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DEDICATION

To Joseph Antah, ESQ
Law Librarian, University of Ghana School of Law

ACKNOWLEDGEMENT

This publication would not have been possible without the professional guidance, review and encouragement of the lecturers, practicing seniors and other peer reviewers who supported and helped greatly in editing and proofreading the manuscripts as well as typesetting this book.

Special Thanks goes to our Dean, Professor Raymond Atuguba of UGSoL, the patrons and members of the Library and Editorial Committee of the Law Students' Union.

We also acknowledge our lecturers who helped in proof-reading the final document, the executives of the LSU for their support, all the contributors to this journal for their immense labour and to all others who played a role in making this publication a success.

EDITORIAL BOARD

EDITOR'S NOTE

The fourteenth installment of University of Ghana Student Law Journal (UGSLJ) is here. The past thirteen installments thrilled readers with thorough legal analysis on selected issues by the respective authors and this fourteenth volume promises to build on the standard set by its forbearers.

At University of Ghana School of Law, students are entreated to take up research and writing as a core aspect of their legal training and the past thirteen years is evidence of that training. In their own humble ways, the authors, over the years, have sought to, by the power of the pen, change the world around them, with their ardent belief that the pen is mightier than the sword.

We have done this through the rigorous analysis of the issues on which we elect to opine while demonstrating our writing prowess. This fourteenth chapter of the UGSLJ takes up the mantle of analyzing leading issues in Ghana and how the law has impacted on these matters as of the 2022/2023 academic year.

When the invitation went out calling for articles, the committee was privileged to get a positive feedback from students. However, seven of the best were selected. These met the committee's requirements of thorough research and orderly presentation. The issues discussed by these authors are leading issues in the legal space, some of them focusing on very recent decisions of the superior courts, while some picked on legal principles and critiqued them, offering their two cents on these principles, while yet, others sort to change existing laws which, in their opinion, had become anachronistic.

Firstly, Richard Kwasi Anim came through with an analysis on HAULING THE TAX NET. Should churches in Ghana pay tax or not? To answer, this the author distinguished between incomes accrued to the church from its ordinary cause of being and business related church income and concludes that the latter should be taxed while the former should not. He also suggests that churches which conduct business or related activities should keep separate books of accounts for the purposes of determining their tax liability.

Secondly, Dominic Ofori analyzed the recent decision in JUSTICE ABDULAI v. ATTORNEY GENERAL. "…the doctrine of parliamentary sovereignty is not unknown to Ghanaian constitutional experience…the Supreme Court, under the 1957 and 1960 constitutions could not question the laws made by parliament even when they were arbitrary laws..." The author herein takes issue with this definite pronouncement made by the apex court in the case under review and

concludes differently on the quote. That notwithstanding, the author agrees with the court on the court's ultimate decision in the Abdulai case.

Oswald Azumah then followed with an analysis of MELFA v. THE REPUBLIC. The writer analyzes the regimes of extreme provocation and justifiable use of force. He draws from case law from Ghana and abroad, as well as jurisprudential arguments from writers on the topic before him. Oswald concludes after his analyses of the two defenses that the Court of Appeal erred in dismissing Melfa's Appeal.

Next in line is Kabu Nartey. He comes through with a piece on THE INTERPRETATIONS OF THE CONSTITUTION. In what he nicknames his valedictory piece at UGSoL, the author reviews the popular Modern Purposive Approach to interpretation (MOPA), and takes a rather bold step that after all, this so called modern approach is not beyond reproach.

The next article is THE TRAJECTORY OF EQUITABLE DISTRIBUTION OF MATRIMONIAL PROPERTY IN GHANA by Cindy Ohui Duordoe. The article traces the evolution of matrimonial property from the case of QUARTEY v. MARTEY to the 2022 decision of ADJEI v. ADJEI. The piece evaluates some of the principles used by the court to arrive at its decision.

Dominic Ofori and Akua Brifo then follow with an analysis of the RULE IN RYLANDS v. FLETCHER and its application to the JUNE 3 disaster where a heavy downpour at the Kwame Nkrumah Circle in Accra coupled with fuel leakage at a GOIL filling station caused a massive explosion leading to the destruction of lives and property. The authors of this piece embark on a journey to find out GOIL's liability in torts, particularly under the Rylands v. Fletcher rule. They also seek to find out if the affected persons can bring an action eight years after the disaster.

Lastly, Oswald Azumah and Comfort Antwi attack two provisions in the Criminal Offenses Act, 1960 (Act 29). The two authors take on SECTIONS 207 AND 208, ARGUING THAT THEY ARE AN AFFRONT TO FREE SPEECH, especially in the manner in which the provisions have been deployed recently. Among other points, the writers argue the overbreadth of the provisions and charge lawmakers to repeal the provisions to promote free speech.

Before I conclude, I want to say a big thank you to Mr. Joseph Antah, the University of Ghana School of Law Librarian. Mr. Antah has been the unsung hero of students over the years. I want to especially laud his efforts in supporting the Law Students' Union and more specifically, the Library and Editorial

Committee. May God bless you for all your efforts, sir. In recognition of all his efforts and dedication to issues concerning students, we dedicate this fourteenth volume of the Student Law Journal to him.

We fervently believe that these ideas expressed in written form, will live through the ages and contribute to the body of knowledge and encourage those who come after us to carry on the mantle of the UGSLJ.

Oswald Kevin Azumah

Editor-In-Chief

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HAULING THE TAX NET: CHURCH-BUSINESS AND TAXATION IN GHANA, AN EXAMINATION OF SECTION 97 OF THE INCOME TAX ACT, 2015 (ACT 896) AS AMENDED BY INCOME TAX (AMENDMENT) (NO.2) ACT, 2016 (ACT 924)

RICHARD KWASI ANIM[*]

PART I: INTRODUCTION

The development of every State is directly proportional to the amount of revenue it is able to generate from its natural, human and capital resources. Whereas the geopolitical location and geophysical characteristics of each State, to a large extent determines the amount of revenue a State generates from natural resources, the commensurate revenue from the human resources of a nation, is a direct result of its tax laws and the incidence of tax. To this end, tax reforms are carried out frequently to widen the scope of tax, clarify ambiguities as to who may or may not pay tax, and to ensure adequate mobilization of revenue for government expenditure.

The purpose of this essay is therefore, an exercise to examine existing Ghanaian tax law on the imposition of tax on charitable organizations, with special emphasis on the church's business-related activities. This will be done in three parts, the first being this introduction. The second is an examination of statutory provisions and case law as to whether charitable organizations, with specific emphasis on religious institutions of a public nature, can be charged to tax, and finally conclusion and recommendations based on the analysis.

Tax is variously defined as "a compulsory levy imposed by an organ of government, for public purposes. The legal essence of this definition lies in the compulsion. Law requires that the payment is made. The political essence lies in the public purpose for which the payment is made." [2] A tax is also defined as "a compulsory financial charge or some other type of levy imposed on a taxpayer

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[2] G Morse and D William, "Davies Principles of Tax Law" (4th Edn) (Sweet & Maxwell) 2003: 3

(an individual or legal entity) by a governmental organization in order to fund government spending and various public expenditure." [3]

Tax, generally is the creation of legislation. It is for this reason that tax practitioners and academics alike have noted forcefully that "a tax liability will arise in a state only if there is a taxable person (tax subject) as well as a taxable event (tax object), and the rules for determining those factors are established by the domestic law." [4] Therefore, neither citizens nor foreigners can be taxed except the Constitution allows for such imposition in principle and in practice.

