foster innovation while safeguarding financial stability. The framework targets VASPs, to ensure that entities engaged in trading, exchange, and custodial services for digital assets adhere to anti-money laundering (AML) and counter-terrorism financing (CFT) measures. The main objectives of the proposed regulatory framework are as follows:[79]

1. Ensure integrity and stability of the financial sector;
2. Protect consumers and Investors;
Guard against Financial Crime (AML/CFT);
3. Foster innovation and market integrity;
4. Promote domestic coordination in managing risks posed by crypto asset service providers;
6. Promote international cooperation in combating financial crime; and
7. Address cyber security risks.

4.1 ***Regulation of Virtual Asset Service Providers (VASPs)***

VASPs, including exchanges, will be regulated for money laundering, terrorism financing, and consumer protection. VASPs will be required to conduct customer due diligence, monitor transactions, and report any suspicious activity to the Financial Intelligence Centre (FIC). VASPs must conduct comprehensive risk assessments and implement a risk-based approach to prevent and report financial crimes. Compliance with the Financial Action Task Force (FATF) Travel Rule will be mandatory, which involves sharing information about the originators and beneficiaries of transactions. The Bank of Ghana will collaborate with the Securities and Exchange Commission (SEC) to create distinct regulatory frameworks for various digital asset use cases. These frameworks will be informed by the specific mandates of both the Central Bank and the SEC. Enhanced Payment Service Providers (EPSPs) may be authorised to process virtual asset transactions for registered VASPs, subject to prior authorisation from the Bank of Ghana. EPSPs are prohibited from operating exchanges, holding virtual assets, or providing custodial services. They must create separate entities for any virtual asset-related activities, and funding for such activities must not come from the EPSP. Commercial banks will be allowed to provide banking, payment, and settlement services to registered VASPs, subject to the same conditions as EPSPs, including prohibitions on direct involvement in virtual asset businesses. All VASPs currently operating in or intending to operate in Ghana will need to apply for authorisation

79 Bank of Ghana (n 9) 4-5.

from either the Bank of Ghana or the SEC, depending on their product offerings. VASPs that fail to register within the specified timeframe will be considered to be operating illegally. VASPs will be required to provide a detailed company profile, governance and ownership structure, financials, and evidence of registration in Ghana. They must demonstrate a robust internal control and risk management framework, along with compliance measures in line with existing regulations, including consumer protection, cybersecurity, and data privacy practices. Prospective VASPs may also need to meet minimum capital and solvency requirements. VASPs will be required to ensure adequate education and risk disclosures to users, making them aware of the risks associated with virtual asset transactions.

5. INTERNATIONAL COMPARISONS: REGULATORYAPPROACHES IN OTHER EMERGING ECONOMIES

In examining Ghana's regulatory framework for cryptocurrency, it is essential to compare it with approaches adopted by other emerging economies, each of which faces unique challenges and opportunities in regulating digital currency. These comparisons provide insights into how countries can balance innovation and investment with regulation to foster cryptocurrency growth while mitigating risks.

5. 1 Nigeria

Nigeria has one of the highest rates of cryptocurrency adoption in Africa.[80] In 2021, the Central Bank of Nigeria (CBN) issued a ban on cryptocurrency transactions by banks and financial institutions, citing concerns over money laundering and fraud.[81] Despite this ban, Nigerians have continued to use cryptocurrency extensively for peer-to-peer transactions. The government later introduced the eNaira, a Central Bank Digital Currency (CBDC), as a regulated alternative to decentralised cryptocurrency. In December 2023, the Central Bank lifted the ban on cryptocurrency whilst providing guidelines for its operation. The institutions covered by the guidelines include: Merchant Banks, VASPs licensed by the Securities and Exchange Commission ("SEC"), digital asset custodians, digital asset offering platforms, digital asset exchanges ("DAX"), DAX operators, and any other entity that may be categorised as such by the CBN from time to

80 African Law & Business, 'Nigeria offers legitimacy to crypto-asset providers' (2024) < https://www.africanlawbusiness.com/news/20208-nigeria-offers-legitimacy-to-crypto-asset-providers> accesed 5 September 2024.

81 HKTDC Research, 'NIGERIA: Ban on Digital Currency Transactions Lifted' (2024) < https://research.hktdc.com/en/article/MTYwMjE3OTI1MA#:~:text=In%20February%202021%20the%20CBN,assets%2C%20subject%20to%20new%20guidelines.> accessed 5 September 2024.

time.[82]

The primary objectives of the guidelines are to establish minimum standards for banking relationships with VASPs, guide financial institutions (FIs) in operating accounts for entities licensed by the SEC, and ensure robust risk management in the cryptocurrency sector. These objectives are designed to create a safer environment for digital asset transactions while supporting the increasing activity of VASPs in Nigeria.

Under the guidelines, FIs such as commercial and merchant banks can open designated, non-interest-bearing settlement accounts for VASPs. These accounts are restricted to virtual asset-related transactions, and FIs are tasked with adhering to strict compliance measures, including setting transaction limits based on the risk profile of account holders and reporting suspicious activities to relevant authorities.[83]

To ensure transparency and minimise risks, the guidelines impose various restrictions on the operations of designated accounts. For example, withdrawals can only be made through Manager's Cheques or transfers, and accounts that remain inactive for three consecutive months will be classified as dormant and closed. Additionally, VASPs must meet specific requirements, such as being incorporated in Nigeria and licensed by the SEC, to open designated accounts.

The guidelines also place heavy emphasis on anti-money laundering (AML), combating the financing of terrorism (CFT), and customer protection. FIs are required to implement robust know-your-customer (KYC) procedures, monitor account activities closely, and establish customer complaint mechanisms to protect against fraud.

The CBN's move marks a strategic shift that is expected to drive broader cryptocurrency adoption in Nigeria. By allowing FIs to facilitate cryptocurrency-related transactions for VASPs, the guidelines remove a significant barrier that previously restricted the operations of virtual asset exchanges.[84] However, FIs remain prohibited from holding or trading virtual assets on their own account. This balanced approach aims to support innovation in the digital asset space while maintaining necessary oversight and mitigating financial risks.
The step taken by the Central Bank of Nigeria is significant as compared to

82 Udo Uduoma & Bel-Osagie, 'The Regime for The Operation Of Bank Accounts By Virtual Asset Service Providers/Exchanges In Nigeria' <https://uubo.org/wp-content/uploads/2024/01/Guidelines-on-the-Operation-of-Bank-Accounts-for-Virtual-Asset-Service-Providers.pdf> accessed 5 September 2024.

83 Ibid.

84 Ibid.

the Ghana's central bank's cautionary "wait and see approach".
On March 15, 2024, the Securities and Exchanges Commission introduced proposed revisions to its current Rules on the Issuance, Offering Platforms, and Custody of Digital Assets. These draft amendments are intended to include and clarify additional registration requirements for VASPs operating in Nigeria. While these changes are still being finalised and new digital asset regulations are under development, the Commission, on June 21, 2024, released a *Framework on Accelerated Regulatory Incubation Program (ARIP)* for onboarding VASPs and other Digital Investment Service Providers (DISPs), referred to as the *ARIP Framework*.[85]

5.2 Kenya

Kenya does not yet have a blockchain regulatory framework in place.[86] The Central Bank of Kenya (CBK) in 2015, issued a clear stance regarding the use, holding, and trading of virtual currency, such as Bitcoin, within the country. The CBK emphasised that Bitcoin is an unregulated digital currency that is neither issued nor guaranteed by any government or central bank, including Kenya's. Moreover, the CBK highlighted that no entity is currently licensed to offer money remittance services using virtual currency under Kenya's existing financial laws, such as the Central Bank of Kenya Act.[87]

Kenya's position is that Bitcoin and other virtual currency are not considered legal tender, meaning they hold no official status as currency within the country. As a result, the public have no legal protection if a platform facilitating Bitcoin transactions collapses or ceases operations. The CBK outlines several risks associated with virtual currency, including the anonymity of transactions, which makes them vulnerable to criminal activities like money laundering and terrorism financing. Furthermore, these currencies are traded on unregulated platforms globally, exposing users to the risk of losing their investments without any legal recourse.
This reflects Kenya's cautious approach towards cryptocurrency, prioritising consumer protection and financial security. The CBK did not, however, ban trading in or other transactions relating to the use of virtual or digital assets.

85 Seun Timi-Koleolu and Hillary Okorotie, 'Operating A Crypto Trading Company In Nigeria: Regulatory Requirements'(2024) < https://pavestoneslegal.com/newsletters/> accessed 5 September 2024.
86 Baker Mckenzie, 'Blockchain and Cryptocurrency in Africa: A comparative summary of the reception and regulation of Blockchain and Cryptocurrency in Africa' (2018) <https://www.bakermckenzie.com/-/media/files/insight/publications/2019/02/report_blockchainandcryptocurrencyreg_feb2019.pdf.> accessed 5 September 2024.
87 Ibid.

5.3 Brazil

Brazil is one of the leading countries in Latin America in terms of cryptocurrency usage. The country has adopted a progressive regulatory stance, with the Brazilian Securities and Exchange Commission (CVM) allowing the trading of cryptocurrency-based assets. The Central Bank of Brazil, however, has taken a cautious stance, warning about the risks of using digital currency for illegal activities. In late 2022, the Brazilian Congress passed legislation aimed at regulating the cryptocurrency market in Brazil.[88] The approved bill outlines concepts, resolutions, and guidelines for services related to virtual assets, including cryptocurrency payments. The specific processes for its implementation will be further developed and refined by relevant authorities responsible for overseeing the regulation.

5.4 South Africa

South Africa has one of the most developed financial markets in Africa, and its approach to cryptocurrency regulation reflects this. The South African Reserve Bank (SARB) has adopted a balanced approach, acknowledging the potential benefits of digital currency while warning about the associated risks. The country is currently working on regulatory frameworks that would classify cryptocurrencies as financial products, subjecting them to oversight under existing financial regulations.

6. CRYPTOCURRENCY IN GHANA: NOTABLE CHALLENGES

One of the major challenges is the lack of a clear legal framework for cryptocurrency operations. The ambiguity in regulations creates uncertainty for businesses and investors. This legal uncertainty can deter investment and innovation in the sector. Also, there is a lack of clarity regarding which institution is to exercise oversight responsibilities over the operations of digital assets. As to whether it is the Bank of Ghana or the Securities and Exchange Commission, there is no clear-cut line between the two institutions. This could create instances of duplicitous, overlapping and conflicting roles or decisions being taken by the two institutions, further confounding the problem.

Again, cybersecurity threats and fraud are significant concerns in the cryptocurrency space. The rise in digital asset theft and scams highlights

88 Ebury Bank, 'New regulation for crypto market in Brazil' (2023) <https://br.ebury.com/en/blog/new-regulation-for-crypto-market-in-brazil/> accessed 5 September 2024.

the need for robust security measures and regulatory oversight to protect users and investors. The volatility of cryptocurrency markets poses risks to financial stability. The potential for large-scale financial losses and market manipulation requires careful regulatory measures to mitigate these risks while supporting innovation. Additionally, Ghana faces real infrastructural challenges, including limited internet access and inadequate technological support for cryptocurrency transactions. Developing the necessary infrastructure is essential for supporting widespread cryptocurrency adoption.

7. RECOMMENDATIONS AND OPPORTUNITIES FOR GROWTH

Ghana's burgeoning cryptocurrency market presents both opportunities and risks, making it essential for the Bank of Ghana and other relevant authorities, such as the Securities and Exchange Commission, to establish a comprehensive regulatory framework. However, care must be taken to ensure that this framework balances innovation with security and compliance. The following are key recommendations for addressing regulatory challenges related to cryptocurrency in Ghana.

1. **Avoid Overly Stringent Licensing Requirements**

First, it is suggested that stringent licensing requirements or overly complex capital adequacy norms could deter innovation and restrict market entry for smaller or emerging VASPs. While it is essential to maintain high standards to protect the integrity of the financial system, the Central Bank must ensure that licensing criteria are not so restrictive that they prevent startups or local companies from entering the market. A tiered licensing system could be introduced, where smaller VASPs or new entrants face lower capital requirements and simplified procedures, while larger, more established entities are held to stricter standards.

Moreover, the regulatory framework should be designed to be inclusive, allowing a diverse range of businesses, from fintech startups to established financial institutions, to engage in the cryptocurrency market. This would encourage growth and competition in the sector, spurring innovation while maintaining the necessary safeguards.

2**. Clear Regulatory Scope Between BoG and SEC**

It is recommended that a clear delineation of regulatory responsibilities between the BoG and the SEC is crucial to avoid regulatory overlap or confusion in the cryptocurrency space. The Bank of Ghana should focus on the financial stability aspects of cryptocurrency, particularly with regard to its use in payments and banking. Meanwhile, the SEC could regulate digital assets as financial instruments, overseeing issues related

to investments, securities, and market integrity.

To achieve this, a joint task force could be established between the two regulators to ensure coordination and reduce gaps or conflicts in regulatory oversight. Such cooperation would also enable both entities to stay updated on market trends and technological advancements, allowing for more agile and effective regulation.

This suggestion is made having regard, particularly, to the complications encountered by the two institutions relative to the operations of Menzgold Ghana Ltd. These challenges were encountered because of a lack of clear-cut roles between the two institutions. Lessons from those incidents should inform the two institutions to work closely in defining their roles regarding the regulation of digital assets in Ghana.

3. **Enhance Cybersecurity Standards for VASPs**
One of the key risks in the cryptocurrency sector is cybersecurity threats, such as hacking, fraud, and data breaches. It is vital that VASPs implement robust cybersecurity measures to protect their platforms and users from these risks. The Bank of Ghana should mandate that all VASPs comply with stringent cybersecurity protocols, such as encryption, multi-factor authentication, and secure data storage practices.

To ensure compliance, VASPs could be required to undergo periodic cybersecurity audits and risk assessments. Additionally, creating a national cybersecurity framework for the financial sector, specifically tailored to the needs of the digital assets market, would provide a unified approach to mitigating cyber threats.

4. **Flexible Guidelines for Future Technological Advancements**
As the cryptocurrency landscape is constantly evolving, it is important that the regulatory framework is adaptable to future technological developments. Technologies such as decentralised finance (DeFi), non-fungible tokens (NFTs), and central bank digital currencies (CBDCs) are likely to shape the future of the crypto market. Therefore, regulations should be designed with flexibility in mind, allowing for updates and amendments as new technologies emerge, just like what the Nigerian Securities and Exchange Commission has done.

This could be achieved by incorporating review clauses in the regulations, and mandating periodic reassessments of the regulatory framework to ensure it remains relevant. Establishing an innovation sandbox for digital assets could also allow regulators to test new technologies and regulatory approaches in a controlled environment before fully implementing them.

5. **Further Define Digital Assets and Expand Regulatory Scope**
A key aspect of any regulatory framework is clarity. It is essential that the scope of Ghana's cryptocurrency regulations clearly defines what constitutes a digital asset. Whether the asset is a cryptocurrency, a stablecoin, or a digital token, the regulations need to specify the types of assets covered and the obligations of market participants dealing with them.
This will help prevent ambiguity and ensure that all market players understand their legal responsibilities. Additionally, specific regulations could be developed for different types of digital assets, with varying levels of oversight based on the risk they pose to the financial system.

6. **Comprehensive Anti-Money Laundering (AML) and Counter-Terrorism Financing (CTF) Compliance**
Given the potential for cryptocurrency to be used for illicit activities, such as money laundering or financing terrorism, strong AML and CTF measures are essential. The regulatory framework should include detailed guidelines on the specific actions VASPs must take to comply with these regulations. This could involve:
Requiring VASPs to conduct thorough know-your-customer (KYC) checks; Implementing transaction monitoring systems to detect suspicious activities; and Reporting requirements for large or unusual transactions to the appropriate financial intelligence units.

VASPs should also be required to maintain comprehensive records of all transactions, which would aid in investigations by law enforcement authorities in case of criminal activity. Regular audits and compliance checks should be conducted to ensure ongoing adherence to AML/CTF regulations.

7. **Address Data Privacy and Protection**
As VASPs handle sensitive user data, it is crucial that data privacy regulations are enforced to protect personal information. VASPs should be required to adhere to Ghana's Data Protection Act and implement measures to ensure that user information is securely stored and processed. The regulatory framework should specify the obligations of VASPs in handling customer data, including guidelines for data collection, storage, sharing, and protection.

Furthermore, VASPs should have clear data breach protocols in place to promptly address any unauthorised access or loss of user data. Ensuring transparency regarding how customer data is used will also foster trust in the cryptocurrency sector.

8. **Establish Clear Tax Regulations for Digital Assets**
Taxation of digital assets is another critical area that must be addressed in Ghana's cryptocurrency regulations. Clear guidelines on how gains from digital assets are taxed, whether as capital gains or income, will promote transparency and compliance. This could include specific tax reporting obligations for VASPs, as well as guidelines for individuals and businesses that trade or invest in cryptocurrency.

The Bank of Ghana and the Ghana Revenue Authority (GRA) should work together to ensure that tax regulations are straightforward, with provisions that account for the complexities of digital asset transactions. This may require an amendment of the Income Tax Act and the Value-Added Tax to ensure that the definition of assets encapsulates digital assets.

This will not only help boost government revenues but also ensure that the crypto market operates within the legal financial system.

8. CONCLUSION

The future of cryptocurrency in Ghana presents a dynamic landscape filled with both regulatory challenges and promising opportunities. As digital assets continue to gain traction globally, Ghana stands at a crossroads where the adoption of cryptocurrency could drive financial innovation, inclusion, and economic growth. However, this potential can only be realised if the regulatory framework effectively addresses key concerns such as money laundering, consumer protection, and market stability.

The proposed regulatory measures by the Bank of Ghana, in collaboration with other stakeholders, demonstrate a proactive approach towards establishing a secure and transparent environment for cryptocurrency activities. By fostering a regulatory ecosystem that balances innovation with risk management, Ghana can position itself as a leader in the digital finance space in Africa. It is crucial for regulators, policymakers, and industry participants to collaborate in crafting policies that harness the benefits of cryptocurrency while mitigating their associated risks.

Ultimately, the successful integration of cryptocurrency into Ghana's financial system will depend on clear regulations, effective enforcement, and continuous stakeholder engagement. This approach will not only attract investment and enhance economic resilience but also ensure that Ghana remains competitive in the evolving global financial landscape.

NAVIGATING THE COMPLEXITIES OF AI: CHALLENGES IN THE PROTECTION OF COPYRIGHT REGARDING AUTHORSHIP AND OWNERSHIP

Richard Obeng Mensah and Martin Waana-Ang[1*]

ABSTRACT

The rapid advancements in artificial intelligence (AI) have ushered in a new era of innovation and creativity. They have also given rise to intricate conundrums in the realm of intellectual property. AI-generated content such as artworks, music, and literature, have raised fundamental questions about who should be recognized as the author of these creations. The nagging question is: should AI itself be considered the author, or should credit be assigned to the human programmer who created and trained the AI? This ambiguity fuels debates about the appropriate attribution of creative works, especially when AI systems are used to produce content that is virtually indistinguishable from human-made works. Closely related to this is the question of whether AI can be considered as autonomous in itself to be able to generate ideas on its own, hence contents generated by it should be afforded copyright in the name of the AI.

The question of whether the creator of the AI, the user who inputs parameters, or the AI itself should possess ownership rights becomes a complex legal puzzle. This blurs the line between human innovation and machine-driven creation. Striking a balance between stimulating innovation and protecting the interests of creators and innovators is an ever-challenging task. Addressing these conundrums necessitates a re-evaluation of copyright laws to accommodate AI's

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transformative capabilities. This paper, therefore, seeks to undertake an excursus on these intricate complexities that AI presents to intellectual property as it relates to copyright in modern times.

1. INTRODUCTION

The advent of technology has brought with it concomitant benefits and challenges in the field of intellectual property law and other fields of human endeavor. One of the most profound technological advancements in recent times is the development and proliferation of artificial intelligence (AI).[2] AI's capabilities have evolved to the point where it can create content that is virtually indistinguishable from that produced by humans. This development poses significant questions and challenges regarding the authorship and ownership of AI-generated content.

This is primarily due to the axiomatic fact that, traditional copyright laws, such as those outlined in the Berne Convention, were designed with human creators in mind.[3] These laws provide a framework for the protection of literary and artistic works, ensuring that creators are recognized and rewarded for their efforts, without contemplating the intervention of machine learning generated information. Accordingly, when AI systems autonomously generate content, these laws are called into question.

In the peculiar case of Ghana, the Copyright Act 2005 (Act 690) defines an author as "a person who creates a work" and an owner as "the person to whom the copyright in a work belongs."[4] These definitions, while clear in the context of human creators, do not account for AI-generated content. The fundamental question arises: Should AI be considered the author of the works it generates, or should the human programmers and operators behind the AI receive the credit? This issue is further complicated by the nature of AI itself—whether it can be considered autonomous enough to generate ideas and create content independently.

The ownership of AI-generated content presents another layer of complexity. AI systems are typically developed and operated by corporations or individuals, leading to ambiguity regarding who holds the rights to the content produced. The dilemma is whether the rights should belong to the creator of the AI, the user who provides the input, or the AI

2 Abdikhakimov Islombek Bahodir ugli, 'Unraveling the Copyright Conundrum: Exploring AI-Generated Content and its Implications for Intellectual Property Rights' (2023) International Conference of Legal Sciences 1(5) 18-32.

3 Berne Convention for the Protection of Literary and Artistic Works (adopted on 24th July 1971, entered into force on 28th September 1979), Article 2 &3.

4 Copyright Act, 2005 (Act 690), s. 76.

itself.

This paper is divided into five parts, the first part of which is the introduction. The second part of the paper undertakes an excursus into the literature surrounding the topic. The third part of the paper considers the challenges that confront copyright protection especially, with the evolution of AIs. The fourth part undertakes comparative analysis of the situation in Ghana with other countries and lessons to be drawn from these jurisdictions. Finally, the paper concludes with recommendations for addressing these challenges, whilst encouraging innovation.

2. LITERATURE REVIEW

2.1 General Background About Copyright

Copyright is a property right that subsists in certain types of works, such as original literary and artistic works, films and sound recordings.[5] The copyright owner of a work holds the exclusive rights to perform certain actions related to that work, such as reproducing it, broadcasting it, or distributing copies to the public.[6] These activities are restricted by copyright law. The copyright holder can manage the usage of the work by, for instance, making copies, selling them to the public, or granting others permission to do so in exchange for payment.[7] A typical example is when a copyright owner allows a publishing company to print and sell copies of a literary work, receiving royalty payments, which are usually a predetermined percentage of the book's selling price.[8]

Copyright is the expression of ideas which is original and not just the existence of the idea.[9] In determining what is original work, one cannot look beyond without considering the provisions of the Berne Convention, which is the source of modern copyright law. The provisions of the WIPO Copyright Treaty require contracting states to comply with the substantive provisions of the Berne Convention,[10] as does the TRIPS Agreement.[11] The Berne Convention, while providing that it is a matter for the contracting states to determine which work shall be the subject copyright protection,[12] emphasizes the need for the work to be an intellectual creation.[13]

5 David I. Bainbridge, *Intellectual Property* (9th Edn, Pearson Education Limited, 2012).
6 Ibid, (n 3), s 5&6.
7 Ibid.
8 Ibid.
9 Ibid.
10 WIPO Copyright Treaty (Adopted on 20th December 1996, Geneva), Article 1-21.
11 TRIPS Agreement, Article 9.
12 Berne Convention, Article 2(2).
13 Ibid, Article 2(5).

Accordingly, the Copyrights Act of Ghana provides that copyright cannot extend to ideas, concepts, procedures, methods or other things of a similar nature. However, the work must be an expression of an idea.[14] In essence, for a work to be copyrightable, it must be a work in the nature of the expression of an idea in a tangible form, and more particularly, the work must be an original work. Originality of work does not mean the work must be new or must be of first invention.[15] It must be noted that, in certain instances, there could even be an expression of ideas which are not protected by copyright because, the ideas expressed therein, do not relate to literary, artistic or musical works.[16] The second instance is where the idea so expressed is not original in nature.[17]

However, the test is that the work must involve some mental or intellectual effort, and not necessarily the exertion of labour or expense.[18] For a work to be "original" within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique.[19] What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. Skill means the use of one's knowledge, developed aptitude or practised ability in producing the work.[20] Judgment, on the other hand, means the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.[21] This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.[22] For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.[23]

Consequently, this test has done away with the sweat and brow doctrine by which a person was entitled to copyright protection merely because the person expended some effort without necessarily the exercise of any intellectual skill.[24]

Therefore, it has been held that requiring that an original work be the

14 *Pearson Education Limited v. Morgan Adzei* [2011] GHASC 47.
15 Bainbridge, (n 4).
16 *Designer Guild Limited v. Russel Williams* [2000] 1 WLR 24616.
17 Ibid.
18 Ibid.
19 *Law Society of Upper Canada v. CCH Canadian Ltd* [2004] FSR 871
20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid.
24 *University of London Press, Ltd. v. University Tutorial Press, Ltd*., [1916] 2 Ch. 601; *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (F.C.T.D.).

product of an **exercise of skill and judgment** is a workable yet fair standard.[25] The "sweat of the brow" approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner's rights and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works.[26] On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious — concepts more properly associated with patent law than copyright law.[27] By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the Copyright Act.

