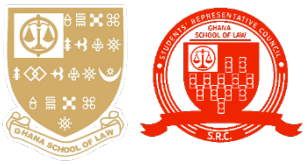
Published 2023



GHANA SCHOOL OF LAW
STUDENT JOURNAL

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

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Publisher
The Students' Representative Council
Ghana School of Law
Accra

http://www.gsljournal.org/

ISSN: 2961-032X
This journal should be cited as (2023) 8 GSLSJ

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

Frederick Agaaya Adongo*

ABSTRACT

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

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[1] Criminal Appeal No. J3/04/2022 dated 31st May, 2023 (Unreported).

1.0 INTRODUCTION

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

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

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

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

2.0 FACTS OF THE CASE

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

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

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

3.0 DECISION OF THE SUPREME COURT

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

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

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

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

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

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

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

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

4.0 THE PRINCIPLE OF LEGALITY

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

This time-honoured principle, encapsulated in the Latin maxim, *nullum crimen sine praevia lege*, finds expression in article 19(5) of the 1992 Constitution: 'A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.' This means that a person may be charged with or held to be guilty of a criminal offence only if at the time the act or omission allegedly constituting the offence took place there was a written law that prohibited the said act or omission.

Not only does the principle of legality concern itself with ensuring the presence of a duly enacted law prohibiting or requiring a certain conduct, it requires that at the time of conviction, the law creating the crime under which a person is being prosecuted must still be in force for any conviction to be lawful. This latter leg of the principle of legality, expressed in Latin as *nulla poena sine praevia lege*, is given constitutional blessing in article 19(11) of the 1992 Constitution: 'No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.' This constitutional provision, the

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

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

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

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

5.0 EARLIER PRECEDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] British Airways (n 6) 73.

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

Hear also the conclusion of Acquah JSC:

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

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

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

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

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

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

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

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

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

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

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

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

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

6.1 Disregard of Precedent

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.0 CONCLUSION

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