This principle was given clarity in the English case of **Russel v Scott.**[5] In that case, the respondent, a farmer, who let out part of his land for use as a sand-pit between 1941 and 1944, and received regular accounts was assessed to tax under the Income Tax Act, r. 3, which provided that "In the case of ironworks, gasworks, salt springs or works, aluminium mine…and other concerns of the like nature having profits from or arising out of any lands, shall be understood to be profits of the preceding year". He was assessed for the year 1940/41 and he challenged the collection of sand on his land as a concern of the like nature. The issues before the court for resolve were; whether what the respondent did in respect of the sand-pit was the carrying on of a concern, and if so, whether it was a concern of a like nature?

Lord Simmonds, at the Court of Appeal held that, *"the subject is not taxed unless the words of the taxing statute unambiguously impose the tax on him."* [6] In his concurrent statement, Viscount Simon, in his opinion stated; *"I feel that the taxpayer is entitled to demand that his liability to a higher charge be made out with reasonable clearness before he is adversely affected. In the present instance this reasonable clearness is wanting."* [7]

The authority charged with the sole responsibility for imposing, varying or waiving tax obligations under the Constitution 1992 of Ghana, is Parliament. [8] Article 174 of the 1992 Constitution states;

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[3] Charles E. McLure, Jr. "Taxation" www.britannica.com/topic/taxation. Retrieved 28th February 2022

[4] The Need for a Substantial Presence Test in Ghana" Abdallah Ali-Nakyea and William Kofi Owusu Demitia. Tax Notes International Volume 81, Number 2 January 11, 2016

[5] Russel v Scott [1948] AC 422

[6] *Ibid* at 433

[7] *ibid*

[8] Article 174(1) of the Constitution, 1992.

1) No taxation shall be imposed otherwise than by or under the authority of an Act of Parliament.
2) Where an Act, enacted in accordance with clause (1) of this article, confers power on any person or authority to waive or vary a tax imposed by that Act, the exercise of the power of waiver or variation, in favour of any person or authority, shall be subject to the prior approval of Parliament by resolution.

It is therefore illegal for any authority, organ or any other institution, other than Parliament, to purport to impose a tax burden on any person within the territorial confines of Ghana. [9]

The verity of this constitutional provision was tested at the High Court in the case of **Development Data & 2 Others v National Petroleum Authority & Another.** [10] In this case, the National Petroleum Authority (NPA), published in the gazette on 5th June 2009, ex-refinery prices of petroleum products. Plaintiffs contended that the ex-refinery prices contained an extraneous component called "ex-refinery differentials" contrary to the petroleum pricing formula as contemplated by the National Petroleum Authority Act, 2005 (Act 691). They therefore sought an order that the ex-refinery differential component of the ex-refinery prices was unlawful. First defendant countered that the object of the Authority is to regulate, oversee and monitor activities in the petroleum industry…and further, that the "ex-refinery differential" is a legitimate component of the pricing build-up and though not listed in the petroleum pricing formula, since it has been approved by the National Petroleum Authority Board, it does not require Executive and or Parliamentary approval to validate the ex-refinery prices of which the "ex-refinery differential" is a component.

Justice Patrick Baayeh J, stated in his judgment affirming the argument of plaintiffs as follows;

> *"I agree with counsel for the plaintiff that 'the characteristics of the ex-refinery differential imposed by the National Petroleum Authority fits the characteristics of tax. In theory and in practice, the ex-refinery differential is tax', and say that it is an excise tax.* [11]

[9] Development Data and Two others v National Petroleum Authority & Another [Suit no. BC 553/2009 (unreported)]
[10] Suit No. BC 553/2009 (Unreported)
[11] Suit No. BC 553/2009 (Unreported)

To situate the appropriate authority for the imposition of taxes, he further observed;

> *"As I have stated earlier by Article 174, of the Constitution 1992." No taxation shall be imposed other than by or under an Act of Parliament". 1st defendant has thus by the imposition of the ex-refinery differential imposed an illegal excise tax on consumers of petroleum products."* [12]

Part II: Examining Section 97 of Act 896 as amended by (Amendment) (No. 2) Act 924

The fiscal regime in Ghana imposes tax on all persons with chargeable income [13] and persons who receive final withholding payments within a year. [14] Chargeable income is defined as "the total of the assessable income of that person for the year from each employment, business or investment less the total amount of deduction allowed that person under this Act." [15] These tax impositions are however subject to certain exemptions. [16][17]

The difficulty however is, whether the church can be described as a person properly so called, for tax purposes under Act 896.

For the avoidance of doubt, the church is defined in the Black's Law Dictionary, as a "religious society founded and established by Jesus Christ, to receive, preserve, and propagates his doctrines and ordinances." [18] It is also defined as a body or community of Christians, united under one form of government by the profession of the same faith, and the observance of the same ritual and ceremonies. [19] The term may also denote either a society of persons who, professing Christianity, hold certain doctrines or observances which differentiate

[12] *ibid*
[13] Section 1(1)(a). Income Tax Act, 2015 (Act 896)
[14] Section 1(1)(b). (Act 896)
[15] Section 2(1). Act 896
[16] Section 7, Income Tax Act, 2015 (Act 896)
[17] Section 97(4). Income Tax Act, 2015 (Act 896). The income accruing to or derived by a charitable organization is exempt from tax.
[18] Black H.C.; Black's Law Dictionary, (2nd Ed) West Publishing Company, Washington D.C. pp 418
[19] *ibid*

them from other like groups, and who use a common discipline, or the building in which such persons habitually assemble for public worship. [20]

The Constitution, 1992 has established fundamental human rights for the enjoyment of both legal and natural persons. [21]

In **New Patriotic Party v Attorney General (CIBA Case)** [22]**,** the Supreme Court by a four to one majority decision held,

> *Since rights and freedoms can be enjoyed by both natural as well as legal persons under the Constitution the duty to defend same through the enforcement procedure under article 2(1) of the Constitution, 1992 should be assured to all classes of persons, natural or legal. That legal persons are within the contemplation of the Constitution, 1992 in certain applicable cases, is evident in article 12 which requires that certain specified persons including "natural and legal persons in Ghana" should respect and uphold the fundamental human rights and freedoms enshrined in chapter 5 of the Constitution, 1992.* [23]

The effect of this holding is that, the Supreme Court has effectively stretched the definition of "a person" as contemplated under Article 2(1) of the 1992 Constitution, to cover corporate bodies registered under Ghanaian law. [24]

In the case of **Quayson And Others v The Church of Christ (SM)**, [25] when the respondent church was challenged as lacking capacity to maintain an action in law, the Court of Appeal, Kumasi per Essilfie-Bondzie JA, held as follows;

It is my humble view that the combined effect of exhibits A, F and H as well as exhibit D is to recognise the plaintiff church and its authority to practice its religion in Ghana. Exhibits A, P, H as well as exhibit D further constitute a recognition of the plaintiff church as a religious body registered and incorporated under the laws of Ghana and can ***sue and be sued in its name****. In the circumstances I hold that the plaintiff church is clothed with capacity to institute the action against the defendants.* [26] (Emphasis mine)

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[20] *Supra note 18*
[21] Chapter 5, Article 12. Constitution, 1992
[22] [1996-97] SCGLR 729; [1997-1998] 1 GLR 378
[23] New Patriotic Party v Attorney General (CIBA case) [1997-1998] 1 GLR 378
[24] Companies Act, 2019 (Act 992)
[25] Quayson And Others v The Church of Christ (SM), [1997-98] 2 GLR 671
[26] [1997-98] 2 GLR 671 at 679

It is therefore clear from the preceding holdings of the venerable judge sitting in the Court of Appeal in Kumasi that the Church once registered and legally operating within the territorial confines of the Nation Ghana, same is clothed with legal capacity and thus can sue and be sued in its own right.