Now, for copyright to exist in a work under the Copyrights Act, it must comply with the requirements of the Act. Therefore, pursuant to section 1(2) of the Copyright Act, a work is not eligible for copyright protection unless:

> (a) It is original in nature.
>
> (b) It has been fixed in a tangible form of expression, whether currently known or developed in the future, so that the work can be perceived, reproduced, or communicated either directly or with the help of any machine or device.
>
> (c) It meets one of the following criteria:
>
> (i) It is created by a citizen or a person who is ordinarily resident in the Republic.
>
> (ii) It is first published in the Republic; if first published outside the Republic, it must be published in the Republic within thirty days of its initial publication abroad.
>
> (iii) It is a work for which the Republic has an obligation to provide protection under an international treaty.

It is evident from this provision that for a work to be entitled to copyright protection, there must be someone who is the author or owner of the work. Authorship and ownership are, however, two separate concepts in relation to copyright, each attracting unique rights. Authors have moral rights, while copyright owners hold economic rights. Sometimes, the author of a work is also the copyright owner, but this is not always the case, and many works have different individuals as authors and copyright owners.[28]

25 *Law Society of Upper Canada* (n 18).
26 Ibid.
27 Ibid.
28 Bainbridge (n 4).

Ownership generally derives from authorship; the person who creates the work is usually the initial copyright owner, unless the work was created as part of their employment, in which case the employer is typically the first copyright owner.[29]

The author of a work is the one who creates the work, and generally, will be the owner of the work except in certain specified instances where the author decides to transfer or assign or otherwise grant license in respect of his rights.[30]

This is further reinforced by Article 15 of the Berne Convention. Therefore, in the absence of any agreement to the contrary, the one who creates the work is regarded as the author of the said work.[31]

Also, a person who acts solely as a scribe, accurately producing a copyright expression based on instructions without any creative input, cannot be considered an author or co-author of the work.[32] Accordingly, there must be a significant creative contribution and a 'direct responsibility for what actually appears on the paper' to meet the criteria for authorship.[33]

Based on the above, the author is the individual who creates or originates a work. For example, the author of a literary work is the writer; the author of a piece of music is the composer; the author of a photograph is the photographer; and the author of a compilation is the person who collects, organizes, and arranges the material within it. In the case of joint authorship, there must be evidence of contribution of each co-author to the finished work that is not distinct from each other.[34] There is no requirement that the authors intend to create a work of joint authorship: the question is simply that the authors collaborated and created a work in which their contributions are not separate.[35] However, there must be evidence that the contribution of each co-author involved the exercise of skill and judgment.[36] Contribution by way of ideas, will not, without more, make a person the joint owner of a work, since the overriding principle is that copyright protects expression of ideas and not ideas.[37] This reinforces the view that even a significant contribution cannot guarantee co-authorship; it has to be inexorably linked with the creative input required to produce a work of copyright. In cases where it is impossible to determine the author of the work, the presumption is that the person whose name appears on

29 Ibid.
30 Ibid.
31 Copyright Act, s 7.
32 Ibid.
33 *Robin Ray v Classic FM plc* [1998] FSR 622.
34 Copyright Act, s 76.
35 *Hodgens v Beckingham* [2003] EMLR 18.
36 *Fylde Microsystems Ltd v Key Radio Systems Ltd* [1998] FSR 449.
37 *Robin Ray v Classic FM plc* [1998] FSR 622.

the work shall be presumed to be the author of the said work.[38]

On the other hand, ownership of copyright means the person to whom the copyright in a work belongs and includes the heir of an author or an assignee in whole or in part of a copyright.[39] This implies that, the owner of a copyrightable work is the person with the right to enjoy the economic and other rights vested in that work. As has been discussed already, the first author of a work is the owner of the said work. But there are some exceptions to this basic rule. For example, where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of the copyright subsisting in the work subject to any agreement to the contrary.[40]

The rights to a work may still belong to the employee based on an implied term arising from past practices. If the employee's name is on the work or its copies, it is presumed that the work was not created as part of their employment.[41]

For joint authorship works, unless the authors are employees acting within their employment, the joint authors automatically become the initial joint owners of the copyright. They own the copyright as tenants in common, meaning each author's rights are separate.[42] Each can assign their rights without the permission of the other, and upon their death, their rights will transfer to their personal representatives as part of their estate.

When copyright is assigned to two or more persons, they hold it as tenants in common unless otherwise specified in the agreement. Copyright can be considered a bundle of rights, allowing for partial assignment. For instance, if Owner A of a dramatic work's copyright assigns the public performance rights to new joint owners B and C, and the right to publish paper copies to D and E jointly, A remains the sole owner of the remaining rights, such as the translation rights.[43]

However, simply granting different rights to different people does not make them joint owners. Each person becomes the sole owner of their specific part of the copyright.[44] For example, assigning the right to publish paper copies to P and the right to public performance to Q makes each the sole owner of their respective rights. One co-owner of a copyright cannot perform or authorize infringing acts related to the work without

38 Copyright Act, s 40.
39 The Copyright Act, s 76.
40 Ibid, s 7.
41 Ibid, s 40.
42 Chioma O. Nwabachili etal, 'Authorship and Ownership of Copyright: A Critical Review' (2015) Journal of Law, Vol.34, 1.
43 Ibid.
44 Ibid.

the consent of the other co-owners.

3. COPYRIGHT PROTECTION AND ITS CHALLENGES

3.1 Traditional Copyright Laws and AI-Generated Works

Copyright law traces its origins back to the Renaissance, coinciding with the advent of the printing press.[45] The earliest recorded copyright grant occurred in England in 1557 when the Crown bestowed a monopoly over printing to the Stationers' Company.[46] Initially, this was more about censorship than protecting authors' rights.

The contemporary notion of copyright began to take shape in the 18th century. The British Statute of Anne, enacted in 1710, is widely acknowledged as the first copyright law centered on authors' rights, giving them exclusive control over their works for a limited period, after which the works would enter the public domain.[47]

Three foundational principles emerged from the Statute of Anne (1710):

1. Copyright safeguards the expression of ideas, not the ideas themselves.

2. Copyright is time-limited, balancing the need to incentivize authors while eventually allowing societal access to works once protection expires.

3. Copyright holders are granted exclusive rights, such as reproduction, distribution, and adaptation of their works.

These principles significantly influenced international treaties like the Berne Convention of 1886, which harmonized copyright protections among member nations and underscored the principle of national treatment, ensuring foreign authors were afforded the same protections as domestic ones.[48]

Throughout the 20th century, copyright law expanded to address emerging technologies, ranging from phonographs to digital media. For instance, the Digital Millennium Copyright Act (DMCA) of 1998 in the USA tackled issues related to the internet, particularly concerning digital reproduction and distribution. Despite these developments, the core goal of copyright law remains consistent: balancing the rewards for creators with the promotion of public access and innovation.[49]

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45 Syed Wajdan Rafay Bukhari etal, 'Impact Of Artificial Intelligence on Copyright Law: Challenges and Prospects' (2024) < https://www.researchgate.net/publication/377334695> accessed 30th June 2024.

46 Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968); Ibid.

47 Ibid.

48 Ibid.

49 Ibid.

Traditionally, copyright laws are designed to protect human authors without any anticipation of works created by AIs. As already discussed, the Copyright Act of Ghana defines an author as the person who creates the work. A person could be either a natural person or a legal person. The Interpretation Act of Ghana defines a person as including a body corporate, a corporate sole, an unincorporated body and an individual.[50] It does appear that these laws were designed with human authors in mind because of the fact that copyright is conferred on original works that involve the exercise of skill and judgment, and which are in tangible form. Secondly, human authors are granted specific exclusive rights over their original works. These rights include the ability to publish their work, earn financial benefits, transfer copyright ownership, and protect their reputation from any actions that might harm it.[51] The Berne Convention is a fundamental element of copyright protection, exemplifying the principles of authorship. This international treaty ensures that literary and artistic works receive worldwide protection, benefiting authors and their successors in title.[52] By doing so, it empowers authors to assert their rights and safeguard their creative expressions. The Berne Convention also promotes transparency by encouraging the clear identification of the author's name or pseudonym, thereby removing any ambiguity about the author's identity.[53]

Significantly, therefore, it is axiomatic that AI is not a legal or a natural person and thus is not recognised by these legislations. This raises pertinent questions as to who then is the author of work generated by AI, and whether the said work could be said to be the product of skill, ingenuity and judgment as required by copyright laws for the work to be original. The subsequent sections of this Article will be dedicated to undertaking this exploration.

3.2 Historical Context and Development of AI

Artificial intelligence has come a long way since its inception. The concept of machines capable of performing tasks that typically require human intelligence was first proposed in the mid-20th century.[54] Early AI research focused on problem-solving and symbolic methods, leading to the

50 Interpretation Act, 2009 (Act 792) s 46.

51 Copyright Act, s 5&6.

52 Hafiz Gaffar & Saleh Albarashdi, 'Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape' (2024) Asian Journal of International Law <doi:10.1017/S2044251323000735> accessed 30 June 2024.

53 Ibid.

54 Chris Smith et al., 'The History of Artificial Intelligence' (2006) <https://courses.cs.washington.edu/courses/csep590/06au/projects/history-ai.pdf> accessed 30 June 2024.

development of the first AI programs in the 1950s and 1960s.[55]

In the decades that followed, AI research experienced periods of optimism and stagnation, often referred to as "AI winters."[56] However, significant breakthroughs in machine learning, neural networks, and computational power in the late 20th and early 21st centuries led to a resurgence in AI development. Modern AI systems, particularly those utilizing deep learning techniques, have demonstrated remarkable capabilities in areas such as image and speech recognition, natural language processing, and autonomous decision-making.[57]

The term "Artificial Intelligence" was coined by John McCarthy in 1956.[58] Currently, there is no settled legal definition of "artificial intelligence."[59] AI can be described as "the ability of machines to perform tasks that typically require human intelligence." In 1990, Ray Kurzweil defined AI as "the science of making computers perform tasks that require intelligence when executed by humans."[60] AI generally refers to the "capability of machines to undertake cognitive tasks such as thinking, perceiving, learning, problem-solving, and decision-making."[61] According to Russ Pearlman, "the main objectives of AI encompass reasoning, knowledge, planning, learning, natural language processing (e.g., understanding and speaking languages), perception, and the ability to move and manipulate objects."[62] The World Intellectual Property Organization (WIPO) identifies three categories of AI systems: (i) "expert (or knowledge-based) systems," (ii) "perception systems," and (iii) "natural language systems."[63]

AI's impact on creative industries has been profound. From generating music and visual art to writing literature and creating digital content, AI systems are increasingly capable of producing works that are indistinguishable from those created by humans.[64] Examples include AI-generated paintings that have been sold at prestigious auction houses,

55 Ibid.

56 REDACTED, A (Brief) History of Machine Learning (2023) < https://www.sparkfun.com/news/7896> accessed 30 June 2024.

57 Amirhosein Toosi etal., 'A Brief History Of Ai: How To Prevent Another Winter (A Critical Review)' (2021) < https://www.researchgate.net/publication/354387444> accessed 30 June 2024.

58 Fredy Sánchez Merino, "Artificial Intelligence and a New Cornerstone for Authorship", WIPO-WTO Colloquium Papers, 2018, p. 28.

59 Philip C. Jackson, *Introduction to Artificial Intelligence* 1 (Dover Publications, Inc. 1985).

60 Nina Fitzgerald and Eoin Martyn, "An In-depth Analysis of Copyright and the Challenges presented by Artificial Intelligence", Ashurst's Website, March 11, 2020, https://www.ashurst.com/en/news-andinsights/insights/an-indepth-analysis-of-copyright-and-the-challenges-presented-by-artificial-intelligence/ accessed 1 July 2024.

61 Sanjivini Raina, "Artificial Intelligence through the Prism of Intellectual Property Laws" in V.K. Ahuja and Archa Vashishtha, Intellectual Property Rights: Contemporary Developments 133-41 (Thomson Reuters, 2020).

62 Russ Pearlman, "Recognizing Artificial Intelligence (AI) as Authors and Inventors under U.S. Intellectual Property Law", 24 (2) Richmond Journal of Law & Technology 4 (2018).

63 WIPO, "WIPO Worldwide Symposium on the Intellectual Property Aspects of Artificial Intelligence", WIPO, March 25, 1991<https://www.wipo.int/edocs/pubdocs/en/wipo_pub_698.pdf> accessed 1 July 2024.

64 Prachi Pathak, 'Challenges in Protecting Copyright For AI-Generated Content' (2024) IJCRT, Vol 12, Issue 2, 772.

music composed by AI algorithms that rival human compositions, and AI-written articles and stories.[65] AI-generated content is now being utilized in various fields, such as journalism, advertising, art, and entertainment. For example, AI algorithms can analyze data to produce coherent news articles, compose music, or create visual artworks that mimic the style of famous artists. These applications demonstrate AI's potential to increase efficiency, foster new forms of creativity, and expand the limits of human expression. However, they also raise issues related to attribution, authenticity, and the potential displacement of human creators within the creative ecosystem.[66]

3.3 Artificial Intelligence and Copyright Protection

The ability of AI to mimic human creativity raises questions about the nature of authorship and the value of human creativity. If an AI system can produce a work of art or a piece of literature that is indistinguishable from a human creation, does the AI deserve recognition as the author? Or should the credit go to the human programmers and data scientists who developed and trained the AI?

The legal implications of AI-generated content are complex and multifaceted. Traditional copyright laws were not designed to address the unique challenges posed by AI, leading to uncertainty and debate within the legal community. AI harbours the capability to generate a substantial volume of work in a brief timeframe with minimal investment.[67] The question is whether the works independently created by these AIs can be considered as original. Can the work be the exercise of skill and judgment so that the requirement of originality for copyright can be met? This is particularly so, due to the fact that AIs are preprogrammed with certain languages which enable them to explore large databases and generate content within the shortest possible time. Most of the works generated by AIs are derived from patterns of existing works already in existence. Consequently, although the work may be independently generated by AI, it is doubtful if such work could meet the test of originality which is cardinal in copyright protection.[68] Even if it is argued that the fact of generating content from patterns of existing work amounts to fair use of such works by the AI, it is contended that fair use in itself will not be sufficient to grant authorship to the AI for fair use amounts to only a

65 Ibid.

66 Abdikhakimov Islombek Bahodir ugli, 'Unraveling the Copyright Conundrum: Exploring AI-Generated Content and its Implications for Intellectual Property Rights' Online Scientific Conferences.

67 Ibid.

68 Syed Wajdan Rafay Bukhari etal, 'Impact of Artificial Intelligence on Copyright Law: Challenges and Prospects' (2023) JLSS Volume 5, Issue 4, pp 647.

permissive use of an already copyrighted work and thus, is not intended to confer authorship on the AI.

Furthermore, AIs are constantly regenerating and thus, any content created is susceptible to change. This raises the question as to whether content generated by AIs could be said to be in a tangible or fixed form as required by copyright laws.[69]

It has further been argued that human creativity is often linked to emotions, experiences, and intent. AI-generated content, while technically proficient, might lack the depth, emotion, or cultural context that human artists infuse into their works.[70] Furthermore, as AI enters the realm of creativity, the role and identity of the human artist are under scrutiny. Are they the creator, curator, or collaborator when using AI tools? This blurring of lines poses philosophical challenges about the essence of human creative expression which is an essential requirement of copyright protection.[71] While AI offers immense potential to augment human creativity and open new avenues of artistic exploration, it also presents challenges that force society to reflect on the nature of creativity, authenticity, and the role of the artist in the digital age.[72]

Again, if AI-generated content can be copyrighted, who should receive the economic benefits? Should it be the developers, the users, or perhaps a separate entity or trust that could allocate the funds for societal benefits? Additionally, moral rights, which are recognized in many jurisdictions, protect the personal and reputational value of a work for its creator.[73] With AI, the application of these moral rights becomes unclear. Can a machine have reputational concerns? If not, do these rights transfer to human operators?[74]

Moreover, the proliferation of AI in creative industries can disrupt traditional economic models. If AI can produce content rapidly and inexpensively, it could challenge the livelihoods of human artists and creators. As AI tools become more accessible, there's potential for misuse. Plagiarism, copyright infringements, or the creation of misleading or harmful content can become pressing issues.[75]

The question of whether AI-generated works can be copyrighted hinges on how the work is categorized. It is essential to distinguish between fully

69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 Ibid.

AI-generated works and AI-assisted works, as these categories are treated differently in most legal systems.[76] Fully AI-generated works are created autonomously by AI systems without human intervention, whereas AI-assisted works involve human input or assistance in their creation.

The eligibility of a work for copyright protection is fundamentally based on its originality, which, similar to patents, revolves around human creativity. Originality requires that the work is independently created by the author and not copied from another source, whether copyrighted or in the public domain. With AI's lack of conscience and emotions, it becomes difficult to ascertain whether work created by AI is the result of skill and judgment.

For instance, in ***Naruto v. Slator***,[77] a macaque monkey named Naruto took a selfie using a camera owned by British photographer David Slater. People for Ethical Treatment of Animals (PETA) sued Slater, arguing that the monkey owned the copyright. The U.S. Ninth Circuit Court of Appeals ruled that animals could not hold copyright. The Court ruled that the Copyright Act did not grant the animals the right to sue for copyright infringement. It was argued that the concept of the next friend should be applied to enable the animal through a human being. This argument was, however, discarded by the Court on grounds that the next friend doctrine applies in certain specified instances such as where the actual person is suffering from some mental defect or condition. The Court noted that a work will only be entitled to copyright protection if it is original in the sense of being the result of creative and intellectual effort by the author.

For works created with the assistance of AI, they may qualify for copyright, with the human contributor potentially being recognized as the author.[78] However, it is not entirely clear how much human contribution is necessary for a work to be eligible for copyright protection. While the human input should not be minimal, the exact level of contribution required for copyright eligibility remains uncertain.

4. COMPARATIVE ANALYSIS OF COPYRIGHT LAWS AND HOW THEY ADDRESS THE COMPLEXITIES OF AI

4.1 The European Union

The European Union has undertaken significant inroads towards the

76 Eightgeeks, 'Demystifying Copyright in the Age of Artificial Intelligence: Legal Perspectives Unveiled' < https://eight-geeksatlaw.wordpress.com/2024/05/23/demystifying-copyright-in-the-age-of-artificial-intelligence-legal-perspectives-unveiled/> accessed 1 July 2024.

77 No. 16-15469 (9th Cir. 2018).

78 *Mr Lee v Ms Liu* [27 November 2023]

regulation of AI. The question which however remains, is whether AI-generated works are entitled to copyright protection. In one of its reports, the European Commission notes that AIs are merely tools that assist in the production of large datasets or that can be used in diverse industries for the creation of various products. However, the report maintains that works entirely generated by AI lack inherent intellectual effort and thus, do not meet the test of originality required for copyright protection.[79] The concept of "the author's own intellectual creation" implies, in the first place, that the subject matter must be "the author's own", i.e. not copied. In the second place, and more importantly, it must constitute an "intellectual creation" by the author.[80] This further connotes that the author must have the ability to make free choices among various possibilities for such work to be regarded as the result of an intellectual exercise.[81]

For instance, in the ***Painer case***,[82] the dispute arose out of events surrounding the abduction in 1998 of Natascha Kampusch, a.k.a. Natascha K., then aged 10, and her escape in 2006. The dispute centred on the use by certain newspapers (right) of portrait photographs of Natascha K. taken by a freelance portrait photographer, Ms. Painer, prior to the child's disappearance.

When Natascha escaped from her captor in 2006, and before she had yet made her first public appearance as an 18 year-old, the newspapers lacked an up-to-date photograph to show their readers. Rather than await the inevitable press conference, they republished the old portrait photos of Natascha as a child and also generated from these photos a simulated "photo-fit" of what she might look like in 2006. Ms Painer objected to both the republication of her pictures and the publication of the photo-fit images which were, she argued, adaptations of her work.

The European Court of Justice held at paragraph 89-92 of the judgment thus:

> 89 ...that is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices (see, ***a contrario*, Joined Cases C403/08 and C429/08 *Football Association Premier League and Others* [2011] ECR I0000,** paragraph 98).

79 European Commission, Directorate-General for Communications Networks, Content and Technology, Hartmann, C., Allan, J., Hugenholtz, P. et al., *Trends and developments in artificial intelligence – Challenges to the intellectual property rights framework – Final report*, Publications Office of the European Union, 2020 <https://data.europa.eu/doi/10.2759/683128> accessed 1 July 2024*; Levola Hengelo BV v Smilde Foods* BV. C-310/17.

80 Ibid.

81 Ibid.

82 (Case C-145/10).

> 92 By making those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'.

The Court noted that the work must be the product of an intellectual effort for it to qualify for copyright protection.

A similar position was held by the Court in ***the Cofemel — Sociedade de Vestuário SA v. G-Star Raw CV***,[83] the Court stressed that the concept of 'work' that is the subject of all those provisions constitutes, as is clear from the Court's settled case-law, an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied. First, that concept entails that there exists an original subject matter, in the sense of being the author's own intellectual creation. Second, classification as a work is reserved to the elements that are the expression of such creation.[84]

Further, the CJEU held in ***Judgement of 16 July 2009, Infopaq International A/S v Danske Dagblades Forening, C5/08, EU:C:2009:465*** that copyright will only subsist if there is originality flowing from the "author's own intellectual creation".

As to what is meant by originality, the Court underscored in *Lithoss Nv v. Vimar S.P.A. and Vecolux Bv*, [85] that a work is copyrightable if it is original, meaning that it embodies an author's own intellectual creation, expressing their personality. This occurs when the author expresses their creative work by making free and creative choices. On the contrary, a work is not original when the shape is only dictated by technical constraints. The author has the burden to prove the original character of the work. This therefore means that if the author of the work is AI, it may not meet this test laid down by the Courts and thus, is not entitled to copyright protection.

The EU parliament has, however, come out with legislation to regulate the use of Artificial Intelligence. Article 1 of the Regulation states that the purpose of the Regulation is to improve the functioning of the internal market and promote the uptake of human-centric and trustworthy artificial intelligence (AI), while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter of Fundamental Rights, including democracy, the rule of law and environmental protection, against the harmful effects of artificial intelligence systems (AI systems) in the Union, and to support innovation.

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83 ECLI:EU:C:2019:721.

84 Ibid.

85 Antwerp Court of Appeal, 2021/AR/1900, 13th September, 2023.

The EU Artificial Intelligence Act is the world's first concrete initiative for regulating Artificial Intelligence. It aims to turn Europe into a global hub for trustworthy AI by laying down harmonized rules governing the development, marketing, and use of AI in the EU. The AI Act aims to ensure that AI systems in the EU are safe and respect fundamental rights and values. Moreover, its objectives are to foster investment and innovation in AI, enhance governance and enforcement, and encourage a single EU market for AI.

The AI Act has set out clear definitions for the different actors involved in AI: providers, deployers, importers, distributors, and product manufacturers. This means all parties involved in the development, usage, import, distribution, or manufacturing of AI systems will be held accountable.[86] Moreover, the AI Act also applies to providers and deployers of AI systems located outside of the EU, e.g., in Switzerland, if the output produced by the system is intended to be used in the EU.[87] Based on the model repository, the AI systems can be classified by risk. The EU AI Act distinguishes different risk categories:[88]

1. Unacceptable risk
2. High Risk
3. Limited Risk
4. Limited Risk.

The Act does not, however, provide whether works generated by AIs should be protected by copyright. It merely provides that providers or deployers of AI systems must comply with the requirements of copyright directives provided by the Union. This still leaves open the question as to whether AI should be given copyright protection for content generated by it.[89]

4.2 **The United States of America**.

The United States of America, just like the EU takes the position that for a work to qualify for copyright protection, it must be the product of an

86 Artificial Intelligence Act, Article 2.
87 Ibid.
88 Ibid, Article 6.
89 Ibid, Article 53.

intellectual effort which is original in nature. The US Copyright Office and the Courts have consistently maintained that the Copyright Act protects, and the Office registers, "original works of authorship fixed in any tangible medium of expression." Courts have interpreted the statutory phrase "works of authorship" to require human creation of the work.[90] For this reason, courts have uniformly rejected attempts to protect the creations of non-humans through copyright. For example, the Ninth Circuit held that a book containing words "'authored' by non-human spiritual beings" can only gain copyright protection if there is "human selection and arrangement of the revelations."[91]

For instance, in ***Thaler v. Perlmutter***,[92] the Court observed thus:

By its plain text, the 1976 Act . . . requires a copyrightable work to have an originator with the capacity for intellectual, creative, or artistic labor. Must that originator be a human being to claim copyright protection? The answer is "yes. Because copyright protection is only available for the creations of human authors, "the Office will refuse to register a [copyright] claim if it determines that a human being did not create the work.

In the case of ***Théâtre D'opéra Spatial***[93] an attempt was made to register before the United States Copyright Office ('USCO') a two-dimensional artwork without disclosing the fact that it had been generated using artificial intelligence('AI'). The fame of the image however made it known. The Copyright Review Board of USCO stated that the AI-generated content must be disclaimed in the registration application. They concluded that the image, which constituted a substantial portion of the final artwork, was not the product of human authorship. While acknowledging the potential creativity involved in prompting the AI system, they determined that prompts did not equate to human creative control over the resulting image. This decision underscores the Copyright Office's stance that human authorship is a fundamental requirement for copyright protection and works containing AI-generated content must follow specific guidelines for registration.

In March 2023, the Office provided registration guidance to the public for works created by a generative-AI system. The guidance explained that, in considering an application for registration, the Office will ask: [W] hether the 'work' is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the

90 *Thaler v. Perlmutter*, No. 22-cv-1564, 2023 WL 5333236, at *4 (D.D.C. Aug. 18, 2023) (stating that "human authorship is a bedrock requirement of copyright" in affirming the Office's refusal to register a work "autonomously" created by AI).

91 *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 957–59 (9th Cir. 1997)

92 No. 22-cv-1564, 2023 WL 5333236.

93 US Copyright Office, [5 September 2023].

traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine.[94] The report noted that this analysis is "necessarily . . . case-by-case" because it will "depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work."[95] To enable the Office to conduct such an analysis, registration applications must disclose AI-generated content that is "more than de minimis. Applicants may disclose and exclude such material by placing a brief description of the AI-generated content in the "Limitation of the Claim" section on the registration application. The description may be as brief and generic as "[description of content] generated by artificial intelligence." If all of a work's "traditional elements of authorship" are generated by AI, the work lacks human authorship, and the Office will not register it.[96] If, however, a work containing AI generated material also contains sufficient human authorship to support a claim to copyright, then the Office will register the human's contributions.[97]

In the circumstances, it is clear that the US copyright office is not prepared to grant copyright to works or content generated purely by AI. However, if there is sufficient evidence that the substantial part of the contribution to the content was by human effort, then the office may be prepared to confer copyright on the human author.

4.3 **United Kingdom**

In 1988, the United Kingdom became the pioneer in explicitly providing copyright protection for "computer-generated" works.[98] According to Section 178 of the Copyright, Designs and Patents Act, 1988 (the 1988 Act), a work is considered computer-generated if it is produced by a computer in such a manner that there is no human author involved. This definition effectively encompasses works generated entirely by artificial intelligence.

The 1988 Act acknowledges the copyright in these computer-generated works and assigns the rights to an author, defined as the person who undertakes the necessary arrangements for the creation of the work.[99] However, the Act and subsequent UK court rulings do not provide

94 Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16,190, 16,192 (Mar. 16, 2023) (quoting U.S. COPYRIGHT OFFICE, SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, 5 (1966))

95 Ibid.

96 Ibid.

97 Ibid.

98 Ryan Abbot, "The Artificial Inventor Project" (December 2019) WIPO Magazine < https://www.wipo.int/wipo_magazine/en/2019/06/article_0002.ht> accessed 1 July 2024.

99 Copyright, Designs and Patents Act, 1988, s 9(3).

clear guidance on identifying the individual responsible for making these arrangements or specifying which actions qualify as necessary arrangements.[100]

The only UK case that has applied Section 9(3) of the CDPA is ***Nova Productions Ltd v Mazooma Games Ltd.***[101] In this case, the court had to determine whether individual frames displayed on a screen during the play of a computer game were "computer-generated" works and whether the programmer was the author. The court concluded that the programmer was the author because he designed the game's appearance, the rules, the logic for generating each frame, and wrote the relevant computer program. Thus, he was deemed the person who made the necessary arrangements for the creation of the work.

The court also considered the role of the user, noting that while the appearance of graphics and frames depended on how the game was played, the user was not the author of these artistic works. The user's input was not artistic, and they contributed no artistic skill or labor, nor did they undertake any necessary arrangements for the creation of the frame images. The user merely played the game.[102]

While the 1988 Act extends copyright protection to computer-generated works, it imposes several exclusions and limitations. These include the absence of the right to be identified as the author or director and the right to object to derogatory treatment of the work. Additionally, the duration of copyright for computer-generated works is reduced to fifty (50) years, compared to the seventy (70) years granted for other works.

Based on this, the CDPA appears to provide copyright protection for AI-generated works, assigning it to the person who made the necessary arrangements for the creation of the work. This could be either the programmer or potentially the user if they contributed artistic skill and labor. However, this interpretation is seen as problematic, especially for AI-generated works, because it is unclear who truly makes the "necessary arrangements"—the programmer or the user.[103] Moreover, a low threshold for what constitutes making "the necessary arrangements" could lead to a virtual monopoly on AI-generated works. Additionally, the requirement for originality remains ambiguous.[104] It has, however, been contended that despite the foregoing concerns, there are advantages to the UK's approach, and it is better than the current position under Australian and EU laws,

100 Ibid, s 79(2).

101 *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219.

102 Ibid.

103 De Roza, Jolyn --- "The Impact of Artificial Intelligence on The Culture Industries and Copyright Law" [2020] UNSWLawJlStuS 26; (2020) UNSWLJ Student Series No 20-26.

104 Ibid.

which likely consider AI-generated works as not worthy of protection.[105]

4.4 Australia

The Copyright Act 1968 (the "CA") stipulates that "the author of a literary, dramatic, musical or artistic work is the owner of any copyright subsisting in the work."[106] While the CA does not explicitly define "author," Section 35(5) clarifies that only a human can be considered an author. Section 208(1) further specifies that the author of a photograph is the person who owned the material on which the photograph was taken at the time it was taken. These provisions suggest that only humans can be authors and owners of works under the CA.

Recent Australian case law has taken a stricter stance on originality and authorship. In ***Desktop Marketing Systems v Telstra Corp,***[107] the court deemed that the "industrious collection" involved in creating telephone directories was sufficient for originality, even with substantial computer use. However, this was overturned in ***IceTV Pty Limited v Nine Network Australia Pty Limited,***[108] where the court ruled that minimal skill and labour in creating a TV schedule did not meet the originality requirement. The court emphasized the need for "independent intellectual effort" from a human author and noted that antecedent work leading to the final product does not qualify as authorship.

Consequently, the current Australian approach requires a higher threshold of originality and human direction in creating the work. This implies that AI-generated works, lacking human authorship and intellectual creation, do not qualify for copyright protection under the CA.

Further, in ***Telstra Corporation Limited v Phone Directories Co Pty Ltd,***[109] the court ruled that automated processes used to create telephone directories did not qualify for copyright as there were no human authors involved. Human efforts in data collection and entry were deemed irrelevant to authorship. Similarly, in ***Acohs Pty Ltd v Ucorp Pty Ltd,***[110] the court denied copyright for HTML source code generated by a computer program, as it was not authored by a natural person. The programmers of the system were not considered authors of the output.

Legal commentators have observed that AI-generated works are unlikely

105 Ibid.
106 Copyright Act, s 37.
107 *Desktop Marketing Systems v Telstra Corp* [2002] FCAFC 112.
108 *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] 239 CLR 458.
109 *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCAFC 149; [2010] 273 ALR 725.
110 *Acohs Pty Ltd v Ucorp Pty Ltd* [2010] FCA 577.

to be deemed authored under current law, as the role of the user is merely to initiate the automated process, not to direct the material form of the work.[111]

4.5 China

The Chinese Copyright Law is silent on issues involving AI. Although it defines the concept of work in Article 3 as "intellectual achievements that are original and can be expressed in a certain form in the fields of literature, art and science", this article and other copyright-related regulations do not clearly define whether an object generated by AI constitutes work. This question is therefore left for the courts to consider. The attitude of Chinese courts to this issue has undergone major changes. At the beginning, the Chinese courts followed the international approach by giving a negative answer, evidence of which can be found in the trial guidelines issued by the Beijing High Court (A) and the judgement of the Beijing Internet Court in the *Feilin* case (B).[112] However, the Nanshan District Court in Shenzhen gave a positive answer in the subsequent ***Tencent case***.[113] In this case, the plaintiff was Tencent, a prominent Chinese internet company that developed the writing robot "Dreamwriter" in 2015. Since its launch, Dreamwriter has produced approximately 300,000 articles annually. On August 20, 2018, Tencent published a financial report generated by Dreamwriter on its website. On the same day, Yingxun company copied and published the entire article on its own website, leading to a copyright dispute between Tencent and Yingxun.

The Nanshan District Court, when determining whether the output in question constitutes a work, considered "whether it reflects the creator's individual choice, judgment, and skills, among other factors." This perspective aligns with that of courts in other countries. The court, however, ruled that the automatic generation of the article by Dreamwriter should not be seen as the entire creation process because the software does not operate entirely independently. It identified four necessary steps in generating the article: data service, triggering and writing, intelligent verification, and intelligent distribution.

Furthermore, the court found that Tencent made specific arrangements and choices regarding data input, article themes, writing styles, and other elements. This indicated that the article's creation involved personalized

111 De Roza (n 101).

112 Zhe Dai, 'The copyright protection of AI-generated works under Chinese law' (2023) < https://www.tribunajuridica.eu/arhiva/An13v2/5.%20Dai%20Zhe%20and%20JIN%20Banggui.pdf> accessed 1 July 2024.

113 *Nanshan District Court in Shenzhen, Tencent Computer Company v. Yingxun Technology Company*, Judgement No. 14010, 2019.

choices and arrangements from a human creator. Consequently, the court concluded that the process used by Dreamwriter met the conditions for protecting literary works under copyright law, and the article, as the final output, constituted a literary work.[114]

Regarding ownership, the Nanshan District Court determined that the article was created by multiple teams organized by Tencent, reflecting Tencent's needs and intentions. Therefore, the court ruled that the article was the work of a legal person created by Tencent, and the copyright belonged to Tencent.[115]

Also, in November 2023, the Internet Court of Beijing granted copyright to an AI-generated image.[116] While other countries, like the United Sates of America, seem to be going the other way, China has interestingly opened the door of protection for the output of text-to-image models. The Court deemed the image eligible for copyright due to its originality stemming from the numerous positive and negative prompts inserted and the adjustments and amendments made by the human user to select the final image that matched his expectations. Mr Lee (the plaintiff) posted an AI-generated image titled 'The Spring Breeze Brings Tenderness' on Xiaohongshu, a Chinese social media platform similar to Instagram. The image bore the plaintiff's assigned ID on Xiaohongshu. Ms Liu (the defendant) later used the image, without authorisation, on another platform and omitted the plaintiff's ID. The plaintiff filed a lawsuit at the Beijing Internet Court for infringement of copyright, in particular the right of communication to the public on information networks.

The Court ruled in favour of the plaintiff finding the work eligible for copyright for the following reasons. According to the Court, the AI-generated image constituted an original work, falling within the realm of intellectual achievements in art expressed in a tangible form. The image reflected the plaintiff's individual creativity and aesthetic choices made during the creation process. Accordingly, despite the involvement of AI technology, the court recognised the plaintiff's creative intellectual input, including designing, selecting prompts and setting parameters during the image's creation.[117] Moreover, the author amended and adjusted the output image several times, until he reached a final image that matched his expectations. The court affirmed the plaintiff's entitlement to copyright ownership, emphasising that AI models lack legal personality and humans remain the creators of works generated using this technology.[118]

114 Ibid.
115 Ibid.
116 Jing 0491 Min Chu No 11279, *Mr Lee v Ms Liu* [27 November 2023]
117 Ibid.
118 Ibid.

4.5 Ghana

In Ghana, neither the courts nor the Copyright Office have yet addressed whether AI-generated works, whether fully created by AI or assisted by AI, can be copyrighted. The Copyright Act, 2005 (Act 690), does not explicitly address this issue. However, the overall interpretation of the Copyright Act suggests that such AI-generated works may face challenges in obtaining copyright protection.

Similar to U.S. and Austrian law, the Copyright Act bases copyright protection on human authorship. Section 1(1) of the Copyright Act states that "an author, co-author or joint author of any of the following works is entitled to the copyright and protection afforded to that work under this Act…" This implies two things: first, the work must be created by an author, and second, the author is primarily entitled to the copyright. Further, the Act defines an author as the person who creates a work.[119] Person, as has already been noted, is defined to mean a natural or artificial legal person. AI does not fall into any of these categories as an AI is not recognised as a person.

Additionally, a work of joint authorship is defined as a work created by two or more authors in collaboration, where individual contributions are indistinguishable from each other. The use of terms like "person" and "individual" in these definitions indicates that human authorship is necessary for copyright protection.[120] Therefore, wholly AI-generated works cannot be copyrighted in Ghana.

As for AI-assisted works, the conclusion is less clear. The Copyright Act does not address the use of tools in creating an original work, only in making reproductions of an original work. This implies that AI-assisted works may not be protected by copyright without specific amendments to the Copyright Act or broader interpretation by Ghanaian courts.

Ghana has a long way to go in terms of recognition of works created by AI as the law in its current state does not contemplate AI generated works. It is submitted that even a wider interpretation of the Act, cannot possibly cover works generated by AI.

119 Copyright Act, s 76.
120 Ibid.

4.6 Striking A Balance Between Simulation of AI Innovation and Protection Of Interest Of Creators And Owners Of AI Subject Matters/ Copyrightable Work.

From the discussion so far, it is clear that proponents of recognizing AI as an author argue that AI systems are capable of creating original and valuable works that deserve protection under copyright law. They contend that the creativity and innovation demonstrated by AI systems should be recognized and rewarded, even if the AI itself is not a human.

Thus, AI systems can generate content that is original and indistinguishable from human-created works, demonstrating a form of creativity that merits recognition. Also, advanced AI systems operate autonomously, making decisions and creating content without direct human intervention, which suggests a level of authorship.

On the other hand, opponents of AI authorship argue that AI systems lack the human attributes that underpin traditional notions of authorship, such as creativity, intention, and effort. They contend that recognizing AI as an author undermines the value of human creativity and could have negative implications for the protection of intellectual property.

Thus, AI systems do not possess the human attributes that are central to traditional notions of authorship, such as creativity, intention, and effort. Also, recognizing AI as an author could have negative implications for the protection of intellectual property and the value of human creativity.

The overwhelming majority of jurisdictions, except for China have shown unpreparedness to confer AI systems with copyright protection for works generated by them. This is primarily due to the fact that, the laws require that a work, to be entitled to copyright protection must be an original work generated through intellectual effort. The problem with AI systems generated work is that they are preprogrammed and thus, lacks the element of human intellect. They lack consciousness and emotions which make them unsuitable for meeting the originality requirement which is cardinal for copyright law. The laws in their present state, unless reconsidered may not afford any protection for works generated by AI systems.

4.7 Possible Solutions and Compromises

There are several possible solutions and compromises that could address the challenges posed by AI-generated content while balancing the interests of creators, innovators, and the public. These include:

One possible solution is to attribute authorship to the human programmers

and developers who created and trained the AI systems. This approach recognizes the human creativity and effort involved in developing AI while addressing the limitations of AI itself.[121]

Another possible solution is to create new legal categories for AI-generated content, recognizing the unique nature of AI creativity while providing appropriate protections and incentives for human creators. This would require a redefinition of the concept of originality. Thus, it is submitted that reconsidering the traditional criterion of originality to recognize that AI-generated content, while derivative, can possess a distinct form of novelty. It will also be necessary to establish a fixed copyright duration, given the absence of a human author's lifespan as a benchmark. Considering that AI lacks emotions and conscience, there will also be the need to adapt the various rights conferred on authors and owners of work to meet the peculiar needs of AI. Therefore, by ensuring that copyright laws remain relevant and adaptable, policymakers can provide a clear legal framework that fosters creativity and protects the rights of all stakeholders involved.

Also, the concept of fair use and transformative works requires careful consideration in the realm of AI-generated content. It is essential to balance the rights of copyright holders with the transformative capabilities of AI systems. Policymakers should develop guidelines and principles to clarify the boundaries of fair use for AI-generated content, considering factors like the purpose and nature of the use, the character of the copyrighted work, the amount used, and the potential impact on the market. Clear guidelines can foster innovation, creativity, and the advancement of AI technologies while protecting the rights of copyright holders.[122]

In the case where corporations rely on AI systems to create work, the concept of 'employee' would also need a redefinition such that, where the work was created at the instance of the corporation, then the copyright will be given to the corporation and not the AI. This is consistent with the present law, where employees generate content in the course of their employment, such work belongs to the employer in the absence of any agreement to the contrary.

It is also recommended that there should be a promotion of international collaboration. Given AI's global impact, international collaborations should be encouraged to harmonize copyright standards and address AI-generated content.[123] As AI transcends national borders, collaborative efforts among countries can foster consistency and facilitate cross-border protection of intellectual property rights. Policymakers should engage in

121 Syed, (n 43).
122 Abdikhakimov (n 1).
123 Ibid.

international discussions and harmonization efforts to develop unified standards and guidelines for copyright law in the context of AI-generated content. Such cooperation can enhance legal certainty, promote global innovation, and prevent jurisdictional inconsistencies that may hinder the development and dissemination of AI-generated content, as demonstrated through the comparative analysis above.[124]

Another possible solution is to place AI-generated content in the public domain or make it freely available to all, recognizing that it is produced without human creativity and effort while promoting innovation and access to knowledge.

Further, education and awareness initiatives are crucial to equip individuals and organizations with the knowledge and understanding needed to navigate the complexities of AI-generated content. Educational programs should be developed to train professionals in the legal, ethical, and technical aspects of AI-generated content. Additionally, public awareness campaigns can help demystify AI technology, dispel misconceptions, and foster trust in AI-generated content. By promoting education and awareness, stakeholders can make informed decisions, contribute to policy discussions, and engage responsibly with AI-generated content.[125]

5. CONCLUSION AND FUTURE DIRECTIONS

The rapid advancements in AI present significant challenges and opportunities for the field of intellectual property law. As AI systems become increasingly capable of generating original and valuable content, it is essential to reevaluate and adapt copyright laws to address the complexities introduced by AI.

The debate over AI authorship and ownership highlights the need for a balanced approach that recognizes the value of human creativity while addressing the unique capabilities of AI. Possible solutions and compromises include attributing authorship to human programmers, creating new legal categories for AI-generated content, and promoting public domain and open access.

Ultimately, addressing these challenges will require ongoing dialogue and collaboration between legal experts, technologists, policymakers, and stakeholders to ensure that the intellectual property framework remains relevant and effective in the face of rapid technological advancement. The future of AI and intellectual property law will depend on our ability to

124 Ibid.
125 Ibid.

navigate these complexities and create a legal framework that promotes innovation, protects the interests of creators, and benefits society as a whole.

THE ETHICAL AND LEGAL DIMENSIONS OF MISSING ORGANS: PROSECUTING MEDICAL PRACTITIONERS IN ILLEGAL TRANSPLANT CASES.

Ojo Oluwadunsin Hecares[1]

ABSTRACT

Organ transplantation is one of the life-changing and life-saving medical advancements in the world today. However, as a result of the imbalance in the demand and supply of organs for transplant, there is an emergence of illegal transplants. This study underpins the ethical principles guiding organ transplants, beneficence, non-maleficence, and autonomy. It also examines the different cases where such illegal transplants have taken place and explores doctors' activities, aiding the continuity of the crime. This work underscores the various legal frameworks important in combating illegal transplants and prosecuting the medical practitioners involved. Using a strictly doctrinal approach, it explores a variety of case law, online journals, articles, and newspapers, as well as various legal frameworks, both local and international, for combating illegal transplants and prosecuting medical practitioners engaged in these cases. This study reveals challenges to prosecuting medical practitioners in illegal transplant cases. There is a need for an amendment of the Nigerian Laws to address the contemporary realities of society and sensitisation of patients and donors on the concept of consent, and their obligation to report any suspicious activity observed while receiving treatment. This work finally emphasises the role of the government, medical practitioners, and patients in addressing this problem and the need for cooperation amongst them to combat it

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1. INTRODUCTION

The growing scarcity of human organs, combined with the increased demand for organs, has led to rapid growth in the illegal organ market. This is also because of the slow pace associated with using government-approved systems put in place for organ transplantation.[2] Presently, there are only estimations of the scope of illegal organ transplants. This illicit organ trade is ranked as one of world's top five most lucrative international crimes, with an estimated annual profit of $840 million to $1.7 billion[3] and about 12,000 illegal transplants. While unlawful organ transplants have been reported to take place in countries across the globe, there is scarce knowledge of their operational features.[4] It is less common than other illegal trades because of the high medical knowledge, expertise, and coordination necessary for the crime to occur.[5]

So far, only 16 convictions of organ trade have been reported to the United Nations Office on Drugs and Crime.[6] This is less than the global estimates of the problem. Most cases of organ transplants involve kidney transplants; in recent times, illegal transplant features human eggs, embryos, etc.[7] However, a closer look at these cases reveals that successful convictions of hospitals and medical staff are virtually absent.[8] This crime often occurs within legalised medical settings by legally certified medical practitioners, making it challenging to track and estimate the depth of the crime.

The world's first and only case of the conviction of a hospital on this crime is the ***Netcare case***[9] in 2003 in which over 100 illegal transplants were uncovered. It involved Netcare KwaZulu (Pty) Limited and St Augustine's

2 Ambagtsheer, F. 'Understanding the challenges to investigating and prosecuting organ trafficking: a comparative analysis of two cases.' *Trends in organ Crime* (2021) <https://doi.org/10.1007/s12117-021-09421-2>accessed 3 December 2023.

3 May C, 'Transnational Crime in the Developing World' (Global Financial Integrity, 2017) < https://gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf > accessed 1 December 2023.

4 Pascalev A. and others. 'Trafficking in human beings for the purpose of organ removal: A comprehensive literature review' (2013).

5 F. Ambagtsheer & W. Weimar (eds.), 'Trafficking in Human Beings for the Purpose of Organ Removal: *Results and Recommendations*' (Pabst, 2016) 15-68.

6 UNODC (2022). Case Law Database. United Nations Office on Drugs and Crime accessed 3 December 2023.

7 Susan Maginn, 'Organ Trafficking Facts' (The Exodus Road, 16 January 2023) https://theexodusroad.com/organ-trafficking-facts/ accessed 6 December, 2023.

8 F. Ambagtsheer, 'Combating Human Trafficking for the Purpose of Organ Removal: Lessons Learned from Prosecuting Criminal Cases' in J.A. Winterdyk & J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan) 733-1749.

9 State v. Netcare Kwa-Zulu Limited (UNODC Case Law Database)< https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/zaf/2010/state_v._netcare_kwa-zulu_limited.html?> accessed 6 December 2023.

Hospital, which used their facilities for unauthorised transplantation. The 2008 ***Medicus case*** reported the conviction of a group of medical doctors for illegal transplantation.