It is further provided under the Constitution 1992, that the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations…" [27] Corollary to this, the church, which is recognized under Ghanaian law as a 'person' capable of bringing and sustaining an action in its own rights, enjoys all the rights appertaining to such class of persons and consequently liable to the performance of duties and obligations under the Constitution, 1992.

However, section 97(4) of the Income Tax Act, 2015 has exempt from tax the income of charitable organizations. Subsection (2)(a), lists a number of bodies which fall under the category of charitable organizations including religious institutions. [28]

The question remaining unanswered is whether or not, this provision serves as a statutory bar against imposing taxes on religious organizations *stricto sensu*? It is the considered opinion of the present writer that this is not a statutory bar simplicita. Sub-section 5, of section 97, makes the exemptions allowed under subsection 4, inapplicable where the charitable organization engages in business. Similarly, where the charitable organization engages in party political activities, support a political party or uses its platform to engage in party politics, [29] the exemptions will be waived, [30] if satisfied by the Commissioner-General. [31]

A further question is posed whether or not the activities of a church with a business character could be charged to tax?

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[27] Article 41 of the Constitution 1992.

[28] Section 97 of Income Tax Act, 2015 (Act 896)
(2) The Commissioner-General shall, before approving an entity under subsection (1), ensure tha
(a) the entity is established to operate as
(i) charitable institution which is of a public nature;
(ii) a religious institution which is of a public nature;
(iii) a body of persons formed for the purpose of promoting social activities or sporting activities;

[29] Section 97(2) (b). Income Tax Act, 2015 (Act 896)

[30] Section 97(1). Income Tax Act, 2015 (Act 896)

[31] Section 133. Act 896. "Commissioner-General" means the Commissioner-General appointed under section 13 of the Ghana Revenue Authority Act, 2009 (Act 791)

Whereas some religious organizations have expressly registered or hold substantial shareholding in companies which are chargeable to tax, there are some that engage in activities with a business character, or trade-like but same are not chargeable to tax.

For example, the Catholic Church has a major shareholding in Quality Assurance, a limited liability company whose income is chargeable to tax. Similarly, Methodist Bookshop is a limited liability company belonging to the Methodist Church. Again, Kingdom Books and Stationeries, is another limited liability company run by the Jehovah Witness. Ice TV and OB TV otherwise known as Obinim TV are limited liability companies although legally having a separate personality, the fact cannot be glossed over that these are companies established by Bishop Daniel Obinim, with substantial resources from the proceeds from his religious organization, the "International God's Way Church."

Undoubtedly, there is no strain among revenue officials and tax practitioners alike, over whether or not profits from such established companies, owned and or having a substantial share held by religious institutions should be charged to tax or not.

The difficulty is, where a religious organization engages in, for example, the selling of anointed water, anointed oils among others in the ordinary course of their being, should these activities be charged to tax on the profits accruing from the sales?

Tax law in Ghana is principally regulated by the Income Tax Act, 2015 (Act 896), which though defines business under the interpretation section [32] to include trade, profession or vocation, does not define trade neither does the numerous amendments or the regulating instrument LI 2244. This lacuna in the statute leads us to resort to the common law for a definition of what trade is. In **Griffiths (Inspector of Taxes) v J P Harrison (Watford) Ltd.**[33] Lord Denning in his dissenting opinion, said the following about trade:

> "*Try as you will, the word trade is one of the common English words which does not lend themselves readily to a definition but which all of us think we understand well enough. We can recognize a trade when we see it, and also an adventure in the nature*

[32] Section 133 of the Income Tax Act, 2015 (Act 896)
[33] Griffiths (Inspector of Taxes) v J P Harrison (Watford) Ltd [1962] 1 All ER 909

of trade. But we are hard pressed to define it…short of a definition , the only thing to do is to look at the usual characteristics of a trade and see how this transaction measures up to them."

In **Kowloon Stock Exchange v Commissioner of Inland Revenue,** [34] Lord Brightman noted that;

> *"The word trade is no doubt capable of bearing a variety of meanings according to the context in which it is used. In its most restricted sense, it means the buying and selling of goods, in a slightly wider sense, it includes the buying and selling of land. There is no reason to exclude in an appropriate context, the buying and selling of choses in action. It is commonly used…to denote operations of a character by which the trader provides to the customer for reward some kind of goods or services."*

In **Ramson (Inspector of Taxes) v. Higgs** [35] Lord Wilberforce attempts this in the following words:

> *"Trade involves, normally, the exchange of goods or services for reward, not all services, since some qualify as a profession or employment or vocation, but there must be something, which the trade offers to provide by way of business. Trade moreover, presupposes a customer (to this too, there may be exceptions, but such is the norm) or as it may be expressed, trade must be bilateral- you must trade with someone."*

Indeed, Lord Wilberforce's view elicits the difficulty in identifying an all-embracing criterion for determining what trade is, hence the need to examine each case on its merits. Obviously, even at common law the judges cannot seem to give an exact definition of what trade is. Professor J.E.A. Mills, put this forcefully as follows; "under English law the question of what the statute means by "trade" is a question of law. However, the question whether a trade has been carried on or not is one of the fact to be decided by the General or Special Commissioners. [36]

34 Kowloon Stock Exchange v Commissioner of Inland Revenue [1984] STC 602
35 Ramson (inspector of Taxes) v Higgs [1974] 3 All ER 949
36 Mills J.E.A. "The Taxation, of Gains or Profits from Isolated Commercial Transactions" [1978] Vol. X No. 1 Rgl 52—59

Failing an exact definition of trade, a better approach to ascertaining whether a transaction is a trade or not, is to resort to identifying its peculiar characteristics. Hence in **Erichsen v. Last,** [37] Jessel M.R. at p. 416 of the report noted;

> *"There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of a trade, but I know of no one distinguishing incident, for it is a compound fact made up of a variety of things."*

To resolve this controversy in defining a trade, the Radcliff Royal Commissioners for the Taxing of profits and income, reviewed case law and identified six badges of trade in their 1955 report, [38] namely; i. nature of the subject matter, ii. Period of ownership, iii. Frequency of transactions, iv. Supplementary works, v. circumstances of realization, and vi. Motive. These six badges of trade have become indicia for determining whether an activity carried on by the taxpayer is one of trade for which proceeds should be charged to tax or otherwise. Thus, to be able to subject these sales in the church to tax, it is important to situate it within the purview of trade under the badges of trade.

For the purpose of this essay, I shall expound on two badges of trade namely, the nature of the subject matter, and supplementary works seriatim, to determine whether or not the sales in the churches can appropriately be conceived as trade properly so called for the purposes of taxation of the income accruing from same.

Under the nature of the subject matter, the case of **Wisdom v Chamberlain,** [39] is authoritative. In this case, the taxpayer, in anticipation of the devaluation of the pound sterling, bought two large quantities of silver bullion as a hedge against the devaluation. When he later resold the bullions at a profit, he was assessed to tax on the profits from the realisation, to which it was contended on behalf of the taxpayer on appeal to be a speculation to protect the assets of the taxpayer. The issue turned upon in court for resolve was whether the taxpayer had carried out trade or an adventure in the nature of trade? The court presided over by

[37] Erichsen v. Last (1881) 8 Q.B.D. 414
[38] Association of Chartered Certified Accountants Global. https://www.accaglobal.com/my/en/technical-activities/technical-resources-search/2011/august/badges-of-trade.html Retrieved on 12/04/2022, 9:13 PM
[39] Wisdom v Chamberlain [1969] 1 W.L.R. 275

Harman and Salmon L.JJ. and Cairns J. unanimously held that the transaction was in the nature of trade. Lord Justice Harman, noted at p.282 of the report;

> *"…supposing it was a hedge against the devaluation, it was nevertheless a transaction entered into on a short-term basis for the purpose of making a profit out of the purchase and sale of a commodity, and if that is not an adventure in the nature of trade, I do not really know what is."*

Again, in **Rutledge v Commissioner of Inland Revenue**, [40] aappellant, a money-lender, with interests in the film industry while on a trip to Berlin, Germany, purchased from a bankrupt German firm a large consignment of toilet paper. He sold them upon his return to London in one tranche and was assessed to tax on the profit derived from the sale. He contended that the profit was from capital accretion and that it was made from an isolated transaction which was not within the ambit of the appellant's trade. The issue is whether the adventure was in the nature of trade?

The court held dismissing the appeal that the profits were liable to tax since in buying the toilet rolls, the appellant entered into a commercial adventure or speculation which was carried on the same way as trade and that the purchase and resale of the toilet rolls was in the nature of trade. Lord Clyde noted,

> *"It is no doubt true that the question whether a particular adventure is in the nature of trade or not must depend on its character and circumstances, but if – as in the present case – the purchase is made for no purpose except that of resale at a profit, there seem little difficulty at arriving at the conclusion that the deal was 'in the nature of trade' though it may be wholly insufficient to constitute by itself trade."*

The taxpayer thus made himself liable because he purchased the vast amounts of toilet paper for no other reason than to sell and make a profit.

Similarly, in the case of **Johnston (Inspector of Taxes) v Heath**, [41] the taxpayer, an accountant, was offered a land. Having no means of financing the purchase or a loan to allow retention, and having no intention of developing the land himself, contracted to resell the land before he entered into a contract to purchase it. It was held that, the transaction was an adventure in the nature of

[40] Rutledge v Commissioner of Inland Revenue 14 TC 490
[41] Johnston (Inspector of Taxes) v Heath (1970) 3 All ER 915

trade, especially considering that the taxpayer contracted to sell the property before he entered into a contract to purchase it. Goff J noted in paragraph 8 as follows,

> *"…the purchaser of a large quantity of commodity …which yields no pride of possession, which cannot be turned to account except by a process of realisation, I can scarcely consider to be other than an adventurer in a transaction in the nature of trade; and I can find no single fact among those stated by the commissioners which in any way traverses that view."*

From the foregoing case law analysis, it can reasonably be inferred that where a person acquires property and that property does not produce income nor provide personal enjoyment, or pride of possession to the owner, then it is conceivably more likely acquired with the sole purpose of trading.

Since these water and oils undergo certain form of transmogrification to attain the status of 'anointed oil' or 'anointed water', it may be argued that these are religious rituals and therefore within the ambit of worship and consequently should not be taxed. I submit that such is just an improvement done to the product of the water or oil in order to make it profitable for sale and therefore chargeable to tax.

This brings us to the next badge of trade, supplementary works. This was demonstrated in the case of **Cape Brandy Syndicate v Inland Revenue Commissioners.** [42] Appellants in this case purchased brandy from the Cape Government on joint accounts and blended with French brandy which were bought for the purpose. The blended brandy was re-cask and sold on commission on behalf of the appellants. The profits accruing from the sale was charged to tax which was opposed by appellants.

Rowlatt J, held at page 69 of the report that, "…*the question whether the appellants carried on trade or business was a question of fact and that there was evidence before the Commissioners entitling them to find as they did."* This was further given credence by the House of Lords in the case of **Martin v Lowry** [43] in which the taxpayer bought the entire war surplus of airline linen expecting to sell it in one tranche at a profit. When the sale fell through, he rented an office and set up a large and

[42] Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64
[43] Martin v Lowry [1927] AC 312

skilled organization to dispose of the stock which took about seven months whereupon he was assessed to excess profits duty and income tax. He appealed to the Commissioners contending that the purchase was a speculation in the nature of gambling transaction, and that the profits were not annual profits, within the meaning of the tax law. The Commissioners found that he was carrying on a trade or business and was liable for excess profit duty and for income tax. Rowlatt J. affirmed the decision of the Commissioners and his decision was affirmed by the House of Lords. Viscount Cave LC, speaking on the findings of the Commissioners, noted at p. 314

> *"…having regard to methods adopted for the resale of the linen, to the number of times occupied by the resale, I do not myself see how they could have come to any other conclusion"*. He went ahead to stated that, *"I think that the profits which are now in question come within the words of charge"* Lord Sumner in his concurrent opinion stated *"I agree that there was abundance of evidence to justify the Commissioners in holding that the appellant carried on a trade."*

From the above analysis, Rowlatt J, observed that, "if the property is worked on in any way during ownership to bring it to a more marketable condition or if there is a special exertion made to find or attract purchasers, such as advertising and opening of an office then there is some evidence of trading."[44] It is thus submitted that, the prayer by the pastor or man of God or whatever name they may be known by, on the ordinary bottled water or oils to turn them into the anointed water or anointed oils is only but supplementary work done to enhance the value of the water or oil thereby bringing it within the ambit of trade and thus taxable.

Part III: Conclusion

From the foregoing analysis, it is evident that where a religious organization engages in such activities which the reasonable man, seized with relevant knowledge will find it difficult not to classify it as a trade, same is trade and should be treated as chargeable to tax.

The fact that such sales have not been the subject of taxation in Ghana does not mean income accruing from these sales are exempt from tax as was the case in

[44] Bennett v Ogston (HM Inspector of Taxes) (1930) 15 TC 374

Kubi & Others v Dali [45] where it was held that, *"the income tax laws of Ghana imposed an obligation on all income earners of a certain category to pay taxes on their earnings. The plaintiff fell under that category and the fact that she had stated in her evidence that she had not been paying taxes did not absolve her from that liability."*

It is the considered opinion of the present writer that, sales made in the ordinary course of religious ceremonies such as during harvests, appeal for funds etc., should be distinguished and exempt from tax.

However, the sale of anointed water, anointed oils, souvenirs among others that are sold in some religious organizations especially churches who go the extent of mounting television and radio advertisements for such sales, same cannot be said to be done in the ordinary course of religious ceremonies or rituals as contemplated by the Income Tax Act 896, [46] as amended by Income Tax (Amendment No. 2), 2016 (Act 924).

It is therefore recommended that, the Commissioner-General of the Ghana Revenue Authority and other relevant stakeholders charged with the responsibility of mobilizing revenue for government spending, cause appropriate laws to be passed instructing religious organizations which engage in such sales to keep separate books of accounts on the sale for the purpose of tax.