In China, several doctors have been jailed for illegally harvesting organs from victims of accidents. The family members of the deceased were made to sign fake consent forms, and then the deceased were moved into a van where their organs were taken out. This was uncovered upon the report of the son of a victim to the police.[10]

Another illegal transplant case is the case of ***R v Obeta*** involving three Nigerians accused of a conspiracy to bring a donor to the United Kingdom to exploit him and harvest his kidney.[11] The doctor (Obeta), in this case, acted as the middleman and recruited a vulnerable donor with the promise of getting him a visa into the UK. The donor reported to the police, and upon prosecution, the doctor was sentenced to a ten-year prison term, while his co-conspirators were also sentenced.[12]
A case presently under investigation is a Nigerian case involving a medical practitioner by the name of Dr. Noah Kekere, who was accused of removing his patient's kidney without her consent whilst she underwent surgery for appendicitis.[13] This was uncovered when her sickness persisted after the surgery. Seven other patients who had at one time had surgical procedures in his clinic also came forward with the allegation of missing organs.[14] The Nigeria Medical Association also said Dr. Noah Kekere is not a medical doctor. This shows that there might be no checks to verify the certification of doctors and health centres. As such, persons may be operating health centres without being licensed.[15]

Although illegal transplant is not a new occurrence, it is underreported

10 'Chinese Doctors Jailed for Illegal Organ Harvesting' (BBC News, 27 November 2020) <https://www.bbc.com/news/world-asia-china-55097424> accessed 7 December 2023.
11 *R v Obeta* and Others Sentencing Remarks (2023) < https://www.judiciary.uk/wp-content/uploads/2023/05/R-v-Obeta-and-others-sentencing-remarks.pdf> accessed 5 December 2023.
12 'UK Court Jails Nigerian Senator Ekweremadu, Wife Over Organ Harvesting Plot' (Sahara Reporters, 5 May 2023) <https://saharareporters.com/2023/05/05/breaking-uk-court-jails-nigerian-senator-ekweremadu-wife-over-organ-harvesting-plot> accessed 4 December 2023.
13 James Abraham, 'Plateau NMA investigates medical doctor over alleged organ harvesting' (The Punch)
<https://punchng.com/plateau-nma-investigates-medical-doctor-over-alleged-organ-harvesting/> accessed 2 December 2023.
14 Isaac Shobayo, 'Plateau Organ Theft: Seven Other Ex-Patients Found with Missing Kidneys' (Tribune Online) <https://tribuneonlineng.com/plateau-organ-theft-seven-other-ex-patients-found-with-missing-kidneys/#google_vignette> accessed 3 December 2023.
15 *Ibid.*

because of its secretive nature and the limited awareness of law enforcement agencies on how and where to identify and disrupt illegal transplant activities.[16] Vulnerable populations are usually victims of this crime because of their ignorance of the existence of the crime and its different dynamics. In a country like Nigeria, it does not help that when a person is found dead with their organs missing, they are linked to ritual killings rather than organ harvesting and transplant because of their unfamiliarity with the crime.[17]

The activities of doctors in illegal transplants and the absence of reported cases on their prosecution calls for an examination of the prosecution of doctors involved so far and to offer recommendations to the challenges hindering the prosecution. The different trends in illegal organ transplants call for a new approach to be taken to ensure the persons perpetuating such crimes are brought to justice. This study aims to highlight the involvement of medical practitioners in illegal transplants, examine the difficulties law enforcement authorities face in investigating and prosecuting this crime, and proffer recommendations for the criminal justice system to address these challenges. This is in a bid to curb illegal organ transplants in society.

2. ORGAN TRANSPLANT AND THE ETHICAL PRINCIPLES GOVERNING IT

Organ transplant involves removing a person's organ to transplant it into another individual. The organ is removed from one person (donor) and implanted into another (recipient) during the transplant surgery. The donor may be a deceased or a living donor; in the case of a living donor, only an organ or part of an organ is donated. In contrast, in the case of a deceased donor, such a person must have consented to their organs being donated before their death.[18] In the UK and some other jurisdictions, consent for organ donation by a deceased donor may be presumed, even

16 F. Ambagtsheer and W Weimar (eds), *Trafficking in Human Brings for the Purpose of Organ Removal: Results and Recommendations* (Pabst Science Publishers 2016).

17 Abubakar Musa, 'Ritual Killing: Another Corpse Recovered in Plateau Village, Vital Organs Missing (Daily Trust) <https://dailytrust.com/ritual-killing-another-corpse-recovered-in-plateau-village-vital-organs-missing/> accessed 7 December 2023.

18 Lara Adejoro, 'Consent Central to Organ Donation - Abugu, President, Medical Law Association' (The Punch, 5 July 2022) <https://punchng.com/consent-central-to-organ-donation-abugu-president-medical-law-association/> accessed 3 December 2023.

though the donor may not have actively provided consent.[19]

Organ transplants are based on the medical ethics principles of beneficence, non-maleficence, autonomy, and justice. The Principle of Beneficence requires a medical practitioner to act in the patient's best interest and remove any condition that will harm the patient.[20] The Principle of Nonmaleficence explains a medical practitioner's duty not to cause harm or pain to their patient and deprive them of the goods of life. The medical practitioner must always weigh the benefits against the burdens and try to choose the best course of action for a patient. The Principle of Autonomy is based on the principle that humans have the power to make decisions and choices concerning what happens to them.

The principle of autonomy, as stated in the case of ***Schloendorff v Society of the New York Hospital,***[21] explains that every human being of adult years and sound mind has a right to determine what happens to their body. As such, patients have the right and power to decide whatever treatment option they want, whether or not the doctor considers it beneficial or harmful to the patient. The principle of autonomy is derived from informed consent and is in reaction to the paternalism of medical practitioners.

The Principle of Justice entails what is fair and equitable in treating people. Distributive justice particularly relates to organ transplantation as it refers to the equitable and fair distribution of healthcare resources like medications, equipment, and available organs irrespective of their different ideologies and social or economic status.[22]

Consent is a fundamental discourse in medical practice, though it depends on the medical situation, the nature of the treatment, and the circumstances. New circumstances raise new issues in obtaining consent. Valid consent must be given voluntarily by a person with capacity without any form of coercion, undue influence, force, or duress. At the time of giving consent, the donor must be of sound mind and be able to understand the necessary information and provide a clear decision on it. The person giving consent must be above 18 years except the person is deemed to have Gillick competence.[23] Here, a person who is less than eighteen years

19 Ibid.

20 Medical Protection Society, 'The Four Pillars of Medical Ethics' (26 June 2023) <The four principles of medical ethics (medicalprotection.org)> accessed 6 December 2023.

21 (1914) 105 N.E 92, 211 N.Y 125.

22 Basil Varkey, 'Principles of Clinical Ethics and Their Application to Practice' (2021) 30Med Princ Pract 17 <https://doi.org/10.1159/000509119> accessed 7 December 2023.

23 *Gillick v West Norfolk and Wisbech AHA* (1985) UKHL 7.

old but above sixteen years old has the mental capacity to make medical decisions concerning himself.

Medical practitioners also have a duty to disclose all the necessary information relating to the treatment to ensure the patient gives valid informed consent. This includes the risks and side effects associated with the treatment, which should be brought to the patient's attention.[24]

Consent to undergo organ transplantation is more complex than consent to undergo other surgical operations because of the need to balance the risks. Organ transplant requires informed consent. The donor must give informed consent before an organ transplantation can take place. In the UK and other jurisdictions, consent for organ donation by a deceased donor may be presumed or deemed, even though the donor has not actively provided consent. Persons are usually given the option of opting out of the law.[25]
Consent in organ transplantation can be withdrawn at any time. If at any time a patient withdraws their consent, the transplant can no longer occur and any transplantation that takes place after such withdrawal will constitute an illegal transplant. It is not always illegal to remove an organ. An organ transplant becomes unlawful when it is done without medical reasons and patient consent.

3. ILLEGAL TRANSPLANT, THE DIFFERENT TRENDS AND THE ACTIVITIES OF MEDICAL PRACTITIONERS.

Organ donation would be morally acceptable if the consent of the donor is obtained and the donor is not at risk. However, because the donor can withdraw his consent at any time, people who are desperate for an organ transplant often resort to other means of getting a transplant. This is what is called an illegal transplant. Illegal transplants are a result of the inability of the supply of organs to cater to the growing demand for organs.

Medical practitioners are always at the frontline of illegal transplant activities because the successful commission of this crime requires the technicalities, knowledge, and expertise that only medical practitioners possess. It may be as their sole business, where the medical practitioner

24 Raza F, Neuberger J, 'Consent in Organ Transplantation: Putting Legal Obligations and Guidelines into Practice,' (2022) 23 BMC Medical Ethics 69 <https://doi.org/10.1186/s12910-022-00791-y> accessed 3 December 2023.

25 Lara Adejoro, 'Consent Central to Organ Donation - Abugu, President, Medical Law Association' (The Punch, 5 July 2022) <https://punchng.com/consent-central-to-organ-donation-abugu-president-medical-law-association/> accessed 3 December 2023.

is both the trafficker who makes the victim surrender their organs at no cost and the person who carries out the harvesting and transplantation. It may also be an organised crime where the doctor acts as the intermediary who convinces gullible victims to surrender their organs with the promise of giving them financial assistance. This was as in the case of ***R v Obeta***[26] where the doctor procured the victim for organ transplantation. Even in such situations, the operation is still always carried out by a medical practitioner.

There are doctors who would treat patients for non-existent ailments and, by extension, remove organs without the victim's knowledge and consent. There are also doctors who remove organs from a patient's body while they are carrying out surgery on the patient.[27] When consent is obtained for treatment or the removal of an organ in a surgical procedure, the doctor is bound to remove only the organ the patient or his next of kin has consented to remove except when necessary for medical reasons. Any removal not consented to by the patient may constitute an offence.[28]

Often, this crime is committed in an approved hospital space by licenced medical practitioner(s). They use authorised places to carry out this crime to prevent people and authorities from noticing. This makes it more challenging to uncover them in such cases.[29]

6. ETHICAL CONSIDERATIONS AND IMPLICATIONS OF SUCH OCCURRENCE PATIENTS IN HEALTH-CARE SYSTEMS.

The illegal transplant goes against the pillars of medical ethics, which are autonomy, beneficence, non-maleficence, and justice.[30] They do not respect patients' autonomy in deciding whether they want to donate an organ or not; instead, they take organs without their patient's consent and knowledge. This, more often than not, brings harm to patients. This goes against their duty to not cause harm to patients and to protect them from harm instead, they put them in harm's way. Most patients are

26 *R v Obeta* and Others Sentencing Remarks (2023) < https://www.judiciary.uk/wp-content/uploads/2023/05/R-v-Obeta-and-others-sentencing-remarks.pdf> accessed 5 December 2023.

27 Karen R. V, 'Current Challenges and Advances in Organ Donation and Transplantation: The Nauseous Nexus between the Organ Industry and the Risks of Illegal Organ Harvesting' (2022). <https://www.intechopen.com/chapters/83637> accessed 2 December 2023.

28 Code of Medical Ethics 2008 Rule 19

29 Pascalev A. and others. 'Trafficking in human beings for the purpose of organ removal: A comprehensive literature review' (2013).

30 Medical Protection Society, 'The Four Pillars of Medical Ethics' (26 June 2023) <The four principles of medical ethics (medicalprotection.org)> accessed 6 December 2023.

unaware of this evil perpetrated by some medical doctors. This is because of the fiduciary relationship they have with their doctors and based on paternalism. Patients trust their doctors not to do anything to cause harm to them, so it is straightforward for doctors to take advantage of this and perpetrate these vile acts.

After an illegal transplant is executed, the patient or the donor is usually at risk. The person in need of the transplant is typically tested to ensure he is matching with the donors before the transplant occurs. When organs are taken without a patient's consent, the patient is at more risk as most of them don't realise the absence of organs in their body or the effects of such operations until they begin to have complications from it later. Often, there is little or no provision of post-care for the donor in situations like this as it may raise suspicion. There is, therefore, a need to protect patients from this.

The implication of a doctor's involvement in this crime is the loss of faith and confidence in the ability of the doctor to provide optimal care for patients and the loss of respect of good standing members of society for the medical profession. Doctors in this situation are more concerned with taking advantage of their access to patients' information to commit crimes. This would gradually cause the patients to lose faith and confidence in doctors and the healthcare system itself.

7. THE LEGAL FRAMEWORK FOR THE PROSECUTION OF MEDICAL PRACTITIONERS IN ILLEGAL TRANSPLANTS IN NIGERIA.

7.1 NATIONAL HEALTH ACT, 2014

The National Health Act is a regulatory law that governs organ harvesting and donation in Nigeria. This Act was enacted in 2014. The Act contains several sections and provisions to guide organ and tissue transplants in Nigeria. Section 48 of the Act provides that a person shall not remove the tissue, blood, or organ from another living person for any purpose without the informed consent of the person except in cases of emergency and medical investigation.[31] It also stipulates the minimum age of 18 years for a person to be a donor and that donation should not be done for commercial purposes. Subsection 3 of this section provides a fine of 100,000 Naira or imprisonment of not less than two years for the removal of a tissue and imprisonment of not more than a year, 100,000 Naira or

31 National Health Act 2014 Section 48.

both for the removal of blood or blood products.

Section 51 states that before an organ transplant can be conducted, the hospital must be authorized to carry out the transplant, and the medical practitioner in charge of or authorized by the hospital must give written authority.[32] The hospital is also to make provision for an independent tissue transplantation committee that engages in the transplantation. Section 52(1) states that only a registered medical practitioner has the authority to remove and transplant an organ into a living person.[33] Section 53 prohibits the receipt of any financial reward for donation except for reasonable purposes and makes the offence punishable by one-year imprisonment and a fine of 100,000 Naira or both.[34]

7.2 CRIMINAL CODE CAP C. 38 LAWS OF FEDERATION OF NIGERIA 2004

The Criminal Code is an act enacted in 1964 containing the criminal law of Nigeria, offences, and the penalties or punishment imposed for the commission of the offence. Although there are no laws criminalising illegal transplants, there are provisions that can be inferred to relate to this offence. Section 252 of the Criminal Code Criminal Code defines assault as 'striking, touching, movement or the application of force to a person without his consent or if the consent is obtained through fraud.' In relation to this, any medical practitioner who touches a patient without his consent or carries out an operation that was not consented to by the patient commits the offence of assault.[35] Section 351 of the Criminal Code provides that assault is a misdemeanour and the punishment for it is imprisonment for one year.[36]

Section 313 of the Criminal Code provides that a person can be said to have killed someone if the death is a result of medical treatment. This means that if a patient dies as a result of the removal of an organ without his consent during medical treatment, the doctor would be held liable.

There is a need for the amendment of the Criminal Code to accommodate the new trends in crime in society. There is also the need for laws that expressly criminalise illegal transplants. This will be in the interest of the victim because of the risks associated with this act. This is also because most laws do not focus on/encapsulate the different dimensions of the

32 National Health Act 2014 Section 51.
33 National Health Act 2014 Section 52(1).
34 National Health Act 2014 Section 53.
35 Criminal Code 1964 Section 252.
36 Criminal Code 1964 Section 313.

perpetuation of this crime.

7.3 MEDICAL AND DENTAL PRACTITIONERS ACT 2004 CAP M8 LAWS OF FEDERATION OF NIGERIA 2004

This Act establishes the Medical and Dental Council of Nigeria and the Medical Practitioners Disciplinary Tribunal. The Medical and Dental Council also known as "The Council" is responsible for the registration of medical practitioners and reviewing the code of conduct for the practitioners from time to time while the Medical Practitioners Disciplinary Tribunal is responsible for determining cases brought to it by the Panel and giving punishment as prescribed by the Act if the medical practitioner is found guilty of the offence.[37] The investigative panel is also established in this Act; it is responsible for conducting an investigation where the medical practitioner is alleged to have committed an offence.[38]

7.4 CODE OF MEDICAL ETHICS 2008

This code of conduct guides medical practitioners in carrying out their duties. Rule 3 provides that they have a duty to expose any corrupt, dishonest, unprofessional, criminal act or omission of their fellow practitioners for the greater good of the profession.[39]

Rule 19 states that appropriate consent should be obtained from the patient, his relative or any appropriate authority before carrying out any surgical procedure.[40] Doctors have a duty to explain to persons whom they are obtaining consent from the necessary information pertaining to the surgery in simple and concise terms and in a language they understand. This includes the risks and consequences of the procedure. In making decisions on irreversible surgical procedures like the removal of organs, the patient is to undertake counselling sessions and be given ample time to make a decision.

7.5 DECLARATION OF ISTANBUL.

This declaration was formed by the International Society of Nephrology (ISN) and the Transplantation Society (TTS) at a Summit in April 2008 to

37 Medical and Dental Practitioners Act 2004 Section 1.
38 Medical and Dental Practitioners Act 2004 Section 15.
39 Code of Medical Ethics 2008 Rule 3.
40 Code of Medical Ethics 2008 Rule 19.

address the growing problems concerning these unethical activities.[41] It aims to provide ethical guidance for professionals to promote the equitable distribution of organs for those in need and discourage unethical and exploitative practices that have harmed people in vulnerable populations. Some of their principles are:

1. Governments should develop and implement ethically and clinically sound programs for preventing and treating organ failure, consistent with meeting the overall healthcare needs of their populations.
2. The optimal care of organ donors and transplant recipients should be a primary goal of transplant policies and programs.
3. Organ donation should be a financially neutral act.
4. Designated authorities in each jurisdiction should oversee and be accountable for organ donation, allocation and transplantation practices to ensure standardization, traceability, transparency, quality, safety, fairness and public trust.
5. All residents of a country should have equitable access to donation and transplant services and organs procured from deceased donors.

8. PROSECUTION OF MEDICAL PRACTITIONERS IN ILLEGAL TRANSPLANT CASES.

Prosecution is an asset to the criminal justice system in a country. The court is the institution saddled with the responsibility of prosecuting offenders and giving punishment as provided by law. Primarily, proceedings for the prosecution of the medical practitioners who have been alleged to perpetuate these acts may be instituted at the Medical and Dental Practitioners Tribunal through a complaint of the doctor's actions to the tribunal. The tribunal will then conduct an investigation through the investigative panel where the alleged registered person has misbehaved in his capacity as a medical practitioner.[42]

Upon determination of the matter, they may or may not give sanctions. The Medical and Dental Practitioners Tribunal is a court of first instance in matters of medical malpractice. An action may also be instituted on the allegation of the commission of the crime at the court. These criminal proceedings will be initiated and undertaken by the office of the Attorney-General during civil proceedings.[43] The court also enlists the help of the

41 The Declaration of Istanbul on Organ Trafficking and Transplant Tourism. <https://www.declarationofistanbul.org/the-declaration> accessed 30 November 2023.

42 Medical and Dental Practitioners Act Section 15(2).

43 Section 174 Constitution of the Federal Republic of Nigeria 1999 as amended.

police and other law enforcement agencies in investigating the allegations.

The prosecution would involve investigating the alleged case of illegal organ transplantation and gathering evidence and witnesses to testify. After evidence is collected, criminal proceedings will be initiated. The prosecution of medical practitioners is significant in illegal transplant cases because of the crucial role they play in the commission of the crime. This will help medical practitioners be accountable for violating the code of conduct and medical ethics in these crimes and serve as a deterrent to other medical personnel. It would help in upholding medical standards and promote the principles of medical ethics. It would also help bring justice to patients and persons who have been victims of this act and the community as a whole. However, research shows that there have been only a few successful investigations and prosecutions of medical practitioners involved in these cases.[44] This is because of the challenges faced in prosecuting medical practitioners involved in these cases.

9. CHALLENGES TO THE PROSECUTION OF MEDICAL PRACTITIONERS.

Firstly, most of the criminal laws providing for the punishment and prosecution of persons who commit this offence are inadequate and also do not include measures of accountability and specify agencies responsible for fostering the implementation of the laws. This causes legal changes to be perceived by enforcement officials as a political mandate, having little or nothing to do with control and prevention of crime and maintenance of order in the society. There is also no proper definition of the offence in the law. Illegal transplant offenders can take advantage of a corrupt and weak legal system to continue perpetuating crime. There is a need to eliminate corruption and enact more vital legislation.[45] Illegal transplant schemes require less preparation and documentation than legal transplants. The legal transplant requires more technicalities, more extensive personnel, rigid informed consent systems, and approval from authorities before the transplant can take place. At the same time, an illegal transplant involves little or no regularities. It uses smaller personnel who can perform diverse roles, making it easier to conceal the crime and change locations.

44 F. Ambagtsheer and R. Bugter, 'The organization of the human organ trade: a comparative crime script analysis,' (2023) 80 *Crime, Law Social Change*1 <https://doi.org/10.1007/s10611-022-10068-5> accessed 2 December 2023.

45 F. Ambagtsheer, 'Understanding the challenges to investigating and prosecuting organ trafficking: a comparative analysis of two cases.' *Trends in Organ Crime* (2021) <https://doi.org/10.1007/s12117-021-09421-2> accessed 3 December 2023.

One of the challenges faced in the prosecution of medical practitioners in illegal transplants is that the activities of illicit transplants are often not reported. So far, only 16 convictions of organ trade have been reported to the United Nations Office on Drugs and Crime.[46] One of the primary reasons for this is that this operation thrives in secrecy and in most cases of illegal transplants, harvesting is usually done once, which makes it almost impossible to trace any subsequent illegal transplant to the doctor.

Furthermore, patients, most especially members of the vulnerable population, lack awareness of what constitutes illegal transplants. Often in Nigeria, when a body is found dead on the road with organs missing, it is always associated with ritual killings. Patients also lack awareness of their rights and obligations as patients. The justifiable belief that doctors do not have any intention of harming patients and that whatever they do is in their best interest often makes patients unconsciously susceptible as victims of the crime. This is because, most times, they do not ask questions, and the doctor can remove an organ during an operation without their consent and knowledge. Although the primary duty of a doctor is to give the utmost care to the patient, some doctors have the intention of harming their patients. Many patients are also unaware of what goes on in their body during surgery.

More so, the attention on illegal transplants is always on the person procuring the organ transplant. Bruckmuller claims that although the first case of illegal organ trafficking and sale was officially investigated in 1993 in Bombay, India, the doctor involved wasn't apprehended until 2008. Similarly, an illegal organ transplant ring leader in the United States was ultimately brought to justice after ten years of operation. According to the World Health Organization, in 2021, the Indian government dismantled a medical practice of physicians, nurses, and paramedics that involved 500 illicit organ transplants to wealthy Indians and foreigners.[47] The reality is that an illicit transplant cannot proceed without the participation of medical practitioners in the procedure. There is always going to be a demand for organs illegally especially by people who have the means. It is up to the medical practitioners to uphold what the profession stands for.

10. RECOMMENDATIONS AND CONCLUSION.

1. The government should set up bodies and agencies to monitor

46 UNODC (2022). Case Law Database. United Nations Office on Drugs and Crime. accessed 3 December 2023.

47 Karen R. V, 'Current Challenges and Advances in Organ Donation and Transplantation: The Nauseous Nexus between the Organ Industry and the Risks of Illegal Organ Harvesting' (2022) https://www.intechopen.com/chapters/83637 accessed 2 December 2023

hospitals. There should be proper documentation of surgeries in hospitals to ensure that due process is followed. These agencies and bodies should send out persons to hospitals to interview patients for treatment feedback. The government should also be severe in carrying out routine checks to ensure that all hospitals and doctors are certified. In the ongoing investigation of Dr Noah Kekere, it was discovered the doctor was not certified and in the list of medical practitioners in Jos.[48] However, this was only discovered during the investigation. Due diligence checks could have prevented this. It is not every occasion that illegal organ transplant is an organized crime. Sometimes they happen in legalized systems. These checks will ensure that hospitals and doctors are upholding medical ethics as illegal transplant is a crime that thrives on silence and concealment thus putting this system in place will help expose the crime.

2. Amendment of the existing criminal law and introductions of provisions that expressly make it an offence for a doctor to carry out such illegal transplant. The present criminal law provisions are insufficient in covering the different dynamics of these activities. The penalties for the commission of the offence should be stringent. As illegal transplants always take place in fragile or corrupt settings and a weak system allows for ease in the commission of the crime, more legal provisions should be made on what constitutes an illegal transplant andtransplant tourism and organ trafficking. Law enforcement agents should employ disruptive techniques to uncover illegal transplant activities by examining the differences between unlawful transplant and legal transplant schemes. This would help in recognising illegal transplant activities.

3. Creation of awareness for patients especially people who are of vulnerable populations.[49] This would be through virtual and physical awareness programs educating them on their right to access their medical files, their right to know the medical practitioner's certification, ways of identifying the scheme, and how to report any irregularities noticed to the appropriate authorities. This will encourage them to speak up if they notice

48 James Abraham, 'Plateau NMA investigates medical doctor over alleged organ harvesting' (The Punch) <https://punchng.com/plateau-nma-investigates-medical-doctor-over-alleged-organ-harvesting/> accessed 2 December 2023

49 Susan Maginn, 'Organ Trafficking Facts' (The Exodus Road, 16 January 2023) <https://theexodusroad.com/organ-trafficking-facts/> accessed 6 December 2023.

any suspicious activities among the doctors attending to them at the hospital and leave the hospital if necessary.