45 Kubi & Or's v Dali [1984-86] GLR 501
46 Section 97(2) (a) (ii). Act 896 as amended by The Income Tax (Amendment) (No. 2) Act, 2016 (Act 924)

A MISREPRESENTATION OF THE 1957 & 1960 CONSTITUTIONS BY THE SUPREME COURT; ABDULAI v. AG DIGEST

DOMINIC OHENE OFORI[1]

INTRODUCTION

Abdulai v. AG indeed remains talk of the town and the dust of the case is not settling anytime soon as many legal and non-legal brains continue to bisect and digest the apex court's judgment. Obviously those happy with the judgment continue to sing the praise of the learned justices whereas those on the other side see the judgment as another politically inspired decision coming from the 'UNANIMOUS FC'[2].Looking critically at the constitution,1992 as a whole the case was, as it seems to me, rightly decided by the court. Indeed articles 97(1) (b), 95(1), 96(1) (a) (b), 104(2) and 111 read solemnly and soberly together unambiguously indicate that voting right is acquired by being a Member of Parliament. This explains why the Speaker, when selected from amongst members of Parliament, ceases to be a member of Parliament in accordance with 97(1)(b) an[3]d her or his voting right lost in accordance with 104(2). The Deputy Speakers however do not lose their voting rights like the Speaker because the Deputy Speakers remain members of Parliament. The Vice-President, a Minister or Deputy, who is not a member of Parliament is even entitled to participate in Parliamentary proceedings but cannot ***vote***, as per article 111, because neither of them are members of Parliament. The provisions mentioned demonstrate that the right to vote in Parliamentary proceedings is ***exclusively*** **limited** to the members of Parliament subject to article 104(5). The intent of the framers to give voting rights to only members of Parliament could not even be blurred by the provisions of article 297(h) (j) which to my mind is inapplicable because the duty to preside in the absence of the Speaker was expressly imposed by article 101 and that 101 did not in any way (intend to) limit the voting right of the Deputy

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[2] For those who are not users of TWITTER (a social media app), Ghana's Supreme Court as headed by Chief Justice Anin Yeboah is referred as 'UNANIMOUS FC' by perhaps sympathisers of the current main opposition party (National Democratic Congress) who perceive the Supreme Court's judgments (which are mostly unanimously decided; example 2020 election petition, Abdulai v AG) as politically inspired in favour of the ruling political party (New Patriotic Party).

Speaker hence the maxim *expressio unius est exclusion alterius* kicking in. However, I would have expected that a Deputy Speaker under article 101 be given a casting vote instead of an original vote for obvious reasons.

In any way, the focus of this article is ***on certain pronouncements made by the court in the build-up to its decision***. The court had to satisfy itself of jurisdiction to hear the matter which heavily bothered on Parliamentary proceedings or procedures. In resolving the issue of jurisdiction in its favour, the court opined *"that the 1992 constitution establishes constitutional supremacy as against* ***parliamentary supremacy***" and concluded that it had power to question Acts (actions too) of Parliament which fell afoul with constitutional provisions. The court went further to state, in effect, that the days of Parliamentary supremacy in Ghana were over. The court cited, in support of its claim of Parliamentary supremacy in Ghana's constitutional experience the **1957, 1960 constitutions** and the **Re: Akoto and 7 Others, [1961] GLR 523-535.**

I have perused these authorities cited by the apex court with a fine-tooth comb and I should say, I came to a different conclusion. To my mind, and contrary to what His Lordships held in the ABDULAI case, the authorities do not support the conclusion arrived at by the honourable court and that the idea of Parliamentary supremacy "as pertains in the United Kingdom" where "parliament is sovereign and all laws, decisions, procedures of Parliament are final and cannot be subject to judicial review by the courts" in its absolute sense of the word never existed in the period of 1957 and 1960. At best, it could rather be said that the 1957 and 1960 constitutions failed to a great extent the test of constitutionalism as against the 1969, 1979 and 1992 constitutions. The 1957 and 1960 constitutions set out very scanty limitations on the powers of Parliament as compared to the 1992 constitution. However, the scanty limitations do not by any stretch of imagination suggest Parliamentary sovereignty, as pertains in the United Kingdom where Acts of Parliament could not be reviewed by the judiciary.

I shall bring these to your notice by first giving a background to the ABDULAI case and then proceeding to perform a legal autopsy on each of the authorities cited by the apex court to come to the conclusion I have already stated.

BACKGROUND

The background to the case was succinctly captured by the court at pages 2 and 3 as thus;

"On the 26th of November 2021, when Parliament sat to approve the 2022 Budget Statement, the Minister for Finance requested Parliament to suspend the approval process of the Budget to give the Executive an opportunity to engage the parliamentary leadership over the introduction of the Electronic Transactions Levy (E-Levy) outlined in the Budget. The Speaker subjected the request for suspension to a voice vote and ruled that those against the prayer had prevailed over those in favour.

In a challenge to the ruling of the Speaker, the Majority asked that the vote be re-taken by division. Before the re-voting, the Majority walked out from the Chamber in protest of the exclusion of the Minister of Finance from the Chamber before the vote. After a short suspension of sitting, the Speaker returned to continue with the business of the House in the absence of the Majority. With 137 members present, the Speaker put the question for approval of the 2022 Budget to a voice vote. Following the voice vote, the Speaker ruled that the motion had been lost and the Budget rejected.

On 30th November, 2021, when the House reconvened, the Majority was in the Chamber but this time, the Minority was absent. The Speaker was absent, and consequently, the 1st Deputy Speaker was presiding. The Majority Leader submitted that there were only 137 members in the House when the Budget was purportedly rejected, in breach of Article 104 of the Constitution, among others. He therefore invited the 1st Deputy Speaker to set aside the decision of the House on 26th November, 2021 as a nullity. The 1st Deputy Speaker before putting the question to the House for decision pursuant to the motion, ascertained by a headcount that there were one half of Members present, as required under Article 104(1) of the Constitution. In so doing the 1st Deputy Speaker was counted as part of the half of Members present to make up the 138. However, he did not vote on the question. The 1st Deputy speaker then declared that the motion had been carried and further that the previous rejection of the Budget was null and void and of no effect. The House was thereby said to have approved the 2022 Budget.

The Plaintiff, by this writ, seeks an interpretation of Articles 102,104(1) and 104(3) of the Constitution, 1992 and contends that it was unconstitutional for the 1st Deputy Speaker to have been counted for the purpose of making up the quorum of half of the Members of Parliament as required under"

Indeed, this was the reason for the suit and as the long-standing practice would have it, the court ought to have satisfied itself of jurisdiction before proceeding to consider the merits of the case. It was this process of self-check that led to the pronouncements by the court which is the subject matter herein.

In emphasizing in its favour the power to determine the merits of the case, the court stated;

"It must be noted that the 1992 constitution establishes constitutional supremacy as against parliamentary supremacy. ***Under parliamentary supremacy****, as pertains in the United Kingdom,* ***Parliament is sovereign and all laws, decisions, procedures of Parliament are final and cannot be subject to judicial review by the Courts.*** *The courts merely apply the legislation made by Parliament and may not hold an Act of Parliament to be invalid or unconstitutional….under our current constitutional dispensation, the sovereign people of Ghana have adopted for ourselves a Constitution…that the Constitution, not Parliament, shall be the supreme law of Ghana to which all other laws must conform…..to this extent any law or act or omission, found to be inconsistent with the Constitution shall, to the extent of the inconsistency be void….That said,* ***the doctrine of parliamentary sovereignty is not unknown to Ghanaian constitutional experience****…the* ***Supreme Court, under the 1957 and 1960 constitutions could not question the laws made by parliament*** *even when they were arbitrary laws, on grounds of parliamentary sovereignty."*

This profound statement by the apex court appears to me to be a misrepresentation hence this article. Before I proceed to state my case, I shall have to briefly describe the term Parliamentary sovereignty.

PARLIAMENTARY SOVEREIGNTY

In its early days, Parliament was a judicial as well as a law-making body[4]. The supremacy of the crown in Parliament was rivalled by the crown acting outside Parliament (through prerogative, imposition of taxes)[5]. After the Revolution of 1688 and the Bill of Rights, judges tacitly accepted to give effect to every Act of Parliament no matter its content.[6]

A.V Dicey, after examining several illustrations from history and showing that there existed no competing authority concluded that within the limits of physical possibility ***Parliament could make or unmake any law whatever and the courts can only interpret and may not question the validity of Acts of Parliament***[7]. Once an Act of Parliament is shown, **the court cannot question**

[4] de Smith, 'Constitutional & Administrative Law' (2nd ed).chapter 3.
[5] Ibid.
[6] Evidence in Cheney v. Conn [1968] 1 WLR 242 held "what the statute itself enacts cannot be unlawful, because it is the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that Parliament enactment…is illegal".
[7] See E.C.S Wade, 'Constitutional Law'(8th ed.) at p.46.

it; it can only apply it[8]. **The courts give their entire obedience** (paramouncy) to Acts once assented to by the Queen, Lords and Commons[9].

Thus, His Lordships were right when they stated in the ABDULAI case that;

"*Under parliamentary supremacy, as pertains in the United Kingdom, Parliament is sovereign and all laws, decisions, procedures of Parliament are final and cannot be subject to judicial review by the Courts*".

BIG QUESTION

Now the question is, is it the case that the doctrine of parliamentary sovereignty is not unknown to Ghanaian constitutional experience in the sense that under the 1957 and 1960 constitutions the courts could not question the laws made by parliament?

Before I examine the position by His Lordships which was simply that Parliamentary sovereignty existed under the 1957 and 1960 constitutions, I need to note that although written constitutions differ widely in their purpose, form and content, they will normally be found to have two characteristics; they will be the fundamental law of the land and they will be a kind of higher law[10]. They will be fundamental law in so far as they designate the principal organs of government and invest them with authority; thus constitute and define the Legislature and state the scope of the law-making power[11]. The existence of a written constitution ipso facto creates limitations as an organ cannot exceed powers given to it by the constitution.

Having thus laid this foundation, I shall now examine the 1957 and 1960 constitutions and the **Re: Akoto case (supra)** as cited by His Lordships to ascertain the validity or otherwise of the conclusion of the apex court.

1957 constitution

The Ghana (constitution) Order in Council, 1957 or the Independence constitution or simply the 1957 constitution was an already made document

[8] H.W.R Wade, 'Administrative Law' (5th ed) at p.27.
[9] Ibid.
[10] De Smith, 'Constitutional & Administrative Law' (2nd ed) at p.18.
[11] Ibid.

handed unto the new Republic by the British. Article[12] 31 thereof is of great weight and would therefore be reproduced in extenso;

31(1) Subject to the provisions of this order, it shall be lawful for Parliament to make laws for the peace order and good government of Ghana.

(2) No law shall make persons of any racial community liable to disabilities to which persons of other communities are not made liable.

(3) Subject to such restrictions as may be imposed for the purposes of preserving public order, morality or health, no law shall deprive any person of his freedom of conscience or the right freely to profess, practice or propagate any religion.

(4) ***Any laws in contravention*** *of subsection (2) or (3) of this section or section 34(on compulsory acquisition of property) of this order* ***shall to the extent of such contravention****, but not otherwise,* ***be void****.*

(5) ***The Supreme Court shall have original jurisdiction in all proceedings in which the validity of any law is called in question*** *and if any such question arises in any lower court, the proceedings in that court shall be stayed and the issue transferred to the Supreme Court for decision.*

The provisions unambiguously fetter the law-making powers of parliament. In the ABDULAI case, the apex court in support of describing the 1992 constitutional dispensation as one of constitutional supremacy cited Article 2 thereof which "*confers on any person who alleges that an act or omission of any person is inconsistent with any provision of the Constitution the right to apply to…court for a declaration to that effect*". In **BIELBIEL v. DARAMANI & ORS (WRIT NO. J1/2/10)** GBADEGBE JSC (as he then was) was of the view that Article 2(1) of the 1992 constitution conferred on a person the right to seek a declaration that an act or omission was in contravention of the constitution whereas article 130[13] thereof provided the means by which that person may exercise the conferred right. The learned judge in delivering the majority decision concluded that Articles 2(1) and 130 conferred on the Supreme Court the power of **judicial review[14].**

[12] Although the provisions of the Ghana (constitution) Order in Council, 1957 were referred to as "sections", I shall use "Articles" for convenience sake. See Ware v Ofori-Atta [1959] GLR 181.
[13] That subject to the exclusive original jurisdiction of the High Court, the Supreme Court shall have exclusive original jurisdiction to determine whether an enactment or an act flies in the face of the constitution or is in excess of the powers conferred.
[14] In this context, the power of the court to determine the constitutionality of legislative act.

Articles 2(1) and 130 of the 1992 constitution are in *pari materia* with article 31(4) and (5) of the 1957 constitution save to say that the former has a broader scope as compared to the latter. All the same, the power of judicial review which is a feature of constitutional supremacy as against parliamentary supremacy as seen was present under the 1957 constitution. Therefore, the notion and position of His Lordships suggesting that "parliamentary supremacy, as pertains in the United Kingdom" where "Parliament is sovereign and all laws, decisions, procedures of Parliament are final and cannot be subject to judicial review by the Courts" is palpably incorrect and not supported, at least for now, under the 1957 constitution.

I am fortified by the case of **WARE v. OFORI-ATTA [1959] GLR 181,** where the High Court, Kumasi struck out as unconstitutional the Statute Law(Amendment)(No.2) Act,1957 which was an enactment passed and assented to by the Governor-General on behalf of the British Queen. It is interesting to note that it took only a High Court to hold as unconstitutional, the Act passed by the then National Assembly and an order made under the Act as unconstitutional, a fortiori, that indeed Parliament was not supreme. Murphy J *(as he then was)* made a worthy remark thus;

"*In Ghana there is only one legislature and all laws passed by it are presumed to be for peace, order and good government, in accordance with…31(1) of the constitution. Obviously, the fact that a law is so passed cannot alone exclude if from the ambit of article 35…*"[15]

It can therefore be safely concluded that per the provisions and case cited, Parliamentary sovereignty as pertaining to the United Kingdom was non-existent under the 1957 constitution and therefore any statement to the contrary is false and consequently a misrepresentation.

1960 constitution

From the discussion so far it can be summarily stated that the presence of judicial review provisions in a legal framework makes nonsense of any claim of parliamentary sovereignty.

Article 42(2) of the 1960 constitution expressly stated that;

[15] Article 35 of the 1957 constitution provided that all bills affecting chieftaincy should be referred to the necessary house of chief for consideration.

"The Supreme Court shall have original jurisdiction in all matters where a question arises whether an enactment was made in excess of the powers conferred on Parliament by or under the constitution, and if any such question arises in the High Court or an inferior court, the hearing shall be adjourned and the question referred to the Supreme Court for decision."

This provision is clearly one of judicial review and in *pari materia* with 130 of the Constitution, 1992.

Interestingly the operation of Article 55 of the 1960 constitution further fettered Parliamentary powers. The provision provided that:

55(1) Notwithstanding anything in Article twenty[16] *of the constitution, the person appointed as the first president of Ghana shall have, during his initial period of office, the powers conferred on him by this Article.*

(2) The first president may, whenever he considers it to be in the national interest to do so, give directions by legislative instrument.

(3) ***An instrument made under this article may alter*** *(whether expressly or by implication)* ***any enactment other than the constitution****.*

(4) Section (2) of article forty-two of this constitution shall apply in relation to the powers conferred by this article as it applies in relation to the powers conferred on Parliament.

(5) gives power to first president until some other person assumes office as president.