4. Medical Practitioners should report the evil activities of their colleagues to the appropriate authorities. Since they have access to patient information, they are in a position to obtain critical information from patients who are recipients of illegally transplanted organs.[50] Doctors who are doing follow-ups for any person who has undergone an organ transplant should do checks to ensure such persons got the organ through legal and approved means. Measures should be implemented for the anonymity and protection of medical practitioners who breach their patient's confidentiality to make any report. This will help in investigating and tracking down the medical practitioners who performed the illegal transplant.

5. The use of whistle-blowing techniques in medical facilities will also encourage medical practitioners to report irregularities. They must report anyone who commits any ethical and professional misconduct.[51]

For a successful prosecution of medical practitioners in illegal transplant cases in subsequent years, every stakeholder in the healthcare sector and law enforcement agency has an essential role to play. Prosecuting medical personnel will serve as a deterrent to other medical personnel, and this will eventually lead to a reduction of illegal organ transplants in Nigeria and the world at large.

50 Timothy Caulfield and others, 'Trafficking in Human Beings for the Purpose of Organ Removal and the Ethical and Legal Obligations of Healthcare Providers' (2016) 2(2) *Transplant Direct* e60, published online 4 January 2016, <10.1097/TXD.0000000000000566> accessed 5 December 2023.

51 Code of Medical Ethics 2008 Rule 3.

DEFINING RESPONSIBILITY OF STATES TOWARDS SUSTAINABLE USE OF THE ENVIRONMENT: THE NATURE OF DUE DILIGENCE OBLIGATION IN THE CONTEXT OF TRANSBOUNDARY ENVIRONMENTAL HARM

Michael Ofosu Duodu[1]

ABSTRACT

The obligation of States under international law to act with due diligence does not provide a clear basis for determining the standard of behavior that States should observe when regulating activities subject to their jurisdiction and control. Due diligence remains one of the elusive normative constructs in international law especially in the area of transboundary environmental harm despite conscious jurisprudential attempts to define its scope. This paper contributes to the literature on due diligence as it highlights the normative contours of the due diligence obligation under international environmental law, exploring the various dimensions and implications of this fundamental principle and bringing them to bear with controversial cases such as the Grand Ethiopian Renaissance Dam. Drawing from existing jurisprudence, the paper attempts to provide a glance at the nuances of the due diligence obligation required in the exploitation and management of shared resources while evincing its strengths and frailties.

INTRODUCTION

While permanent sovereignty is notoriously invoked as basis for state's power to freely explore, develop and dispose of its natural resources in

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accordance with its own priorities,[2] international jurisprudence maintains that such states' freedom to engage in or permit natural resources-related activities within their territorial boundaries or subject to their jurisdictional control should not produce transboundary effects 'contrary to the rights of others'.[3] The import of what has emerged as a primary duty of states is the responsibility of states, while in pursuance of their sovereign rights over natural resources, 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.[4] Rather than operating to totally stall states' activities in pursuit of their economic well-being where there exist potential transboundary environmental threats, the duty imposes upon States a duty to take appropriate measures to prevent or minimise the risk of significant transboundary harm, i.e. the obligation to act with due diligence.[5] Though proven a laudable standard in balancing states' sovereign interests against the overarching global interest in the conservation of the environment and in the moderation of the impacts of states' activities on the global environment, the obligation to act with due diligence is nonetheless laced with uncertainties and limitations. These are uncertainties characterised by the practical relativeness of the concept; its application is subject to differential perspectives and the unequal contextual capacities of states bound to act according to its dictates. Moreover, the content of due diligence is largely dictated by the vicissitudes of time, especially in terms of scientific and technological evolution. What constitutes an appropriate standard for compliance with

2 U.N. CHARTER, art.2, para1; U.N.G.A. Res. 2849, Development and Environment, A/RES/2849 (XXVI 1972), UN General Assembly, 20 December 1971, para 4(a); UN Assembly, *Permanent sovereignty over natural resources*, A/RES/3171, UN General Assembly, 17 December 1973, A/RES/1803 (XVII 1962).

3 Günther Handl, 'Transboundary Impacts' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) ch 22, 533; Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Rep. 1949 (Apr. 9), p. 4 at 22 (9 April): "every state's obligation not to allow knowingly its territory to be used so as to cause harm to the citizens or property of other States". The rule originated in the Trail Smelter Arbitration (United States v. Canada) (1931-41) 3 RIAA 1905. The customary law status of this limitation with regard to the extent to which states may exercise their sovereign rights over natural resources can further be deduced from the decisions of the International Court of Justice in Legality of the Treat or Use of Nuclear Weapons, Advisory Opinion,I.C.J. Rep. 1996 (July 8), p. 226 and Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Rep. 1997 (Sept. 25), p.7. The rule is also codified in Principle 2 of the Declaration of the UN Conference on the Human Environment (1972) and Principle 21 of the Rio Declaration on Environment and Development (1992). The latter advises that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

4 United Nations Rio Declaration on Environment and Development (13 June 1992), 31 I.L.M. 874 (1992), principle 2.

5 See Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission (2001-II), Part 2, para 7.

the obligation to act with due diligence is unclear. The conditions necessary to discharge this obligation are not sufficiently definitive. This paper will be dedicated to justifying the aforementioned claims. Preliminarily, the proceeding section will consider cursorily the normative contours of due diligence as an established principle of international law.

AN OVERVIEW OF THE NORMATIVE CONTOURS OF DUE DILIGENCE

The obligation to act with due diligence developed as a necessary element of the obligation under international law to look after the territory of one's neighbour: *sic utere tuo ut alienum non laedas*,[6] which is exemplified by Principle 2 of the Rio Declaration.[7] The International Court of Justice (ICJ) in the ***Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*** pointed to the fundamental character of the obligation to act with due diligence when it stated that 'the principle of prevention, as a customary rule had its origins in the due diligence that is required of a state in its territory'.[8] It entails the duty to take appropriate measures to prevent or minimise the risks of significant transboundary harm that an activity may pose.[9] Since compliance with due diligence is conditioned on positive action it may consequently be understood as an obligation the breach of which is occasioned by an omission to do what a state will reasonably be expected to do in pre-emption of a foreseeable risk of transboundary harm presented by a developmental project undertaken by or subject to the jurisdictional control of the state.[10]

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6 Principles of neighborliness with regards to transboundary environmental harm can be traced back to the *Alabama Claims Arbitration* and subsequently, the *Trial Smelter Arbitration (United States v. Canada)* (1931-41) 3
RIAA 1905; AJIL (1939) 182. In the latter, US was ordered to pay damages and prescribe a regime for controlling future emissions from a Canadian smelter which had caused air pollution damage. The tribunal concluded that 'no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or to the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'. see 35 AJIL (1941) 716.

7 Ibid (n 3).

8 Case Concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment of 20 April 2010, 2010 I.C.J. (Apr. 20) paras. 67-158 (hereinafter Pulp Mills case), para 101. As of 2015 when *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* were decided by the ICJ the precise scope of the obligation to act with due diligence vis a vis other international environmental obligation remained unclear. See Yotova, R, 'The Principles of Due Diligence and Prevention in International Environmental Law', The Cambridge Law Journal (2016), 75(3), 445-448

9 Prevention of Transboundary Environmental Harm 2001, art 3.

10 Günther Handl, 'Transboundary Impacts' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), The Oxford Handbook of International Environmental Law (Oxford University Press 2008) ch 22, 538.

Generally speaking, the duty to act with due diligence connotes, on one hand, the implementation of policies, legislation, and administrative controls applicable to public and private conduct which are capable of preventing or minimising the risk of transboundary harm to other states or the global environment and on the other hand, the adherence to modern scientific best practices and the adoption of current technologies.[11] On the former, the ICJ in stressing the scope of the obligation cautioned that states are further required to exercise a certain degree of vigilance in their enforcement and exercise of administrative control such as regularly monitoring the activities of the private and public operators.[12] The obligation to exercise due diligence acknowledges the practical impossibility of totally curbing significant harm yet it does not seek to suspend developmental projects where there are possibilities of significant harm.[13] The magnitude of potential harm or inherently harmful nature of a project, such as that of nuclear weapon plants, does not in and of itself render the project illegal. Responsibility for transboundary environmental damage is instead founded on a determination of whether the host state (other than the operator)[14] sufficiently discharged its due diligence obligation in preventing or minimising the harm.[15] For instance, following the Sandoz disaster, Switzerland claimed responsibility for failing to regulate spills from pharmaceutical plants to the standard required by the 1976 Rhine Chemicals Convention.[16] The infamous Sandoz disaster was caused by a fire and its subsequent extinguishing in an agrochemical storehouse resulting in the release of toxic agrochemicals into the air and seriously polluting the Rhine river. A massive casualty of wildlife downstream was recorded including the killing of a large proportion of the European eel population in the river.[17] Furthermore, in the *Pulp Mills* case (supra), the adequacy of the regulatory system of Uruguay, its environmental impact assessment (EIA) and its choice of technology were crucial in determining whether it complied with its due diligence obligation.[18] Factors such as the degree of risk, nature of the activity; its location, size of operation, special climatic conditions, the extent of territorial control, and resources available to the state, are supported by international jurisprudence as necessary

11 ILC Report (2001) GAOR A/56/10, 395-5. These have been expressed as conducts to be expected of good government. See Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd Edition, Oxford University Press 2009), 147.

12 *Pulp Mills* case (n 8) para 197.

13 ILC Report (n 11) 538-40.

14 Ibid 399, para 3; OECD, Legal aspects of Transfrontier Pollution, 380.

15 P. Birnie, (n 11) 148

16 Ibid, 147

17 Herbert Güttinger and Werner Stumm, 'Ecotoxicology: An Analysis of the Rhine Pollution caused by the Sandoz Chemical Accident, 1986' (1992) 17(2) Interdisciplinary Science Reviews < https://doi.org/10.1179/isr.1992.17.2.127 > accessed 05 September 2024.

18 P. Birnie, (n 11) 148.

in determining what conduct of the host state will be appropriate and reasonable in discharging its due diligence obligation.[19] To put in context, 'activities which may be considered ultra-hazardous require a much higher standard to enforce them'.[20]

On the other hand, the due diligence obligation requires states to keep abreast with changing trends in science and technology. This is justified on grounds that the standard of care that may be expected of a state may vary with time. In other words, a reasonable conduct today may not satisfy the threshold of reasonableness in future. For instance, it is empirically logical to expect a newly built mill to operate at higher technological standard than one built decades ago.[21] In this light, the existing international standards requires the adoption of 'best available techniques', 'best practicable means' or 'best environmental practices' in pre-emption of any significant harm.[22] States are consequently required to adopt policies and measures that are commensurate with the expert demands that come with scientific and technological advancement in order to discharge their due diligence obligation.[23]

The main strength of the obligation lies in its flexibility with regards to what should be expected of individual states in any given circumstance taking into account, inter alia, material factors concerning the relative position of the host state in responding to the risk in question.[24] The relative character of this obligation however may prove detrimental in defining the appropriate standards for regulating states' behaviour. The proceeding section will highlight perceivable frailties of the due diligence obligation in that regard.

PERCEIVABLE SHORTCOMINGS OF THE DUE DILIGENCE OBLIGATION

Issues concerning the determination of risk

Identifying the degree of foreseeable risk of harm is necessary to determining what pre-emptive measures will satisfy the threshold

19 *Alabama Claims Arbitration*; *Corfu Channel Case*, ICJ Reports (1949) 89; *Case Concerning Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980) 29-33.
20 ILC Report (2001) GAOR A/56/10, 394, para 11.
21 See *Pulp Mills case* (n 8)
22 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, art 2(3).
23 ibid
24 P. Birnie, (n 11) 149

of reasonableness to comply with the obligation of due diligence.[25] Determining risk involves an assessment of the likelihood of harm and the significance of the anticipated effect. Risk of causing transboundary harm has been defined as 'risks taking the form of a high probability of causing significant transboundary harm and low probability of causing disastrous transboundary harm'.[26] It is not clear what threshold of risk is the object of the obligation to prevent or mitigate. The initial preference of the International Law Commission (ILC) for 'appreciable' magnitude[27] was superseded by the *Trail Smelter* requirement of a relatively high threshold, i.e. 'serious' injury.[28] Recent international jurisprudence, however, forecasts preference for 'significance' of harm.[29] Meanwhile in the ILC's understanding, 'significant harm need not be substantial but must be 'more than trivial'.[30] There's however no definition for 'more than trivial', a lacuna which provides room for uncertainties as to what the due diligence obligation of states may entail in respect of transboundary harm. Even if the element 'significant harm' is to be taken on its face value, it operates as a limitation on the overall aim of the obligation to prevent or mitigate transboundary harm. This is because an activity must be identified to have such level of risk in order to trigger the host state's due diligence obligation. For instance, based on Nicaragua's environmental studies of the impact of the dredging on its own environment and on the expert evidence presented, the Court found that Nicaragua's dredging programme did not pose a risk of significant transboundary harm. In the absence of such risk, the obligation to carry out an EIA or to notify or consult Costa Rica were not triggered.[31]

In addition to the uncertainties surrounding the magnitude of risk is the more controversial balance of interests approach that takes into account equitable considerations of circumstances of individual states in assessing the threshold of harm.[32] The uncelebrated effect of this approach, Birnie

25 ILC Report (2001) GAOR A/56/10, 391-2, para 11; 'the standard of due diligence against which the conduct of the state of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance'.

26 Prevention of Transboundary Environmental Harm (2001), art 2(a).

27 ILC, Draft Articles on International Liability, Un Doc A/CN 4/428 (1990) and on International Watercourses, II YblLC (1993) Pt 1, 112.

28 *Trial Smelter Arbitration (United States v. Canada)* (1931-41) 3 RIAA 1905;35 AJIL (1941) 716.

29 See for instance 1997 Convention on International Watercourses and 2001 Articles on Prevention of Transboundary Environmental Harm

30 ILC Report (2001) ibid 388, paras (4)-(7).

31 See *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, ICJ Reports 2015. See Yotova, R, (n 9) 446.

32 Though not yet legally accepted it has been advocated by most academics as a necessary approach in determining the magnitude of risk. See Philipe Sands and Jacqueline Peel, *Principles of International Environmental Law*, (3rd Edi, Cambridge Press, 2012), 187

rightly pointed out, 'could allow the utility of the activity to outweigh the seriousness of the harm and have the effect of converting an obligation to prevent harm into an obligation to use territory equitably or reasonably or into a constraint on abuse of rights'.[33]

Moreover, the perception of risk is subject to the exigencies of scientific and technological advancements. Taking all material environmental factors into account, the nature and extent of risk of a particular activity is expected to change in the light of increased scientific knowledge and understanding of environmental problems. Consequently, the standard of behaviour of states is expected to increase. However, for states which are slowly catching up on the pace of such advancement it may be challenging to define an objective standard of reference in relation to them. While it may be prudent to consider each state's case on its own merit, the possible effect will be creating opportunities for unfair advantage.

Issues regarding Foreseeability and the Link with the Precautionary Principle

Foreseeability is an acid test for reasonable conduct. A state cannot be required to take pre-emptive measures in response to harm which is not foreseeable. The due diligence obligation cannot be triggered where a state undertakes an activity the potentially harmful effect of which the state 'is not and could not reasonably have been aware' and which it 'did not know and could not reasonably have known'.[34] The significance of harm must be borne in mind, i.e. the state must have foreknowledge of nothing less than a 'significant harm'. Given that scientific and technological evolution influence perceptions of risk variations in what individual states would foresee as potential significant harm is expected. In this light, the threshold of due diligence becomes weaker in favour of developing states, especially if the *Trial Smelter Standard* which requires states to act only where there is a 'clear and convincing' evidence is to be considered the standard approach. The possible effect of this approach generally is to allow activities to proceed as long as their riskiness is not unequivocally established, and irrevocable harm has not been caused. Developing states may therefore leverage their level of scientific and technological acumen as justification for their inability to foresee the risks or the significance thereof. In timely counterweight to such possibility is the intervention

33 Ibid.

34 P. Birnie, (n 11) 153

of the *precautionary principle*.[35] This principle provides that lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation' where 'threats of serious irreversible damage' are present.[36] This is basically a risk-management approach that encourages decision-makers to take action when there is a possibility of harm to the public or environment, but there is no scientific certainty on the issue. However, what constitutes cost-effective measures is ideally to be determined by the state based on its capacity and given that states are keen on their economic development there is a high possibility of states overlooking certain risks where they are satisfied that the benefits of the project could cater for potential damage. Also, it is logical not to expect the host state to have foreknowledge of 'threats of serious irreversible damage' when it could not even establish the potential harm by clear evidence. Besides, it is uncertain as to what degree of scientific certainty is required for the application of the principle.

While itemisation of activities and their potential risks in international standard setting instruments may be helpful in guiding states as to what risks should be foreseeable, such approach may indirectly permit activities which are not explicitly listed. For instance, the Espoo Convention lists the construction of roads as one of the risky activities necessitating an EIA.[37] In contrast, the dredging of canals is not covered by the presumption that it too might be risky.[38] The fact that, at least, some guidance is offered by this approach in case of uncertainty cannot be overlooked.

Issues regarding the Unequal Capacities of States and Determination of 'Appropriate Standards'

Though some possible effects of varying capacities of states on establishing the content of due diligence obligation have been frequented in the above section, it is worth recalling the extent to which considerations of the circumstances of developing states may operate to lower the standard of behaviour expected of them. The essence of acknowledging this fact lies in it having been legally recognised in flagship international agreements

35 Rio Declaration on Environment and Development (1992), principle 15. The ITLOS observed in Advisory Opinion on Responsibilities and Obligations in the Area, 2011, para 135, that the precautionary principle could be considered today as 'part of customary international law'.

36 Principle 15 of Rio Declaration

37 Appendix I of ESPOO Convention (Convention on Environmental Impact Assessment in a Trans-boundary Context) 1991.

38 Yotova, R. (n 8) 448

as the principle of 'common but differentiated responsibility'[39] which balances, on the one hand, the need for all states to take responsibility for global environmental problems and, on the other hand, the need to recognize the wide differences in levels of economic development between states. The international community has however been unsurprisingly stricter in the assessment of due diligence obligation for developing states as there is a high chance of such states taking unwarranted advantage of their relative capacities to pollute the environment.[40] Arguments in favour of lower standards for developing states in respect of oil tankers and nuclear power stations, for instance, have not gained international acceptance. The application of such exceptions where developing states are required to apply the highest possible standards however, may cause undue limitation on developing states' right to develop these resources. The relative contextual capacities of states underscore the difficulty in formulating an economy-wide standard for compliance with due diligence for specific risks. Perhaps a better compromising approach will be to ascribe certain standards to be applied by all states in some circumstances. International treaties as well as EU Law therefore require states to adopt 'best available techniques' or 'best environmental practices' to mitigate the risks of environmental harm.[41] Meanwhile what may be the best of the host state may be far lower than what may be considered appropriate. It therefore leaves much to be desired if the requirements are to be interpreted subjectively than objectively. If the latter is preferred, what then will constitute the appropriate standard against which the reasonableness of the host state's conduct will be measured? As rightly noted by Birnie, the main disadvantage of the relative nature of due diligence 'is that it offers limited guidance on what legislation or technology are required in specific cases'.[42] Reference is therefore usually made to standards set by internationally recognised organisations such as the International Maritime Organisation (IMO) and the International Atomic Energy Agency (IAEA).[43] Standards set by these bodies however may not have the force of customary international law to be binding on all states. Thus, until state practice converts such standards into binding ones, states may exercise discretion according to rules of sovereignty to decide

39 Principle 7 of Rio Declaration. See Article 3(1) and 4(1) of the United Nations Framework Convention on Climate Change (UNFCCC). See also Christopher D. Stone, 'Common but Differentiated Responsibilities in International Law', AJIL Vol. 98, No.2 (Apr. 2004), 276-301.

40 P. Birnie, (n 11) 149

41 Article 194(1) of United Nations Convention on Law of the Sea (UNCLOS), 1982. See also Article 2(3) of OSPAR Convention

42 P. Birnie, (n 11) 149.

43 International Maritime Organization and International Atomic Energy Agency. See MARPOL Convention (Articles of the International Convention for the Prevention of Pollution from Ships, 1973) and Nuclear Safety Convention, 1994, adopted by the IAEA.

whether or not to be bound by a standard.

The Grand Ethiopian Renaissance Dam & Due Diligence

In 2011, Ethiopia announced the construction of a mammoth hydropower dam on the Nile River, known as the Grand Ethiopian Renaissance Dam ('the GERD'), without notifying downstream riparian states, Egypt and Sudan, and proceeded to construct. The dam was meant to cover an estimated height of 145m; 246km in length and a total area of approximately1,874km^2. The GERD will have the capacity to generate 6,000MW of electricity. The dam is expected to feed electricity into the grids of Ethiopia and its neighbouring countries with promising economic advantages for the region. A consultation process begun at the initiative of Ethiopia. An International Panel of Experts' report on the GERD requested additional studies on the project. The Parties agreed to hire international firms to conduct the study. In 2015 a Declaration of Principles between Egypt, Sudan and Ethiopia on the GERD was adopted[44] which required inter alia, the obligation to respect the outcome of the joint studies. Construction which had however already begun continued unabated without regard to the studies. Downstream riparian States viciously contended against the project citing negative impact on downstream waterflows and freshwater resources. Questions abound as to the legality of the project in international law.[45] More precisely whether or not the GERD achieves a correct balance between Ethiopia's rights and obligations under international law. Does customary international law allow Ethiopia an unfettered right to unilaterally initiate construction of the GERD and proceed in a way that disregards the dam impact studies?[46]

The due diligence obligation is well-entrenched in international watercourse law. Article 7 United Nations Watercourse Convention[47] provides that:

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44 Agreement on Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia, and the Republic of the Sudan on on the Grand Ethiopian Renaissance Dam Project, Mar. 23, 2015

45 Ranjan, A. (2024). Grand Ethiopian Renaissance Dam dispute: implications, negotiations, and mediations. *Journal of Contemporary African Studies*, *42*(1), 18–36. <https://doi.org/10.1080/02589001.2023.2287425>; Re Von R. E. Meding. (2022). 'The Grand Ethiopian Renaissance Dame: A Large Scale Energy Project in Violation of International Law?' LSU Journal of Energy Law and Resources, Vol. 10, Issue 1; Funnemark, A. (2020), 'Water Resources and Inter-State Conflict: Legal Principles and the Grand Ethiopian Renaissance Dam (GRED)' PSRP

46 Questions posed by Dr. Jasmine Moussa in her lecture on 'The Grand Ethiopian Renaissance Dam: A Catalyst For Cooperation?'

47 UN Convention on the Law of Non-Navigational Uses of International Watercourses, 1997.

1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.

2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

The combined effect of these provisions assumes the position that where irrespective of a State meeting its due diligence obligation having adopted all appropriate measures to prevent harm to others, harm nonetheless occurs, there is an obligation to consult with the affected state to eliminate or mitigate harm, with due regard to equitable and reasonable use. Thus, the project may not be illegal in itself irrespective of the potential environmental risks. The illegality would arise only in respect of non-compliance with the procedural requirements meant to safeguard the equitable interests of other states which may be directly or indirectly affected by the project. Article 5 of the UNWC states that Watercourse States shall in their respective territories *utilize* an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, *taking into account the interests of the watercourse States concerned*, consistent with adequate protection of the watercourse. Optimal utilisation is defined by the ILC in the following terms: 'attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction for all their needs, while minimizing the detriment to, and unmet needs, of each.'[48] Further Articles 11-19 of the UNWC provide that "watercourse States are under a duty to consult, exchange information and notify other States **before** implementing a planned measure", and that:

> The task before . . . [the Parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal

48 Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries, 1994.

> rights of the other [to] . . . the facts of the particular situation, and having regard to the interests of other States [with] . . . Established . . . rights ....[49]

The Declaration of Principles, which the parties voluntary adopted prescribes 'inform[ing] the downstream countries of any unforeseen or urgent circumstances requiring adjustments in the operation of GERD' and for 'sustain[ed] cooperation and coordination on the annual operation of GERD with downstream reservoirs . . . through the . . . ministries responsible for water.' Essentially Ethiopia is expected to consult, exchange information and notify.