This proviso in effect gives the first president full legislative powers subject only to the constitution as per 55(4). What this means is that subject to the constitution, the first president (a member of the executive) may, by an instrument, make laws to even alter or override enactments made by the legislature. This rival legislative power can be likened to the pre-1688 Revolution and Bill Rights period in England as already discussed under the heading 'parliamentary sovereignty'. Clearly, there cannot be said to be Parliamentary sovereignty under a constitution which provides for judicial review and vests in a president outside parliament the power to alter legislative enactments through an instrument. To this extent, I respectfully conclude hereunder that the position by his Lordships that Parliamentary sovereignty existed under the 1960 constitution is equally not supported and therefore a misrepresentation.

[16] There shall be a Parliament consisting of the President and the national assembly.

Re Akoto case

Before considering this case, it should be mentioned that the Preventive Detention Act, 1958 (NO 17 of 1958) was an enactment under the 1957 constitution and as such its constitutionality could also be challenged against the 1957 constitution. In the case, "*Parliament had enacted the Preventive Detention Act, 1958 that allowed the President of Ghana to imprison, without trial, any person whose action the President suspected to be a threat to the security of the state for up to five years*"[17].

In challenging the validity of the Preventive Detention Act,1958 the Appellants argued, inter alia, that the Preventive Detention Act,1958 was contrary to Article 13(1) of the 1960 constitution, which was in force at time of suit, and that the legislative power of Parliament was limited by the said article 13(1). The court held as captured from holdings (6), (7) of the headnotes that;

(6) Article 13(1) of the constitution imposes only a moral obligation upon the President of Ghana. Throughout the declaration, which is similar to the coronation oath of the Queen of England, the word "should" is used and "shall". The declaration does not constitute a bill of rights and does not create legal obligations enforceable in a court of law.

(7) The effect of Article 20 of the constitution is that Parliament is sovereign and its legislative powers are qualified only with ***respect to the entrenched Articles thereof****.*

The court was clear that the contentious section 13(1) was non-justiciable. On holding 7 the ,court made it clear on page 534 of the judgment that "*the contention that the legislative power of Parliament is limited by Article 13(1) of the constitution, is therefore in direct conflict with express provisions of article 20…"*Article 20 is reproduced below;

20. (1) There shall be a Parliament consisting of the President and the National Assembly.

(2) So much of the legislative power of the state as is not reserved by the Constitution to the people is conferred on Parliament as the corporate representative of the People; any portion of the remainder of the legislative power of the State may be conferred on Parliament at any future time by the decision of a majority of the electors voting in a referendum ordered by the President and conducted in accordance with the principle set out in Article One of the constitution;….

(3) Subject to the provisions of Article Two of the Constitution, Parliament cannot divest itself of any of its legislative powers: Provided that if by any amendment to the Constitution the power to repeal or alter any existing or future provision of the constitution is reserved to the people,

[17] JUSTICE ABDULAI v A-G (WRIT NO.J1/07/2022) at p.12.

section (2) of this Article shall apply in relation to that provision as if the power to repeal or alter it had originally been reserved to the people.

(4) No Act passed in exercise of a legislative power expressed by the Constitution to be reserved to the people shall effect unless the Speaker has certified that power to pass the Act has been conferred on Parliament in the manner provided by section(2) of this Article; and a certificate so given shall be conclusive.

(5) No person or body other than Parliament shall have power to make provisions having the force of law except under authority by Act of Parliament.

(6) Apart from the limitations referred to in the preceding provisions of this Article, the power of Parliament to make laws shall be under no limitation whatsoever.

(7) The power to repeal or alter this Article is reserved to the people.

Article 20(1) of the 1960 constitution established "Parliament" which was to consist of the President and the National Assembly.20(2) thereof vested in Parliament residual power as in the case of article 298 of the 1992 constitution.20(6) of the 1960 constitution expressly vested Parliament with full legislative power just as article 93 of 1992 constitution. Article 20 of the 1960 constitution in effect simply guaranteed legislative power and did not intend to create Parliamentary sovereignty as pertains in the United Kingdom. For if the intention was to create Parliamentary sovereignty, there would have been no need to add **article 42(2)** which was unambiguously a judicial review provision. In other words, article 20 of the 1960 constitution did not create a system of Parliamentary sovereignty as pertains to the United Kingdom, rather it only vested full legislative power in Parliament. Therefore, any attempt to give article 20 a contrary interpretation would in effect render article 42(2) of the 1960 constitution otiose.

His Lordships' view

In the ABDULAI case, His Lordships cited Article 20 of the 1960 constitution in support of their claim that Parliamentary sovereignty existed thereunder. His Lordships reproduced 20(2) and a portion of 20(6) and concluded thus

"In the light of the above, the Supreme Court, under the 1957 and 1960 constitutions could not question the laws made by parliament even when they were arbitrary laws on grounds of parliamentary sovereignty."[18]

The learned justices cited **Re: Akoto** in further support and stated that

"In that case, Parliament had enacted the Preventive Detention Act, 1958 that allowed the President of Ghana to imprison, without trial, any person whose action the President suspected to be a threat to the security of the state for up to five years. The constitutionality of the Act itself was challenged and the Supreme Court was urged to declare the Preventive Detention Act, 1958 as being unconstitutional and arbitrary. ***The courts declined the invitation and said that parliament was supreme and that the judiciary had no power to strike down an Act of Parliament****…"*

First of all, the court erred by introducing the 1957 constitution when His Lordships cited only portions of the 1960 constitution. More importantly, I am of the view that Re: Akoto did not hold that "parliament was supreme **and that the judiciary had no power to strike down an Act of Parliament**…" for if the supreme court had no power to strike down an Act of Parliament then it was a useless venture for the court to have considered the argument by the appellants and to have pronounced on the effect of article 13. For according to Korsah C.J *"all the grounds relied upon appear to be based upon article 13 of the constitution…"*[19]and since the said article was held to impose only a moral obligation, article 13 could not have legally limited the legislative power given under article 20(6) nor disable the Preventive Detention Act,1958.

The power of the Supreme Court to struck down an Act of Parliament clearly existed and Korsah C.J (as he then was) adumbrated this position when he mentioned at page 533 of the judgment that;

"By notice filed during the pendency of this appeal, counsel for ***the appellants invoked the powers of the supreme court under section (2) of article 42 of the constitution to declare the Preventive Detention Act,1958 invalid on the ground that it was made in excess of the power conferred on Parliament****"*(emphasis mine)

[18] See last paragraph of page 11 of the Abdulai case.
[19] See page 533 of the Re: Akoto case [1961]GLR 523.

The learned judge continued; *"As the legal issues arising from those questions could not properly be raised and or determined at the High Court we deemed it appropriate to grant the leave sought, and the issues have been accordingly argued in the course of this appeal"*

These profound statements by Korsah C.J are clear and conclusive of any debate as to whether the Supreme Court had powers under the 1960 constitution to struck down an Act of Parliament. Clearly His Lordships in the ABDULAI case misrepresented the state of affairs regarding Parliamentary sovereignty under the named constitutions.

CONSTITUTIONALISM

Constitutionalism is simply placing limitations on the exercise of legal and political power[20].This concept is to restrain political actors and legal institutions from abusing and overstepping allocated powers. As a comparative studies with regards to Parliament, the subject matter herein, the 1957 and 1960 constitutions provided scanty limitations on the powers of Parliament as compared to those of 1969, 1979 and 1992 constitutions; which has a whole chapter on Human Rights, retroactive legislation amongst others. Perhaps next time, I may write extensively on this subject but for now it is enough to conclude thus the 1957 and 1960 constitutions had scanty limitations on Parliament as against the 1992 constitution and to that extent the former constitutions failed the constitutionalism test.

CONCLUSION.