As to whether there have been potential breaches of this procedural requirements, it is settled that international law does not support a unilateral exploitation or use of transboundary resources. The international legal frameworks on use of transboundary resources maintain a fair balance between a Sate's permanent sovereignty and the equitable interests of other states in respect of a shared resource. This is manifest in the application of the procedural rules above-mentioned. It has been projected that Ethiopia could be in potential breach of the procedural rules for instance 'by not conducting joint studies with Egypt and Sudan and initiating the filling of the dam without a subsequent agreement.'[50] It has been argued that though to some extent Ethiopia had met its obligations to carry out negotiations in good faith the country should have refrained from filling the dam reservoir altogether.[51] In the ***Indus Waters Kishenganga Arbitration***,[52] it was held that where there are several different designs, techniques or modes of operation for a planned use, there is an obligation to implement the one that is least harmful, even if this does not correspond to the 'optimal' or most cost-effective design. While negotiations continue amidst the myriad legal and political issues with which the project is fraught, the aforementioned prescriptions of the due diligence obligation must control the many considerations and hegemony of the parties as regards the project.

CONCLUSION

Environmental law is a relatively new and unsettled area of international law in need of further clarification and the due diligence obligation

49 Article 17 of the United Nations Watercourse Convention, 1997
50 Meding, (n 45) 55.
51 Ibid 56.
52 *Pakistan v India*, 2013, PCA.

has proven a vivid example in that regard. In its Advisory Opinion on Responsibilities and Obligations in the Area, the ITLOS noted that the content of the due diligence obligation 'may not easily be described in precise terms'.[53] Apparently, what constitutes a reasonable or appropriate behaviour of states at a certain moment depends on the level of scientific and technological understanding of environmental problems, the level of risk of transboundary harm a situation gives rise to, the circumstance of the host state as well as international views on appropriate behaviour in particular circumstances.

The legal character of proper standards expected of States in the context of transboundary environmental harm must be authoritatively delineated especially as cases such as the Grand Ethiopian Renaissance Dam continue to challenge the existing legal frameworks on the use of transboundary resources. The ICJ has been instrumental in recent years in that regard. For instance, until the *Pulp Mills case*[54] in 2010, it was not clear whether or not as part of ascertaining the potential transboundary risks of a project States were obligated to conduct an EIA. The preexisting rules on EIA were cast in treaties and soft law such as the 1992 Rio Declaration, the 1991 Espoo Convention on Transboundary EIA and the ILC Draft Articles on Transboundary Harm[55]. It follows that unless a State is a party to the Espoo Convention for instance, that State may not in principle be bound by any positive rule of international law to conduct an EIA in respect of projects that involve risks of transboundary harm. In the *Pulp Mills case* the ICJ pronounced astoundingly that the EIA obligation had in recent years 'gained so much acceptance among states that it may now be taken as a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context…'[56] The Court affirmed that the EIA is a necessary element of the due diligence obligation and in appropriate circumstances must be carried out prior to the implementation of a project that is likely to cause significant transboundary harm.[57] Yet the scope and content of an EIA are not precisely provided for under general international law. The Court proposed that it is for each party to determine on a case-by-case basis what is required 'having regard to the nature and magnitude of the

53 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) (Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, ITLOS Case No.17, 1 Feb. 2011), para 117.

54 *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay*), Judgment of 20 April 2010, (n 8).

55 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous activities, 2001.

56 *Pulp Mills case*, (n 8) para 204.

57 Ibid para 205.

proposed development and its likely adverse impact'.[58]

Indeed, given the growing state practice and proliferation of multilateral treaties on the requirements of due diligence obligation in the context of transboundary harm there is barely any room for States faced with litigation for transboundary environmental damage to challenge the existence of an obligation to carry out due diligence protocols. It is worth reiterating that the general rule of international law laid down in the *Corfu Channel Case*, the *Nuclear Weapons Case*, the *Trail Smelter Arbitration* and reaffirmed in the *Pulp Mills Case* that 'A State is thus obliged to use all of the means at its disposal in order to avoid activities which take place in its territory, or in an area under its jurisdiction, causing significant damage to the environment of another state'.[59]

Finally, as to what the exercise of due diligence entail, the ICJ in the Pulp Mills case enunciated that it required that 'adoption of appropriate rules and measures', 'a certain level of vigilance in their enforcement', 'the exercise of administrative control applicable to public and private operators', 'careful consideration of the technology to be used', EIA and notification.[60]

58 Ibid.
59 Ibid para 101.
60 Ibid.

ENERGY TRANSITION IN AFRICA: A BALANCED APPROACH FOR SUSTAINABLE DEVELOPMENT

Hubert Tieku[1]

ABSTRACT

Africa possesses a wealth of renewable energy resources, including hydropower, solar, wind, and bioenergy. These resources present significant opportunities for the continent to embrace sustainable energy solutions. However, the underutilization of fossil fuels in Africa highlights the complexity of Africa's energy landscape. Many African countries rely heavily on fossil fuels, such as oil and natural gas, which are crucial for economic development and energy security. The challenge lies in balancing the need for energy access with the imperative to combat climate change. This paper argues for a pragmatic approach to energy transition in Africa – one that does not exclusively focus on renewable energy but incorporates fossil fuels where necessary. African nations can adopt a strategy that simultaneously pursues energy security, economic growth, and sustainability. By leveraging existing fossil fuel reserves responsibly, Africa can bridge its current energy gaps while gradually shifting to cleaner alternatives. The integration of renewable energy technologies must be supported by investments in infrastructure, policy frameworks, and international cooperation. The energy transition should be viewed not as an either/or scenario but as a spectrum of solutions tailored to the unique needs of African nations. A balanced approach enables African countries to harness the immediate benefits of their natural resources

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while positioning themselves as leaders in the green energy revolution. Moreover, Africa's journey can serve as a case study for other developing regions facing similar challenges. By navigating the delicate balance between fossil fuel dependence and renewable energy adoption, Africa has the potential to set a global precedent for sustainable energy transitions. African countries must seize this moment to contribute significantly to global climate change mitigation while securing their place in the emerging green economy. By doing so, they ensure not only economic resilience but also a meaningful role in shaping the future of energy on a global scale.

INTRODUCTION

Our planet – the land, the sea and the airspace- is not inhabited by only one nation. Our planet is shared by all states across the world.[2] Since the activities of a state not only affect the environmental domains of that state but also a significant portion of the world in its entirety, it has become necessary to institute international legal mechanisms to control the activities adversely affecting the global environment. For instance, the release of chlorofluorocarbons or greenhouse gases by one state, can have significant effects upon the environment of other states or in areas beyond the jurisdiction of the polluting state.[3] It is widely recognized that the planet faces serious environmental challenges that can only be addressed through international cooperation. Our planet faces imminent threats including acid rain, ozone depletion, climate change, loss of biodiversity and many more.[4] Since a major share of all these global environmental threats, especially climate change, are human-induced,[5] human activities need to be checked in order to deal with these challenges which serve as a real threat to the very existence of our planet.

In order to particularly deal with climate change, "The world is transitioning to a low-carbon economy".[6] This transition is what is often

2 Philippe Sands, and others, *Principles of International Environmental Law* (3rd edn, Cambridge University Press2012) 3.

3 Philip Allott, *Eunomia: New Order for a New World* (Oxford Academic 1990) para. 17.52.

4 Ibid.

5 Theophilus Acheampong 'The Energy Transition and Critical Minerals in Ghana: Opportunities and Governance Challenges' (Ghana Extractive Industries Transparency Initiative 2022) 1.

6 Victoria R. Nalule, 'How to Respond to Energy Transitions in Africa: Introducing the Energy Progression Dialogue' in Victoria R. Nalule (ed), *Energy Transitions and the Future of the African Energy Sector: Law, Policy and Governance* (Springer Nature Switzerland AG 2020) Chapter 2, Page 37.

referred to as "energy transition". Energy transitions, in this context, are therefore focused on the need to address climate change by shifting from fossil fuels or high carbon emitting energy sources like petroleum to renewable energy sources[7] such as wind energy, solar energy, thermal energy and hydroelectric power. The emergence of climate change also necessitates switching to new mobility solutions which contribute far less to global warming – for example, electric cars.[8]

At an international conference in October 1948, assisted by UNESCO, governments and non-governmental actors established the first major international organization to address environmental issues.[9] The conference established the International Union for the Protection of Nature (now the International Union for Conservation of Nature, or IUCN), to promote, amongst others, the preservation of wildlife and the natural environment.[10] Climate change in particular was not then a pressing issue. After 1948, however, hundreds of international conferences and treaties have been established to deal with climate change as a matter of urgency. The most significant of these include the 1972 Stockholm Conference, the 1981 Montevideo Programme, the 1982 World Charter for Nature,[11] 1980 World Conservation Strategy and 1991 'Caring for the Earth' Strategy which gave currency to the term 'sustainable development'.[12]

On May 9, 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was established with the main objective of stabilizing greenhouse gas concentrations in the atmosphere at a level that would effectively deal with the issue of climate change.[13] The UNFCCC created a Conference of the Parties (COP) and made it the Supreme Body of the Convention.[14] The COP was established to "keep under regular review the implementation of the Convention". On 12 December 2015, the COP convened in France, Paris, and adopted the Paris Agreement (PA). The primary objective of the PA is:

> "to strengthen the global response to the threat of climate change" and to maintain "the increase

7 Ibid.
8 Victoria R. Nalule, 'How to Respond to Energy Transitions in Africa: Introducing the Energy Progression Dialogue' in Victoria R. Nalule (ed), *Energy Transitions and the Future of the African Energy Sector: Law, Policy and Governance* (Springer Nature Switzerland AG 2020) Ch 2.
9 Ibid.
10 1977 Statutes, 18 IPE 8960; on the creation of the IUCN, see McCormick, Reclaiming Paradise, 31–6. In 1956, the IUPN was renamed the International Union for the Conservation of Nature and Natural Resources (IUCN).
11 Ibid 22-38.
12 Ibid 38.
13 United Nations Framework Convention on Climate Change (adopted on 9 May 1992) article 2.
14 Ibid. article 7(2).

> in the global average temperature to well below **2°C above pre-industrial levels** and pursuing efforts **to limit the temperature increase to 1.5°C above pre-industrial levels,** recognizing that this would significantly reduce the risks and impacts of climate change. (Emphasis mine)"[15]

Maintaining global temperature at 1.5°C and meeting net-zero goals call for a drastic reduction in greenhouse gas (GHG) emissions emanating from massive dependence on conventional (fossil) fuels.[16]

As at 25 October 2022, there were one hundred and ninety eight (198) signatories to the UNFCCC.[17] Out the 198 signatories to the UNFCCC, one hundred and ninety four (194) have signed the Paris Agreement.[18] It is interesting to note that all the fifty four (54) countries on the African continent have signed and ratified both the UNFCCC and the Paris Agreement.[19] Under the Paris Agreement, all parties to the agreement are required to make commitments in the form of Nationally Determined Contributions (NDCs) "to the global response to climate change".[20] All the African country signatories of the PA have communicated their individual NDCs to the Conference of the Parties (COP).

In 1992, when the UNFCCC was adopted at the Earth Summit in Rio de Janeiro in Brazil, over 170 countries adopted a Plan of Action called the "Agenda 21". It was "adopted as a non-binding blueprint and action plan for a global partnership for sustainable development."[21] After a series of international conferences and declarations such as the World Summit on Sustainable Development (WSSD) and its accompanying 2002 Johannesburg Declaration on Sustainable Development, the UN General Assembly adopted the 2030 Agenda for Sustainable Development which contains the seventeen (17) Sustainable Development Goals (SDGs).[22] Goal number thirteen (13) of the UN SDGs is to "take urgent action to combat climate change and its impacts"[23], Goal seven (7) of the UN SDGs is to

15 The Paris Agreement (adopted on 12 December 2015) article 2(1).
16 Ibid.
17 < https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states> accessed 1 December 2023.
18 Ibid.
19 https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states> accessed 1 December 2023.
20 United Nations Framework Convention on Climate Change (adopted on 9 May 1992) article 3.
21 Philippe Sands, and others, *Principles of International Environmental Law* (3rd edn, Cambridge University Press2012) 44.
22 Philippe Sands, and others, *Principles of International Environmental Law* (3rd edn, Cambridge University Press2012) 47.
23 See: https://sdgs.un.org/2030agenda (Accessed on 2 December 2023).

"Ensure access to affordable, reliable, sustainable and modern energy for all".[24] Goal eight-8 of the UN SDGs is to "…promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all".[25]

Against this backdrop, it is essential to have an overview of Africa's Energy and Development situation. As at the year 2019, half of Africa's population did not have access to electricity. About 75% of Africa's population lack access to clean cooking.[26] "This lack of access not only hamstrings economic growth but it also negatively impacts life expectancy and quality of life".[27] The International Energy Agency (IEA) has projected Africa's population to double by 2050.[28] The growing population, increase in urbanization, rapid industrialization and highly insufficient access to energy on the African continent has led to rapid excessive increase in energy demand. If Africa intends to meet this energy demand, it is imperative to utilize all its available energy resources including conventional or fossil fuels for a considerable time before it can effectively transition fully to alternative sources of energy that are sustainable. Some of these sustainable sources of energy which can serve as an alternative to fossil fuel are wind energy, solar energy and geothermal energy.

The development of Africa is highly dependent on the exploitation of its natural resources especially petroleum. To use the Republic of Ghana as an example, since petroleum was discovered in commercial quantities over ten (10) years ago, the production and exportation of oil and gas have provided significant growth to Ghana's economy.[29] From inception (2010), the total/cumulative petroleum revenue Ghana has generated amounts to $7.36 billion.[30]

Ghana currently has three (3) oil producing fields, namely Jubilee, TEN and the Sankofa Gye-Nyame (SGN) fields.[31] The Jubilee field alone contains approximately two (2) billion barrels of oil and 1.2 trillion cubic feet of natural gas.[32] Thus, with Ghana's cumulative production of oil from

24 Ibid.
25 See: https://sdgs.un.org/2030agenda (Accessed on 2 December 2023).
26 Ibid.
27 Ibid.
28 IEA,'Africa Energy Outlook 2019' (IEA 2019). See: <https://www.iea.org/reports/africa-energyoutlook-2019.>
29 Theophilus Acheampong and Thomas Kojo Stephens, 'Introduction' in Theophilus Acheampong and Thomas Kojo Stephens (eds), *Petroleum Resources Management in Africa: Lessons from Ten Years of Oil and Gas Production in Ghana* (Springer Nature Switzerland AG 2021) xii.
30 Public Interest and Accountability Committee, *2021 Annual Report* 20.
31 Ibid. 19.
32 George Yaw Owusu and M. Rutledge McCall, *In Pursuit Of Jubilee: A True Story Of The First Major Oil Discovery In Ghana* (Avenue Lane Press 2017) 93.

all the three operating fields since 2010 standing at around 500 million barrels, Ghana has not even cumulatively exploited a quarter of the Jubilee field alone. Also, in May 2021, Eni Ghana (a subsidiary of the Italian National Oil Company) discovered between 500 and 700 million barrels of oil in Ghana's Cape Three Point Block 4 which is yet to be developed and exploited.[33] This is to indicate how vast Ghana's unexploited petroleum resource is. Ghana is only a single African country, and it must be noted that Africa is a continent endowed with an unfathomable amount of petroleum reserve.

This analysis demonstrates the obvious fact that Africa needs to keep on exploiting all its natural resources or energy resources for a relatively longer time, especially fossil fuels, in order to achieve the 7th and 8th UN Sustainable Development Goals which are to "ensure access to affordable…energy" and to "promote…sustainable economic growth"[34] respectively.

African governments and policymakers are therefore "faced with the dilemma of addressing the energy and economic challenges on the continent and at the same time addressing the climate change challenges."[35] Should African governments focus on addressing climate change, which will mean forgoing a major part of its effort to achieve access to energy and economic growth, or rather focus on providing access to energy and economic growth to its people, which will mean flouting its international climate change commitments and putting the whole planet at an environmental and/or even existential risk? This paper seeks to suggest how Africa should deal with this dilemma.

THE IMPACT OF CLIMATE CHANGE AND THE GLOBAL RESPONSE: CHALLENGES, CONSEQUENCES, AND THE PATH TO ENERGY TRANSITION

Among all the planets in the universe, Earth is the most unique to the human experience because of its climate.[36] Planets Mercury and Venus are too hot for human habitation because they are extremely close to the Sun. Mars and the outer planets are all too far from the Sun and therefore are too cold for us. "Earth, therefore, is sometimes called the "Goldilocks Planet" because its climate is, as the old story goes, not too hot and not too

33 Ibid. 10.
34 Ibid 22.
35 Ibid 25.
36 Dana Desonie, *Climate: Causes and Effects of Climate Change* (Chelsea House Publishers 2008) x.

cold, but "just right."[37]

Climate Change

Climate Change refers to the "changes in the earth's weather, including changes in temperature, wind patterns and rainfall, especially the increase in the temperature of the earth's atmosphere that is caused by the increase of particular gases, especially carbon dioxide."[38] The United Nations Framework Convention on Climate Change (UNFCCC) has also defined Climate Change to mean "an alteration in the composition of the global atmosphere which is…observed over comparable time periods."[39] Climate, in this context, is simply the global atmosphere which has been observed over a comparable period. Any change in this global atmosphere is referred to as climate change. This means, there can be good or bad climate change. The climate change currently happening globally is a negative or unfavourable form of climate change and serves as a threat to the existence of our planet.

Earth's atmosphere is made up of Nitrogen, Oxygen, Water vapour, Carbon dioxide, Methane, Nitrous oxide, Ozone, Particles (dust, soot) and Chlorofluorocarbons.[40] Apart from Nitrogen, Oxygen and Water vapour, all the gases in the Earth's atmosphere are Greenhouse gases. Greenhouse gases (GHG) allow sunlight to pass through them but trap some of the heat that re-radiates from the planet's surface. This helps to create a temperate climate that has allowed the proliferation of numerous varieties of living organisms. When there is a higher concentration of GHG in the atmosphere, more of the heat re-radiating from the Earth's surface is trapped. Therefore, "higher levels of greenhouse gases warm the atmosphere while lower levels of greenhouse gases cool the atmosphere."[41]

Global Warming

When greenhouse gas levels rise, they trap more of the planet's re-radiated heat and cause global temperatures to rise. The escalating global temperatures over the past few decades is referred to as **"global warming."**[42] As has been defined above, any form of "changes in the earth's weather, including changes in temperature, wind patterns and rainfall" can be referred to as climate change. Whether the change in the weather is upward or downward, it is still climate change. Global

37 Ibid.
38 Oxford Dictionary 2022 See: https://www.oxfordlearnersdictionaries.com/definition/english/climate-change?q=climate+change Accessed on December 3, 2023.
39 United Nations Framework Convention on Climate Change (adopted on 9 May 1992) art 1(2).
40 Dana Desonie, *Climate: Causes and Effects of Climate Change* (Chelsea House Publishers 2008).
41 Ibid.
42 Dana Desonie, *Climate: Causes and Effects of Climate Change* (Chelsea House Publishers 2008).

warming, however, is solely the upward change in the weather on earth caused by the concentration of GHG on earth's surface. Global warming is a form, subset and consequence of climate change.

To effectively combat climate change, enormous financial commitments ought to be made. If no new fossil fuel projects are developed beyond those already under construction or approved for development (Low CCUS Case) because of the fight against climate change, up to $90 billion of existing coal and gas fired capacity could be stranded by 2030 and up to $400 billion by 2050 globally. When fossil fuels are left stranded, it will cost $15 trillion to find an alternative to fossil fuel, which will be exploiting renewable energy sources like wind and solar.

Considering the financial commitments involved in taking climate action, "environmental regulations should only be adopted where there is compelling scientific evidence that action is required to prevent environmental damage."[43] If the scientific evidence concerning the causes of climate change turns out to be unreliable, trillions of dollars may be lost for nothing. For this reason, the United Nations Environment Programme and the World Meteorological Organization (WMO), in 1988, established the Intergovernmental Panel on Climate Change (IPCC) to provide the scientific guidance necessary to take climate action. The IPCC, has undertaken and is still undertaking extensive studies to find the causes of climate change and how to combat it. The IPCC is scientifically certain about the human causes of climate change.[44]

In summary, human activities which inject CO2, methane and nitrous oxide[45] into the atmosphere are the primary cause of climate change. The global energy sector is the biggest contributor to Greenhouse Gas (GHG) emissions. The UNFCCC describes GHG emissions as the release of gaseous constituents, both natural and anthropogenic, into the atmosphere and these gases absorb and re-emit infrared radiation.[46] Currently, around 73% of global GHG emissions come from energy use, with most

43 Ibid 6.

44 Theophilus Acheampong, 'Leveraging clean energy to drive industrialisation in Sub-Saharan Africa: Imaginaries and Realities' in Ellen Davies and Claudia Serwaa Prempeh (eds), *From Rio to COP 26: A collection of essays on Africa's climate journey and the road ahead.* < https://www.researchgate.net/publication/361338650_Leveraging_clean_energy_to_drive_industrialisation_in_Sub-Saharan_Africa_Imaginaries_and_Realities > Accessed on December 5, 2024.

45 These are the main Greenhouse Gases (including fluorinated gases).

46 United Nations Framework Convention on Climate Change (adopted on 9 May 1992) article 1(4) and (5).

emissions generated from fossil fuels.[47] Carbon dioxide emissions from the combustion of fossil fuels, the production of cement, and agricultural and other land use (including deforestation) are widely considered to be the most significant contributors to the threat of climate change.[48] Scientific evidence suggests that continued increase in atmospheric concentrations of these greenhouse gases due to human activities will lead to an enhanced 'greenhouse effect' and global climatic change.[49]

The Effects of Climate Change

Why is the whole international community worried about climate change? Why not allow climate change to continue happening? The global community is worried because of the serious adverse effects of climate change. Due to climate change, many animals and plants will likely go extinct. The most vulnerable animals in this case are polar organisms because global warming is causing rapid melting of polar ice which serves as a habit for animals like polar bears. Eventually, animals in other climate zones will be at risk too. People depend on many of these vulnerable plants and animals for food and medicine.[50] Another reason why the international community is urgently concerned about climate change is that modern agriculture and human settlements depend on stable climate conditions. "A drastic change in climate, even on a smaller scale than those that have taken place earlier in Earth history, could destabilize human civilization."[51]

The adverse impact of global warming is already visible. Glaciers and polar ice caps are melting.[52] Winters are now shorter thanthey used to be and, as a result, some plants and animals are changing their seasonal behaviours. Coral reefs and forests are dying around the world. The weather is becoming warmer, causing floods and intense hurricanes. "According to climate model predictions, this is just the beginning."[53] Considering all these impacts, the global community indeed has reason to be very worried about climate change and its accompanying effects.

47 Theophilus Acheampong, 'Leveraging clean energy to drive industrialisation in Sub-Saharan Africa: Imaginaries and Realities' in Ellen Davies and Claudia Serwaa Prempeh (eds), *From Rio to COP 26: A collection of essays on Africa's climate journey and the road ahead.* < https://www.researchgate.net/publication/361338650_Leveraging_clean_energy_to_drive_industrialisation_in_Sub-Saharan_Africa_Imaginaries_and_Realities > Accessed on December 5, 2024.

48 Ibid.

49 Ibid.

50 Theophilus Acheampong, 'Leveraging clean energy to drive industrialisation in Sub-Saharan Africa: Imaginaries and Realities' in Ellen Davies and Claudia Serwaa Prempeh (eds), *From Rio to COP 26: A collection of essays on Africa's climate journey and the road ahead.* < https://www.researchgate.net/publication/361338650_Leveraging_clean_energy_to_drive_industrialisation_in_Sub-Saharan_Africa_Imaginaries_and_Realities > Accessed on December 5, 2024.

51 Ibid.

52 Ibid.

53 Ibid.

Despite contributing less than 3% of the energy-related carbon dioxide (CO_2) ever emitted worldwide in the history of human civilization, the African continent is one of the regions most adversely affected by the changing climate.[54] Africa is facing worsening drought, famine, flooding and heat waves. These effects are accompanied by the perennial problems of insecurity and civil unrest, and accelerating migration and displacements to flee these threats caused by climate change.

How to combat Climate Change

Both the 2015 Paris Agreement and the 1992 United Nations Framework Convention on Climate Change (UNFCCC) generally suggest that the way to combat climate change is to stabilize the greenhouse gas (GHG) concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[55] However, the Paris Agreement provides a very specific way through which the world should respond to climate change. Article 2 of the Paris Agreement provides that in order to deal with climate change, the states around the world should collaborate to maintain "the increase in the global average temperature to well below 2°C above pre-industrial levels". It proceeds to provide that, after bringing the global average temperature to well below 2°C above pre-industrial levels, the world should proceed to make further "efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".

Since the most significant contributor to the threat of climate change is "the combustion of fossil fuels",[56] then the production and usage of fossil fuels must be grossly reduced in order to deal with the issue of climate change. The combustion of petroleum emits CO2, a very significant cause of climate change, into the atmosphere.

Petroleum literally fuels the world.[57] So if the world really wants to do away with fossil fuels in order to combat climate change, then all the states around the world must collaborate to find a reliable alternative to petroleum. The world must transition from conventional energy sources like oil and gas to a new source of energy which is climate or environment friendly. This switch from hydrocarbons to a climate friendly source of

54 Theophilus Acheampong, 'Leveraging clean energy to drive industrialisation in Sub-Saharan Africa: Imaginaries and Realities' in Ellen Davies and Claudia Serwaa Prempeh (eds), *From Rio to COP 26: A collection of essays on Africa's climate journey and the road ahead.* < https://www.researchgate.net/publication/361338650_Leveraging_clean_energy_to_drive_industrialisation_in_Sub-Saharan_Africa_Imaginaries_and_Realities > Accessed on December 5, 2024.

55 Ibid.

56 Ibid.

57 Tim Boykett and others, 'Oil Contracts: How to read and understand them' (Times Up Press 2012).

energy is what, in this context, is termed as energy transition.

NET-ZERO EMISSION ENERGY TRANSITION: THE SHIFT FROM FOSSIL FUELS TO RENEWABLE ENERGY SOURCES

Understanding the fundamental meaning of the word "transition" is very important in understanding what energy transition is. The Oxford dictionary defines 'transition' as 'the process or a period of *changing* from one state or condition to another'.[58] Currently, there is no agreed definition of the term energy transition[59] but the International Renewable Energy Agency (IRENA), defines energy transition as a "pathway towards the transformation of the global energy sector from fossil-based to zero-carbon by the second half of this century."[60]

Net-Zero Emission Energy Transition

This is a form of "energy resource transition" because it is a transition from one form of "energy which are extracted from the environment" to another. This is a transition from carbon emitting forms of energy like fossil fuels to more environmentally friendly forms of energy resources like solar and wind. The term Net-Zero Emission does not imply reducing CO2 in the atmosphere to 0% or reducing the usage of fossil fuels to zero percentage. Net zero means a huge decline in the use of fossil fuels.[61] Fossil fuels serve as 80% of the world's total energy supply. Net Zero is achieved if the fossil fuel energy supply falls from the current 80% to 20%.[62] After this extreme reduction in the supply of fossil fuels, about 70% of the global energy supply should come "from wind, solar, bioenergy, geothermal and hydro energy." Fouquet establishes that the consumption of a particular energy resource by a society (be it a country or the globe) should reach its peak (80%+) before it can be said that the society in question has successfully transitioned to that energy resource.[63] Solar should become the largest source of energy, accounting for one-fifth of energy supplies by 2050.[64] In the context of

58 Oxford Dictionary. 2019. available at: https://en.oxforddictionaries.com/definition/transition.
59 IRENA and AfDB, *Renewable Energy Market Analysis: Africa and Its Regions* (International Renewable Energy Agency and African Development Bank 2022) <www.irena.org/publications> Accessed on 23 February, 2024.
60 IRENA and AfDB, *Renewable Energy Market Analysis: Africa and Its Regions* (International Renewable Energy Agency and African Development Bank 2022) <www.irena.org/publications> Accessed on 23 February, 2024.
61 International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (IEA 2021) " <https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf> accessed on January 16, 2024 18.
62 Ibid.
63 Roger Fouquet, (2016) 'Historical energy transitions: speed, prices and system transformation' (2016) 22 Energy Research & Social Science<http://eprints.lse.ac.uk/67618/> accessed 8 December 2022.
64 Ibid.

the 1992 UNFCCC and the 2015 Paris Agreement, energy transition is "a pathway toward transforming the global energy sector **to net-zero** by 2050 and beyond..."[65]

History of Energy Transitions in Britain and the United States of America (U.S.A)

Food is the oldest form of energy for humans.[66] Since the beginning of humanity, humans have survived on food for energy and also fed their animals (livestock and farm animals) with food. In the last two hundred years, humans have come to rely on ever-increasing quantities of energy to fuel their rising numbers and improve standards of living.[67]

Before and during the Middle Ages (between the 4th and 15th centuries), the main sources of energy around the world were firewood, charcoal, animals, and human muscle power.[68] The energy sources during that ancient period were basically two; wood and food (food for humans and their animals). Until the Industrial Revolution, wood, wind, and water (renewable energy) were the primary energy resources.[69]

> Home heating and cooking was done from a family hearth using mainly wood. If someone wanted to move about, they walked, rode horses, or drove carts pulled by draft animals. Wind and water mills were used to grind grains and operate simple machinery but were not yet harnessed to industry.[70]

The first energy transition in Britain started when Great Britain began mining coal during the Elizabethan era (1558 - 1603).[71] Since then, the supply and consumption of coal grew exponentially. Faced with rising prices of wood and charcoal, Britain turned to coal. By 1860, 93 % of the energy used in England and Wales came from coal.[72] The transition from wood and food to coal was a very slow process and much of it happened before the Industrial Revolution. "Coal's share of energy generation in

65 Ibid.
66 Richard W. Unger, 'Introduction' in Richard W. Unger (ed), *Energy Transitions in History: Global Cases of Continuity and Change* (Rachael Carson Center Perspectives 2013) < https://www.environmentand-society.org/sites/default/files/2013_i2_web.pdf> accessed 8 December 2022.
67 Ibid.
68 Ibid 11.
69 Samuel A. Van Vactor, 'Historical Perspective on Energy Transitions' (2018) USAEE Working Paper < https://www.econ.cam.ac.uk/seminar-papers/Sam-Van-Vactor.pdf> December 12, 2023.
70 Samuel A. Van Vactor, 'Historical Perspective on Energy Transitions' (2018) USAEE Working Paper < https://www.econ.cam.ac.uk/seminar-papers/Sam-Van-Vactor.pdf> Accessed on December 12, 2024.
71 Ibid.
72 Samuel A. Van Vactor, 'Historical Perspective on Energy Transitions' (2018) USAEE Working Paper < https://www.econ.cam.ac.uk/seminar-papers/Sam-Van-Vactor.pdf> December 12, 2024

England and Wales rose from 10 percent in 1560 to 35 percent in 1660 and reached 64 percent in 1760, a date that is often taken to be the start of the Industrial Revolution."[73] Coal was the driver of the Industrial Revolution in Britain since it constituted 64% of the energy it expended when the Industrial Revolution began in 1760.

However, wood and food were still the major sources of energy in the United States (U.S). Even a century after the commencement of the Industrial Revolution in Britain, Energy consumption in the United States was 70 percent wood in 1870[74] as opposed to 64% coal within the borders of Britain in 1760.[75] Reliance on coal as a major source of energy reached its peak (70% consumption) in the U.S in 1900. Wood was the fuel of choice for locomotives in the first few decades of American railroads. It was available in abundance and relatively easy to burn. The shift to coal was a consequence of increasing wood prices (reflecting the growing scarcity of wood near urban areas and major lines) and decreasing coal prices as the coal industry grew. This sums up the first energy transition in Britain and the United States from wood, wind and food to coal.

The second significant energy transition happened right after the commercial discovery of crude oil in Pennsylvania (U.S) in 1859.[76] Prior to the commercial discovery of crude oil in 1859, lamp oil was acquired from oil seepages in the 1840's and the kerosene distillation market also grew in the early 1850's in the U.S.[77] In 1886, Karl Benz received the first ever automobile patent and in that same year, oil consumption reached 1% of the total energy consumption in the U.S.[78] By 1910, there were several commercial oil discoveries in Texas and across North America, Persia, Sumatra, Mexico, etc.[79] As a result of the mass discovery of crude oil and the introduction of the internal combustion automobile, oil shares in total energy consumption had reached 5% by 1908.[80] Coal was still the prevailing source of energy then in the U.S even though the discovered oil fields were cumulatively producing about 500,000 barrel of crude oil per day.

In 1927, oil consumption in the U.S made up 22% of the total energy

73 Ibid.
74 Peter A. O'Connor, 'Energy Transitions' (The Pardee Papers No. 12 2010).
75 Ibid.
76 Peter A. O'Connor, 'Energy Transitions' (The Pardee Papers No. 12 2010).
77 Abraham Gesner, *The Discovery of Kerosene* (The Channel, Ingenium Canada 2024). <https://ingeniumcanada.org/channel/articles/the-discovery-of-kerosene> Accessed on December 20, 2024.
78 BA Wells and KL Wells, *First Oil Book of 1860* (American Oil & Gas Historical Society 2020). See: <https://aoghs.org/oil-almanac/first-oil-book-of-1860> January 21, 2024.
79 Ibid.
80 Ibid.

consumption and the oil fields were yielding around 2.5 million barrels per day. By 1950, oil production had exceeded coal. The U.S oil production in 1950 was 5.4 million barrels per day. There was a very high demand of oil because of the domination of the transportation market by internal combustion engine cars. In 1950, the automobiles in the U.S was 6.5 million units.[81] By 1960, oil had completely overtaken coal as the major source of energy in the U.S. As a matter of fact, oil constituted 70% of the total energy consumption in the U.S.

Very similar to the United States, the United Kingdom and most parts of Europe, fully transitioned from coal to oil after the 1950s. This is when oil and electricity and the internal combustion engines replaced the older coal-based technologies.[82] Apart from the dominance of oil fuel-based technology in the United Kingdom (such as internal combustion engine), another cause of the decline in coal production and consumption and the surge in oil consumption in the United Kingdom was the increase in the price of coal in Britain.[83]

Contrasting Historical and Modern Energy Transitions: Economic Drivers vs. Climate Imperatives

As has already been noted, the three main causes of climate change over a period of two hundred years has been: (i) A change in the demand for energy services, (ii) The invention of new technology and the advancement of existing ones and (iii) The price of energy resources. One difference between the historical energy transition that happened in the western part of the world decades and centuries ago, and the current one which countries, corporate entities and individuals are supposed to contribute is that the former occurred due to the natural laws of economics and the latter is supposed to occur due to immediate mandatory means.

For instance, in the 19th century, America was not forced by threatening factors like climate change to transition from coal to hydrocarbons. The energy transition from coal to carbon was mostly due to the invention of hydrocarbon powered automobiles. The Americans who abandoned coal and started consuming hydrocarbons did not do so as a matter of obligation. They rather transitioned to the consumption of hydrocarbons because of the invention of automobiles and the cheaper price of discovered hydrocarbons.

81 BA Wells and KL Wells, *First Oil Book of 1860* (American Oil & Gas Historical Society 2020) <https://aoghs.org/oil-almanac/first-oil-book-of-1860> January 21, 2024.
82 Ibid 34.
83 BA Wells and KL Wells, *First Oil Book of 1860* (American Oil & Gas Historical Society 2020) <https://aoghs.org/oil-almanac/first-oil-book-of-1860> January 21, 2024. 3.

The current energy transition is not totally driven by the natural laws of economics but is mainly due to the existential threat facing our planet. We are not required to do away with fossil fuel because there is not enough fossil fuel for our consumption. In fact, only the hydrocarbons reserve in Africa can fuel the entire planet for a considerable period before it gets depleted. On one hand, the world currently consumes around 90 million barrels of oil a day, a quarter of it in the United States.[84] And on the other hand, there are over 1.3 trillion barrels of proven oil reserves in the world. Over 5% - 7% (65 billion barrels) of the world's reserve is found in Africa.

Despite these proven oil reserves, new discoveries are made almost every day. This means that although the fossil fuel reserves on the whole planet will certainly get exhausted at some point, it will definitely take a very long time before this occurs. This is to buttress the point that the signatories to the Paris Agreement have not undertaken to transition from fossil fuels to renewable sources of energy by 2050[85] because by 2050 fossil fuel will be at the brink of exhaustion. Parties to the Paris Agreement are transitioning to renewable sources of energy because the continuous consumption of fossil fuel will certainly worsen climate change and will, by 2050, have devastating repercussions on our planet, some of which are already suffered by many around the world.[86]

Another difference between the historical energy transition that happened in the U.S and Europe decades and centuries ago, and the current one which the signatories to the Paris Agreement are supposed to undertake is the time frame within which the transition is to reach its peak. During the Middle Ages (from 500 AD to the 16th Century) the main energy sources were firewood, charcoal, animals, and human muscle power. By 1860, 93 percent of the energy expended in England and Wales came from coal. "The transition was slow…. Coal's share of energy generation in England and Wales rose from 10 percent in 1560 to 35 percent in 1660 and reached 64 percent in 1760 and 93% by 1869."[87] On the other hand, energy transition in the modern sense is expected to occur within a relatively shorter period of time. As has been noted in the introduction to this paper, the international discussion on climate change and energy transition started a long time ago but the states actually came together to codify it into an international obligation in 2015 (the Paris Agreement). The Paris Agreement expects a

84 Ibid.
85 Ibid.
86 Dana Desonie, *Climate: Causes and Effects of Climate Change* (Chelsea House Publishers 2008). p.xii.
87 Richard W. Unger, 'Introduction' in Richard W. Unger (ed), *Energy Transitions in History: Global Cases of Continuity and Change* (Rachael Carson Center Perspectives 2013) < https://www.environmentandsociety.org/sites/default/files/2013_i2_web.pdf> accessed on 8 December 2022.

full transition from GHG emitting energy resources to renewable energy resources by 2050. The Paris Agreement is requiring the signatories and the world at large to transition within thirty-five (35) years, a process which previously occurred over the course of centuries.

Fossil Fuel Reserves in Africa: Distribution, Production, and Emerging Trends

In order to give an informed insight on how Africa should go about the current energy transition, it is necessary to have a look into the quantity of recoverable fossil fuel on the African continent. It must be noted that the energy outlook of all the 54 African countries cannot be exhaustively evaluated within the confines of this paper.

Out of all the oil and gas produced in the whole world from 2010 to 2019, an average of 8% occurred in Africa. Also, "Africa is home to 13% of the world's natural gas and 7% of the oil resources".[88]

The table below shows the reserves of fossil fuels and their distribution in Africa.

Table 4.0 Fossil Fuel Reserves in Africa as at 2011

Energy Resource Type	Reserves	Regional Distribution
Crude Oil	132.1 billion Barrels	Northern Africa: 53.2% Western Africa: 28.2% Central Africa: 16.9% Other Africa: 1.7%
Natural Gas	14.7 trillion m^3	Northern Africa: 55.8% Western Africa: 36.1% Other Africa: 8.2%
Coal	31,696 billion tonnes	Southern Africa: 95.2% Eastern Africa:1.6% Other Africa: 3.2%

Source: United Nations Economic Commission for Africa (2011)

As at 2011, over 80% and 90% of the oil and natural gas reserves respectively, were found in Northern and Western Africa. In the Northern part of Africa, Libya accounts for over 70% of the oil reserves and in the

88 International Energy Agency, *Africa Energy Outlook 2022* (International Energy Agency 2022).

same region, Algeria accounts for about 55% of the natural gas reserves.[89] Nigeria accounts for almost all the oil and natural gas reserves in Western Africa. Additionally, three countries – Libya, Nigeria and Angola – account for about 80% of the proven oil reserves in the continent.[90] "This distribution of energy resources across the continent becomes more uneven considering South Africa accounts for about 95% of the coal reserves in the continent."[91] The proven crude oil reserves in Africa are increasing with the proven crude oil reserves on the whole African continent increasing from 58.7 billion barrels in 1990 to 132.1 billion barrels in 2010.[92] According to the United Nations Economic Commission for Africa, "the recent increases in crude oil prices now make it economical to explore 'marginal' deposits. Today, exploration is taking place in many regions in Africa while countries such as Ghana, Uganda and Chad have already started drilling activities."[93]

Despite the fact that oil and gas production on the African continent started to dwindle since 2020 due to factors including the Covid-19 pandemic 2020 and the Russian Ukraine war,[94] the proven oil and gas reserves in Africa has been increasing exponentially. For instance, although the oil production in Angola and Nigeria decreased from 1.8 million barrels per day and 2.5 million per day in the year 2010 to 1.2 million barrels per day and 1.7 million barrels per day in the year 2021 respectively[95], more oil reserves have been discovered in these regions.[96]

Africa's Renewable Energy Potential: An Untapped Opportunity for Sustainable Growth

The International Renewable Energy Agency, IRENA, has identified hydropower, solar, wind, geothermal and modern bioenergy as the main renewable energy resources which will drive modern energy transition.[97]

89 United Nations Economic Commission for Africa, 'Fossil Fuels in Africa in the context of a Carbon Concentrated Future'African Climate Policy Centre Working Paper 12, 3.
90 Ibid.
91 Ibid.
92 United Nations Economic Commission for Africa, 'Fossil Fuels in Africa in the context of a Carbon Concentrated Future'African Climate Policy Centre Working Paper 12, 3.
93 Ibid.
94 United Nations Economic Commission for Africa, 'Fossil Fuels in Africa in the context of a Carbon Concentrated Future'African Climate Policy Centre Working Paper 12, 3.
95 International Energy Agency, *World Energy Outlook 2022* (IEA 2022) 336.
96 Theophilus Acheampong and Thomas Kojo Stephens, 'Introduction' in Theophilus Acheampong and Thomas Kojo Stephens (eds), *Petroleum Resources Management in Africa: Lessons from Ten Years of Oil and Gas Production in Ghana* (Springer Nature Switzerland AG 2021).
97 IRENA and AfDB, *Renewable Energy Market Analysis: Africa and Its Regions* (International Renewable Energy Agency and African Development Bank 2022) <www.irena.org/publications> Accessed on 23 February, 2024.

Apart from the fact that the African continent is heavily endowed with several of the critical minerals that are essential inputs for renewable energy and low-carbon technologies like electric batteries and wind turbines, including copper, cobalt and lithium, Africa is also home to vast renewable energy resource potential as will be demonstrated below.

1. *Hydropower*

Due to the presence of large rivers such as the Nile River on the African continent, hydropower has been used in Africa for many decades. As of 2022, the total hydropower plants installed in Africa was close to 131 gigawatts.[98] The largest committed hydropower project in Africa in 2022 was Ethiopia's Renaissance hydropower project (at around 6 GW).[99] Among all the renewable energy resources available on the African continent, hydropower is the most widely used. It is almost exclusively used to generate electricity. In 2019, hydropower accounted for 17.4% of all the electricity on the African continent, while its counterpartssolar, wind, geothermal and bioenergy cumulatively accounted for only 3.7%.[100]

Despite the impressive performance of hydropower in Africa's energy mix, it has not been exploited even to its most minimum potential. In 2014, the Delft University of Technology estimated the continent's unexploited hydropower potential to be 1,753 GW.[101] This implies that not even 10% of the total hydropower potential on the African continent has been exploited. Another very impressive fact about hydropower on the African continent is that hydropower production is almost evenly distributed across the continent. To demonstrate this: Africa's largest hydropower producers are (1) Ethiopia (Eastern Africa), (2) Angola (Central Africa), (3) South Africa (Southern Africa), (4) Egypt (Northern Africa), (5) the Democratic Republic of the Congo (Central Africa), (6) Zambia (Southern Africa), (7) Mozambique (Eastern Africa), (8) Nigeria (Western Africa), (9) the Sudan (Central Africa), (10) Morocco (Northern Africa) and (11) Ghana (Western Africa). To buttress the fact that hydro power is ubiquitous in Africa. The International Renewable Energy Agency, IRENA, noted that 41 of the 53 African countries had installed hydropower generation capacity.[102]

Evidence shows that the distribution of hydropower potential is not evenly distributed across the continent. For instance, out of the 1,753 GW

98 International Renewable Energy Agency, *Hydropower Installed Capacity in Africa* (IRENA 2021) <https://www.irena.org> Accessed on December 10, 2023.
99 Ibid.
100 International Hydropower Association, *2021 Hydropower Status Report* (IHA, 2021) <https://www.hydropower.org/publications/2021-hydropower-status-report> March 30, 2024.
101 Ibid.
102 Ibid 38

hydropower potential in Africa only about 24 GW is found in the Economic Community of West African States (ECOWAS).[103] Regrettably, out of the 24 GW potential of hydropower found in West Africa, only 16% of such hydropower potential energy resource had been exploited as at 2021.[104]

2. *Solar*

"The theoretical reserves of Africa's solar energy are estimated at 60,000,000 TWh/year, which accounts for almost 40% of the global total, thus making Africa the most sun-rich continent in the world."[105] This means every one hour the solar energy emitted by the sun onto the surface of Africa as a continent is "60,000,000 TWh/year". The potential of solar energy is enormous all over Africa to the extent that the African Union describes it as "almost unlimited".[106] The enormousness of solar energy in Africa is due to a variety of factors which include the proximity of the continent of Africa to the equator and the frequent dry bright days.[107] Solar potential tends to be more concentrated in Northern and Southern Africa. In the case of North Africa, a solar farm spanning just 0.3% of North Africa could meet the whole European Union's electricity consumption. Because of its ideal location in the Sunbelt region, Northern Africa has an abundance of solar energy.

Africa possesses some of the world's most promising potential for solar power generation because it is home to 60% of the best solar resources globally, yet only 1% of installed solar PV capacity.[108] The African continent receives annual average solar irradiation of 2,119 kilowatt hours per square metre (kWh/m2) with most countries across North, West and Southern Africa receiving an average in excess of 2,100 kWh/m2 annually. IRENA estimates the continent's solar technical potential at 7,900 GW **(assuming a 1% land-utilisation factor).**

3. *Wind*

It is estimated by the International Renewable Energy Agency, IRENA,

103 Victoria R. Nalule, 'How to Respond to Energy Transitions in Africa: Introducing the Energy Progression Dialogue' in Victoria R. Nalule (ed), *Energy Transitions and the Future of the African Energy Sector: Law, Policy and Governance* (Springer Nature Switzerland AG 2020).
104 Ibid.
105 Liu Zhenya, *Global Energy Interconnection*. (Elsevier Science 2015) 30.
106 Atlas of Energy Resources of Africa, <https://au.int/sites/default/files/documents/36067-doc-ica_-africa_energy_atlas_stc.pdf> March 30, 2024
107 Sustainable Investment Team, Schroders, 'The solar revolution in Africa.' (Schroders 2017) <https://www.schroders.com/en/insights/economics/ the-solar-revolution- in-africa/> Accessed December 20, 2023.
108 Ibid. 17.

that the potential of energy from wind amounts to 461 GW[109] (assuming a 1%land-utilisation factor), with Algeria, Ethiopia, Namibia and Mauritania possessing the greatest potential. Wind power facilities, like the other renewable energy resources, are unequally distributed across the continent, being tied to the geography of wind resources and policy interest in developing them. Wind power contributes substantially to some countries' electricity mix. Annual average wind speeds in North Africa and Southern Africa are high, reaching 7 meters per second (m/s).

Despite this overwhelming wind power generation potential on the continent, wind resources remain highly underexploited in Africa, in particular in parts of North Africa and the Sahel area. At the end of 2020, wind generation capacity in Africa amounted to only 6.5 GW out of the 461 GW wind power generation potential on the African continent. "Countries with significant generation capacity are South Africa, Morocco and Egypt, as well as Kenya, Ethiopia and Tunisia, which together account for over 95% of Africa's total wind generation capacity."[110]

4. ***Geothermal and Bioenergy***

According to the U.S Office of Efficiency and Renewable Energy (EERE), "geothermal energy is heat energy from the earth—Geo (earth) + thermal (heat)."[111] Wells, which may range from a few feet to several miles deep, can be drilled into underground reservoirs to tap steam and very hot water that can be brought to the surface for use in a variety of applications, including electricity generation, direct use, and heating and cooling.

Almost all Africa's geothermal resources are found in the East Africa Rift System (an active continental rift zone in East Africa), where an estimated 15 GW of potential remains untapped. At the end of 2020, Kenya was the only country in Africa which was a significant generator of electricity from geothermal power, with a generation capacity of about 830 MW. Ethiopia, the only other African country currently producing geothermal energy, operates a 7.3 MW geothermal plant which is a pilot plant. Also, according to the International Energy Agency (IEA,'Africa Energy Outlook 2019' (IEA 2019)), at the end of 2019, 1 GW of new geothermal capacity was being planned in Djibouti, Uganda and the United Republic of Tanzania.

Although biomass is the most widely used energy source on the continent, most of it is consumed for cooking, using inefficient traditional practices.

109 Ibid. 43.
110 Ibid.
111 See:https://www.energy.gov/eere/geothermal/geothermal-basics#:~:text=Geothermal%20energy%20is%20heat%20energy,depths%20below%20the%20earth's%20surface. January 10, 2024.

Modern uses for electricity generation represented only 1% of all renewable electricity generation in 2019, although it is not clear how much of the fuel was sustainably sourced. There are also prospects for using advanced biofuels in the transport sector in several African countries. The U.S. Energy Information Administration estimates that West Africa alone might possess the potential to produce over 100 megatons per year of agriculture residues that could be converted into biofuels like ethanol and biobutanolinto electricity.

In summary, Africa is endowed with vast amounts of renewable energy ranging from hydropower to bioenergy. It must be noted that the amount of renewable energy potentials observed above are the renewable energy which can harnessed over a period of one year. For instance, when the Delft University of Technology estimated that the unexploited hydropower potential in Africa is 1,753 GW, it meant that the hydropower which can be generated from the water bodies which flow throughout the continent of Africa over a period of one year is 1,753 GW. Africa's hydropower potential is almost 2,000 GW while only less than 10% has been developed and producing actual hydropower. Africa's solar technical potential is estimated to be about 7,900 GW (assuming a 1% land-utilization factor) out of which only 10.4 GW (constituting less than 1% of the continent's solar potential) has been tapped.

Furthermore, the wind potential in Africa is estimated to amount to 461 GW[112] (assuming a 1%land-utilisation factor) out of which only 6.5 GW (constituting less than 2% of the continent's wind potential) has been exploited. An estimated 15 GW of potential geothermal resources in Africa (constituting almost 100% of the geothermal resources in Africa) remains untapped. Lastly, when it comes to bioenergy, it is estimated that West Africa alone might possess the potential to produce over 100 megatons per year of agriculture residues that could be converted into biofuels like ethanol and biobutanol, or into electricity.

SHOULD AFRICA ABANDON ENERGY TRANSITION COMPLETELY?

This paper, of course, does not propose that Africa as a continent should not contribute to energy transition. As a matter of fact, most African states have already put measures in place to respond to climate change and fulfil their obligations under the Paris Agreement. For instance, Kenya has heavily invested in generating power using wind and solar energy

112 IRENA and AfDB (2022), Renewable Energy Market Analysis: Africa and Its Regions, International Renewable Energy Agency and African Development Bank, Abu Dhabi and Abidjan. Available for download: www.irena.org/publications 43.

by constructing significant wind and solar projects. Lake Turkana Wind Power project in Kenya which generates 310MW is currently the largest wind farm in Africa.[113]

Also, the Nigerian Federal Government (FNG) has made commendable efforts in raising funds for energy transition projects. In the 2017 and 2019, the FNG secured green bonds worth N10.69 billion and N15 billion respectively to fund environmental projects.[114] Ghana has also been making significant efforts to contribute to combat climate change. In 2019, Ghana's Energy Commission launched the Drive Electric Initiative (DEI) to promote the use of electric vehicles as an alternative medium of transportation in Ghana. The DEI has another specific objective of making sure that by 2020, there will be at least 100 electric vehicles in Ghana and 10 public charging outlets in Ghana.

Like it was made clear in the introduction to this paper, Africa is very committed to fighting climate change with almost all the countries in Africa having signed and ratified the United Nation Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. Almost all African states have submitted their Nationally Determined Contribution to the Conference of the Parties (COP) which is the governing body of the Paris Agreement.

It is rather proposed that African countries should find a way to simultaneously contribute to energy transition and still make the best of their fossil fuel reserve.

HOW AFRICA SHOULD APPROACH ENERGY TRANSITION

Should Africa Adopt 'Energy Progression' Over Rapid Energy Transition? Several approaches on how to deal with the dilemma between energy security and energy transition faced by African policymakers have been proposed by academics and experts in the energy and climate change discipline. One very notable way to approach energy transition in Africa was proposed by Victoria R. Nalule in a chapter she authored in a book titled ***"Energy Transitions and the Future of the African Energy Sector: Law, Policy and Governance".*** Nalule introduces a term called "Energy Progression". The main difference between "Energy Transition" and "Energy Progression" is that with the former, there is an accepted

113 Victoria R. Nalule, Pauline Anaman and Theophilus Acheampong, 'Energy Transition and Africa's Oil and Gas Resources: Challenges and Opportunities' in Theophilus Acheampong and Thomas Kojo Stephens (ed), *Petroleum Resources Management in Africa: Lessons from Ten Years of Oil and Gas Production in Ghana* (Springer Nature Switzerland AG 2021) 542.
114 Ibid 546.

international pressure on states to act very rapidly to combat climate change. Some of these pressures come from groups of people such as climate change activists who are interested in witnessing a fast transition.

Pressure from climate activism groups grew to the extent that some climate protesters have been jailed in democracies such as the United Kingdom.[115] Again, governments, fossil fuel firms and airlines are increasingly being met with climate lawsuits.[116] The Intergovernmental Panel on Climate Change (IPCC) has described climate litigation as one of several important new methods through which climate policy is being shaped globally.[117] As at 2023, there were more than about 2,500 lawsuits recorded globally, according to databases run by Columbia University's Sabin Center for Climate Change Law.[118] Out of all these climate lawsuits, more than 50% of them "have direct judicial outcomes that can be understood as favorable to climate action".[119]

These activism and climate lawsuits mount significant pressure on governments and policymakers to hastily transition from conventional energy resources to renewable sources without considering the adverse effect this rapid transition will have on their citizens. The pressure to quickly transition to renewable energy is not only coming from climate activists but from multinational and international institutions such as the European Investment Bank (EIB) which approved a policy to ban funding for oil, gas and coal projects at the end of 2021. Since 2013, the EIB has funded 13.4bn euros of fossil fuel projects. This means the ban on the funding of fossil fuel projects will put a lot of pressure on government and leave them with no other choice but to transition to renewable energy in spite of the possible consequences of a rapid transition.

In the course of introducing the concept of "Energy Progression", Nalule makes the point that economies such as Europe underwent energy

115 A climate activist called **Stephen Gingell was** jailed for six months after pleading guilty to taking part in a protest on a London road. See: Damian Gayle, 'Just Stop Oil activist jailed for six months for taking part in slow march' *The Guardian* (London, 15 December 2023) <https://www.theguardian.com/environment/2023/dec/15/just-stop-oil-activist-is-first-to-be-jailed-under-new-uk-protest-law> accessed 7 March 2024.

116 See: Isabella Kaminski, 'The legal battles changing the course of climate change' *BBC* (8 December 2023) <https://www.bbc.com/future/article/20231208-the-legal-battles-changing-the-course-of-climate-change> accessed on 7 March 2024.

117 IPCC, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Core Writing Team, H. Lee and J. Romero (eds.), IPCC 2023) <doi: 10.59327/IPCC/AR6-9789291691647> April 22, 2024.

118 The Global Climate Change Litigation Database, See: <https://climatecasechart.com/non-us-climate-change-litigation/> Accessed on April 23, 2024.

119 Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot*(Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2023).

progression instead of energy transition in the nineteenth century. According to Nalule, the focus for European countries in the nineteenth century was to shift from wood and water power to coal, in the twentieth century the focus was to shift from coal to oil and in the twenty first century the focus is to shift from fossil fuels to renewable energy. One main reason Nalule is calling for the introduction of "energy progression" into the dialogue of climate change in Africa is that with the anticipated industrialization and urbanization, African countries will need massive energy, including fossil fuels, to tackle their energy needs.

With energy progression, extra attention must be given to the energy access challenges on the African continent, the role of fossil fuels in industrialization, the role of fossil fuels in urbanization, and the role of fossil fuels in meeting the domestic energy demand from the anticipated population growth. In this respect, while advocating for clean technology to utilize fossil fuels, it is advocated that more funding must be provided to support African countries develop and capitalize their fossil fuels and their renewable energy resources at the same time. This does not in any way mean that African countries should not embrace renewable energy; there are already efforts to deploy renewable energy and energy efficiency technologies on the African continent.

NAVIGATING ENERGY AND CLIMATE: POLICY FRAMEWORKS FOR SUSTAINABLE DEVELOPMENT IN AFRICA

(A) Regional Corporation should be fostered to ensure a proper distribution of renewable energy across the continent.

Africa is endowed with enormous renewable energy resources such as solar energy, wind, geothermal, hydropower and biomass. However, these energy resources are unevenly distributed across the continent. In ECOWAS, 90–95% of hydrocarbon potential is found in Nigeria. At the same time a number of ECOWAS Member States have not been able to achieve even up to a 30% efficiency level regarding access to affordable energy services despite their enormous energy resource potential.[120] This distribution of energy resources across the continent becomes even more uneven considering South Africa accounts for about 95% of the coal reserves on the continent.[121]

120 Victoria R. Nalule, 'How to Respond to Energy Transitions in Africa: Introducing the Energy Progression Dialogue' in Victoria R. Nalule (ed), *Energy Transitions and the Future of the African Energy Sector: Law, Policy and Governance* (Springer Nature Switzerland AG 2020).
121 Ibid.

African states have been able to collectively enact the Agreement establishing African Continental Free Trade Area (AfCFTA). AfCFTA has a general objective to, inter alia:

> create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of "An integrated, prosperous and peaceful Africa" enshrined in Agenda 2063".[122]

Article 3 of Protocol on Trade in Goods of the agreement establishing AfCFTA provides that "the provisions of this Protocol shall apply to trade in goods between the State Parties" and the Protocol on Trade in Service. AfCFTA seeks to create free movement of both goods and services with minimal interruption.

Renewable energy, such as solar and wind, can be classified differently depending on the context. On one hand, the physical components—like solar panels and wind turbines—are considered goods that can be bought, sold, and installed. These are manufactured products that facilitate renewable energy generation. On the other hand, the energy generated from these components functions as a service, continuously supplying electricity to power homes, businesses, and other facilities. Thus, renewable energy can be viewed as both a good (the equipment) and a service (the energy produced).

African states should thus make the most of AfCFTA to remove some of the restrictions that might hinder the generation and distribution of their unevenly distributed renewable energy.

(B) Carbon offsetting and carbon credit should be adopted to enable African countries exploit conventional energy for a considerable time.
Carbon credits are traded in carbon markets, where entities that reduce their emissions below a set cap can sell their excess allowances to others. Holders of carbon credits can also offset their carbon credits against the GHG gases they emit into the atmosphere. African countries can strategically utilize carbon credits to balance the need for economic development and the gradual transition from fossil fuels to renewable energy.

Reducing the usage of hydrocarbons is the most effective proven way

122 See: <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> April 22, 2024

of combating climate change.[123] But even if the world stops using fossil fuels, the already emitted GHGs will continue to cause climate change[124] and some activities cannot be made carbon-free.[125] Carbon credits, which are exchangeable certificates, are implemented to allow the owner the right to emit a certain amount of carbon dioxide, with one carbon credit representing a ton of carbon dioxide. Carbon credits are sold on carbon markets. Carbon stored in ecosystems can be quantified and can be sold as credits, which the buyer will then use to offset emissions.

Taiwan has exemplified the adoption of carbon credit mechanisms through its Greenhouse Gas Reduction and Management Act, which sets emission reduction targets and proposes a cap-and-trade system.[126] Similarly, Kenya has successfully implemented the Mikoko Pamoja mangrove conservation and restoration project. This project includes over a hundred nationally-owned mangroves. Credits from the project are managed by Plan Vivo through an agreement with the community itself and not the Kenyan Central Government. Each year, thousands of credits are sold and this has generated massive income for the community for school construction projects, purchase of books, and the installation of water pumps.[127]

African states should individually establish a robust legal and regulatory framework to govern carbon credits and their corresponding markets. Currently, the environmental policies and regulations of African states have a deficit in relation to carbon credits. African lawmakers and policy makers should as soon as possible develop comprehensive policies and legal frameworks that include carbon credits as a key component. They can implement laws similar to Taiwan's Greenhouse Gas Reduction and Management Act to set clear emission reduction targets and establish a cap-and-trade system.

African states are also urged to put in place an institutional framework which will create regulatory bodies to oversee carbon credit transactions

123 Philippe Sands, and others, *Principles of International Environmental Law* (3rd edn, Cambridge University Press2012).

124 IPCC, *Climate Change 2022: Mitigation of Climate Change Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Core Writing Team, P. R. Shukla and J. Skea (eds), IPCC 2022).

125 Teresa Hartmann and Douglas Broom, 'What are carbon credits and how can they help fight climate change?' (*World Economic Forum*, 12 November 2020) < https://www.weforum.org/agenda/2020/11/carbon-credits-what-how-fight-climate-change/?DAG=3&gclid=CjwKCAjw-7OlBhB8EiwAnoOEky5VOhRf-M1iATFzoXBX11HjV7cDYXojwJO7fVw1KerqVb0VtDYhKwBoCdSgQAvD_BwE> Accessed on January 20, 2024.

126 Fortunato Costantino, *Report on international voluntary and compulsory carbon markets with special emphasis to mechanisms applied in case of carbon farming and potential opportunities for Ukrainian developers*(United Nations Development Programme 2022) 51.

127 Lindsay Wylie, Ariana E. Sutton-Grier and Amber Moore, 'Keys to successful blue carbon projects: Lessons learned from global case studies' (2016) 65 Marine Policy 76.

and ensure transparency and accountability. This will also ensure the alignment of the carbon credit policies with international standards and frameworks like the Paris Agreement.

To incorporate carbon credits into their legal framework, African states need to establish comprehensive regimes that addresses challenges related to environmental, social, and governance (ESG) issues, as well as political control over carbon credits. To ensure accountability and transparency, African countries should strengthen their data collection systems. Additionally, to address political challenges associated with carbon project control and equitable distribution of benefits, African countries should empower local communities to create and manage carbon projects. This decentralized approach, similar to the Bazi Bay community model,[128] would allow communities to generate revenue from carbon credits and invest in local development projects, avoiding unnecessary bureaucracy and potential disadvantages associated with centralized control.
By strategically utilizing carbon credits, African countries can balance the use of fossil fuels with the gradual transition to renewable energy. This approach not only helps mitigate climate change but also supports sustainable development and improves the quality of life for local communities. Establishing a robust legal framework, creating and managing carbon projects, leveraging international support, and integrating carbon credits with development goals are essential steps in this process.

(C) **The promising potential of critical minerals should be seized by African states in the course their energy transition journey**
There is no settled definition of critical minerals, however, it is widely accepted that minerals are considered critical minerals if they are scarce and yet are very significant to the economy in which they are found or deposited. The supply of these minerals is geologically limited making it scarce with the potential of becoming very valuable. Some of the minerals considered critical are metals and semi-metals such as lithium, copper, cobalt and nickel that are essential in the manufacture of necessary tools needed for energy transition such as wind turbines, electric cars and solar panels.[129] Metals including copper, lithium, nickel, cobalt, manganese, and graphite are extremely essential to energy transition. They are particularly necessary for "sustaining battery longevity, performance, and energy density of all-electric vehicles (EV) motors, solar panels, and wind

128 Newton Kanhema, 'How Kenyan coastal villagers are cashing in on carbon credits' *Africa Renewal* (19 January 2023) < https://www.un.org/africarenewal/magazine/january-2023/how-kenyan-coastal-villagers-are-cashing-carbon-credits> Accessed on February 6, 2024.
129 Ibid.

turbines."[130]

To put things into perspective, 200kg of seven different metals are needed to manufacture a typical electronic vehicle. Comparatively, only 35-40kg of metals are required to make a conventional car (internal combustion engine). The metals needed for a conventional vehicle come from only two metals. This means more metals are required to manufacture the products and tools needed to achieve a full energy transition. For instance, to manufacture solar panels which have the potential of 1 gigawatt (GW) power capacity, you need around 18.5 tons of silver, 3,380 tons of polysilicon and 10,252 tons of aluminium.[131] This illustrates the fact that more critical minerals in the form of metals and semi-metals are required for energy transition. Hence, any state or entity requires critical minerals to sustain its industries, particularly those involved in manufacturing products essential for energy transition.

Ghana is one of the leading countries with a commercial scale of critical mineral reserves. Ghana has a bauxite reserve which is estimated at 900 million tons.[132] With the right infrastructure such as roads and railways going to and from the mining sites, Ghana can produce up to 10 million tons of bauxite a year. Some other African countries are also heavily endowed with critical minerals. South Africa is responsible for 75% of the world's total platinum production. Other African countries such as DR Congo, Rwanda and Uganda are known for cobalt and copper production.[133] DRC for instance, is endowed with 70% of the global cobalt reserves and produced 100,000 metric tonnes of global 140,000 metric tonnes in 2019.[134] Niger is responsible for about 44% of the uranium supply in Africa.[135]

Since Africa is heavily endowed with critical minerals and energy transition requires critical minerals to have a shot at succeeding, Africa as a continent can contribute to the green revolution. Electric vehicles and its batteries cannot be manufactured without critical minerals. In fact, electric vehicles represent a US$7 trillion market opportunity between 2020 and 2030 and

130 Theophilus Acheampong 'The Energy Transition and Critical Minerals in Ghana: Opportunities and Governance Challenges' (Ghana Extractive Industries Transparency Initiative 2022) 15.
131 Ibid.
132 Moses Mozart Dzawu, 'Ghana signs $1.2 billion deal to develop its bauxite resources' *Bloomberg* (16 September 2021) https://www.bloomberg.com/news/articles/2021-09-16/ghana-signs-1-2-billion-deal-to-develop-its-bauxite-resources accessed on 6 November 2024.
133 Moses Mozart Dzawu, 'Ghana signs $1.2 billion deal to develop its bauxite resources' *Bloomberg* (16 September 2021) https://www.bloomberg.com/news/articles/2021-09-16/ghana-signs-1-2-billion-deal-to-develop-its-bauxite-resources accessed on 6 November 2024.
134 Ibid.
135 Moses Mozart Dzawu, 'Ghana signs $1.2 billion deal to develop its bauxite resources' *Bloomberg* (16 September 2021) https://www.bloomberg.com/news/articles/2021-09-16/ghana-signs-1-2-billion-deal-to-develop-its-bauxite-resources accessed on 6 November 2024.

US$46 trillion between 2020 and 2050. Therefore, African countries should give serious consideration to how they can create economic value-addition and establish domestic jobs from this growth. Africa can capitalize on this emerging sector created by energy transition to retain significant value domestically. This will enable African countries to simultaneously generate significant income and also contribute to climate change at the same time. Revenue from these resources could be used to finance renewable energy projects which are essential for the energy transition.

(D)_African states should capitalize on natural gas in order to ensure energy security for the Africa population without contributing to the factors that cause climate change:

Africa is home to 13% of the world's total natural gas while 40% of all the gas discovered worldwide between 2010 and 2020 was in Africa.[136] More than 5000 BCM of natural gas resources has been discovered to date in Africa that has not yet been approved for development. Natural gas has been recognized as an environmentally preferable product (EPP) for energy transition.

Basically, 'environmentally preferable' products refer to products or services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose.[137] Natural gas is an EPP because compared to coal and oil, it remains the cleanest, less polluting and most hydrogen-rich of all hydrocarbon energy sources. Furthermore, the increased injection of natural gas in the primary energy mix contributed to over 40% reduction in CO2 intensity of oil equivalent energy use in the period between 1980 and 2014.[138]

The African continent holds around 488 trillion cubic feet (TCF) of proven gas reserves.[139] These reserves are distributed across the African continent.[140] Since Africa is facing severe energy insecurity, Africa has to utilize every energy resource at its disposal while promoting energy transition at the same time. Given that natural gas is the safest fossil fuel with minimal contributions to climate change, Africa should shift its focus

136 Ibid.

137 UNCTAD Secretariat, *Environmental Preferable Products (EPPs) as a Trade Opportunity for Developing Countries*(UNCTAD 1995).

138 Wael Hamid A. Moati, 'The Contribution of Natural Gas to the Sustainable Development Goals (SDGs): Arab Countries Case' (9th International Forum on Energy for Sustainable Development, Kyiv, 14 November 2018). <https://www.unece.org/energywelcome/areas-of-work/forum/annual-fora/2018/session-sof-the-9th-ifesd/14-nov/the-role-of-natural-gas-in achieving-sdgs.html.> Accesed on May 9, 2024.

139 BP Plc, *BP Statistical Review of World Energy 2018* (67th edn, 2018) 26.

140 Somik V. Lall, J. Vernon Henderson and Anthony J. Venables, *Africa's Cities: Opening Doors to the World* (World Bank 2017).

from conventional fuels like oil and invest more in natural gas exploitation.

One African country that has put in remarkable effort in relation to the development and exploitation of natural gas is Ghana. Ghana has recently announced exploration and production licensing rounds in relation to natural gas. It has made considerable progress in developing its domestic gas reserves from recent discoveries such as in the Sankofa and Gye Nyame fields, Offshore Cape Three Points (OCTP) area, and the Tweneboah-Enyennra-Ntomee (TEN), etc.[141]

CONCLUSION

In contemplating whether Africa should abandon energy transition entirely, this paper underscores a nuanced stance: Africa should not forsake its commitment to energy transition but rather pursue a balanced approach that integrates its abundant fossil fuel resources with sustainable energy initiatives. The efforts of various African nations, such as Kenya's investment in renewable energy infrastructure, Nigeria's issuance of green bonds, and Ghana's Drive Electric Initiative, demonstrate the continent's dedication to addressing climate change and fulfilling obligations under the Paris Agreement.

There is rather the need for a dual strategy. African countries face a unique dilemma between energy security and energy transition. While global pressures push for rapid shifts to renewable energy, Africa's developmental needs and energy demands necessitate a more measured approach. As proposed by Victoria R. Nalule, the concept of "Energy Progression" provides a more suitable framework for Africa, allowing for a gradual and integrated shift from fossil fuels to renewable energy, much like the historical energy progressions seen in Europe.

To achieve a balanced energy strategy, African states must adopt comprehensive policy and legal frameworks. The paper proposes the following:

1. Regional Cooperation: By leveraging agreements like the African Continental Free Trade Area (AfCFTA), African nations can facilitate the distribution of renewable energy resources across the continent. This cooperative approach can help mitigate the effects of the uneven distribution of energy resources and enhance energy access and efficiency.

141 The World Bank, *Ghana Sankofa Gas Project: Environmental and Social Impact Assessment* (World Bank 2015) http://documents.worldbank.org/curated/en/364231468185978766/Ghana-Sankofa-Gas-Project-Environmental-and-Social-Impact-Assessment Accessed March 4, 2024.

2. Carbon Offsetting: Implementing robust carbon credit systems can allow African countries to continue utilizing fossil fuels while mitigating their environmental impact. Establishing legal and regulatory frameworks for carbon credits, similar to those in Taiwan and Kenya, can ensure transparency and accountability, promoting sustainable development.

3. Exploiting Critical Minerals: Africa's rich deposits of critical minerals, essential for manufacturing renewable energy technologies, present a significant economic opportunity. By developing these resources domestically, African countries can generate substantial revenue and support their energy transition efforts. Investments in infrastructure and value-addition processes will be crucial in maximizing the benefits from these minerals.

4. Natural Gas Utilization: Natural gas, being the cleanest fossil fuel, offers a viable alternative to more polluting energy sources like coal and oil. With substantial natural gas reserves, African countries can ensure energy security while minimizing environmental harm. Strategic investments in natural gas infrastructure, as seen in Ghana, can enhance energy stability and support economic growth.

Africa's approach to energy transition must balance immediate developmental needs with long-term sustainability goals. This dual strategy recognizes the importance of both fossil fuels and renewable energy in addressing the continent's energy challenges. By fostering regional cooperation, implementing carbon offset mechanisms, capitalizing on critical minerals, and utilizing natural gas, African countries can sustainably secure their energy future.

This balanced approach not only aligns with global climate goals but also supports the continent's socioeconomic development. It ensures that Africa remains an active participant in the global fight against climate change while addressing the pressing energy needs of its growing population. As Africa progresses in its energy transition journey, it can serve as a model for other developing regions facing similar challenges, demonstrating that sustainable development and energy security can go hand in hand. Also, this approach will enable the continent to harness its vast energy potential for the benefit of its population. It is crucial that African countries seize this opportunity to play a significant role in the global effort to combat climate change while securing their position in the emerging green economy.

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