I have discussed that contrary to what the apex court held in the ABDULAI case, Parliamentary sovereignty as pertains in the United Kingdom did not exist under the 1957 and 1960 constitutions since those constitutions made provisions for Judicial review and that the existence of a written constitution *ipso facto* casts shadow on the concept of Parliamentary sovereignty as pertains in the United Kingdom. In any way, the misrepresentation made by the apex court did not affect the outcome of the decision reached by the court. This article was however necessary as an academic exercise to bring to the fore the true state of affairs on the notion of Parliamentary sovereignty in Ghana under the named constitutions.

[20] See Chapter III of 'Constitutional Law of Ghana'

TRACING THE NUANCES IN EXTREME PROVOCATION & JUSTIFIABLE USE OF FORCE IN GHANA'S CRIMINAL JURISPRUDENCE: A GOLDEN JUBILEE TRIBUTE TO *MELFA V. THE REPUBLIC*

OSWALD K. AZUMAH[1]

ABSTRACT

It has been fifty (50) years since Melfa v. The Republic was decided. In the cited case, the Court of Appeal dismissed a challenge against the conviction of the accused for the manslaughter of Robert Mensah, "an international football star;" but allowed the appeal against the "harsh" sentence. In doing so, Sowah J.A. (as he then was), stressed that the deceased was the aggressor in the scuffle and the trial judge ought to have considered that before imposing a harsh sentence. Four years imprisonment was substituted for an eight year-term imposed by the trial court and the incident which courted national outrage due to the deceased's high-profile got closure. Half a century on, the question as regards the propriety of the decision continues to divide students of criminal law and even legal practitioners. To what extent did the bench consider all defenses available to or pleaded by the appellant? This paper attempts an investigation into the jurisprudential development of the defenses of extreme provocation and justifiable use of force; (self-defense)—which were available to the appellant; the extent of these defenses and the limitations of each. The paper also relies on statute and case law to illustrate and determine the similarities and divergence between these defenses. What should inform a court's decision to accept one over the other—for one exonerates the accused while the other only goes as to reduce his liability. How do these defenses reflect in the Criminal Offenses Act, 1960 (Act 29); and to what extent did Sowah J.A. and his colleagues accurately apply them in the case under review? By examining these defenses, the writer argues that their Lordships in Melfa, with the greatest of respect, misapplied the law when they held remitting the sentence but did not allow the appeal to the conviction on the whole.

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INTRODUCTION

The fundamental principle of criminal law is that no person should be convicted of an act or omission which was not criminalized at the time the said act or omission took place.[2] This indispensable part of the law is expressed in the maxim *nullum crimen sine praevia lege.*[3] The Constitution, 1992 captures this maxim in ***Article 19 (5)[4] and (11)[5].*** These provisions reflect the principle of legality[6] which seeks to prevent the courts from applying criminal statutes retroactively or imposing punishments for non-existent crimes. Prosecutors can thus only succeed in proving criminal liability for offenses contained in a duly enacted law. How then does the criminal process determine an accused's criminal liability? The prosecution proves the Mens Rea or the mental element of the crime, with a concurrent act or omission, known as the Actus Reus, and in the absence of a valid defense, the accused is likely to be convicted.

Thus, although the law may proscribe the killing of a fellow man, a valid defense, say the carrying out of a lawful order or an element of necessity **may,** completely or partially, discharge an accused of liability in the killing. It was on one of such grounds (provocation) that the then accused in the killing of Robert Mensah was convicted on the diminished liability of manslaughter instead of murder and his appeal against conviction dismissed at the Court of Appeal.

In the ensuing paragraphs, the paper will focus on two key defenses to homicide—extreme provocation and justifiable use of force, specifically, self-defense[7]. The two defenses admit that the accused killed the deceased but contend that his liability be reduced or discharged due to specific circumstances which resulted in the killing. In the discussion, the writer guides the reader through a critique of their Lordships'[8] conclusion to dismiss the appellant's challenge to his conviction in the trial court.

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[2] Garrath Williams, "What is Fundamental in Criminal Law?" (2022) 41 Criminal Justice Ethics 278.

[3] Jerome Hall, 'Nulla Poena Sine Lege' (1937) 47 Yale Law Journal 165.

[4] *19 (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.*

[5] *19 (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.*

[6] Henrietta Mensah-Bonsu, *The General Part of Criminal Law Volume 1* (Black Mask Ltd, 2001) 48.

[7] Afterward, justifiable use of force and self-defense may be used interchangeably

[8] Sowah, Archer and Annan JJ.A.

Provocation as a Defense to Murder

Provocation, in simple English is the deliberate act of making someone angry. As a criminal defense, (extreme) provocation means much more; with its principal characteristic being that it is only available to a murder charge.[9] Simply put, the defense argues that the deceased's behaviour created extenuating circumstances to mitigate the accused's liability.[10] If the jury accepts the defense, the accused is not convicted on murder with which he was charged but is convicted on the reduced liability of manslaughter. In homicide trials, extreme provocation could be the most important deciding factor in construing a confrontational killing of another as either murder or manslaughter.[11] ***The Criminal Offenses Act, 1960 (Act 29)***[12] treats the two crimes.

The Act defines murder[13] as ***intentionally*** *causing the death of another by an* ***unlawful harm***[14]***, unless the murder is reduced to manslaughter by reason of an extreme provocation,*** *or any other matter of partial excuse, as is mentioned in Section 52.*

It defines manslaughter as: *causing the death of another by an unlawful harm…but if the harm causing the death is caused by negligence, that person has not committed manslaughter unless the negligence amounts to a reckless disregard for human life.*[15]

The two definitions give rise to two forms of manslaughter; voluntary manslaughter and involuntary manslaughter. The definition of murder also creates the offense of voluntary manslaughter, the mens-rea to cause death; intent, being present but the offense is mitigated[16] due to extenuating circumstances stated in Section 52[17]. In the definition of manslaughter in ***Section***

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[9] Ibid
[10] E.H. Ofori-Amankwah, *Outline of Criminal Law Lectures* (2WENTY 3HIRD SOLUTION, 2016) 62.
[11] Ibid
[12] Herein and after referred to as Act 29/ the Act
[13] Act 29, Section 47
[14] *Section 76—Definition of Unlawful Harm. Harm is unlawful which is* ***intentionally*** *or* ***negligently*** *caused* ***without any of the justifications mentioned in Chapter One of this Part***
[15] *Act 29, Section 51*
[16] *Ormerod, D. Smith and Hogan's Criminal Law (12th ed. Oxford University Press. 2021) p. 488.*
[17] ***Section 52—Intentional murder reduced to manslaughter***
A person who intentionally causes the death of another person by unlawful harm shall be guilty only of manslaughter, and not of murder or attempt to murder, if—
(a) he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in sections 53, 54, 55 and 56; or
(b) he was justified in causing some harm to the other person, and, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self-control; or

51, the mens rea of intent to kill is absent[18], thus, the unlawful harm which results in fatality—as well as **negligence, which amounts to a reckless disregard for human life**, [emphasis mine] define involuntary manslaughter. The suffix means mere medical negligence, for instance, may not be enough for a prosecutor to discharge the burden of proof beyond reasonable doubt.[19] Reckless driving may suffice.[20] This paper partly focuses on voluntary manslaughter, *supra.* This would have been murder except for the extenuating circumstances permitted by the Act—which include extreme provocation leading to loss of self-control and loss of self-control simplicita from a fear of imminent death or bodily harm which caused the accused to go in excess of the harm he was justified to cause.[21]

The preceding paragraphs underscore a salient principle on the law of extreme provocation and loss of self-control which is but a partial defense to murder.[22] It does not absolve the accused entirely of the homicide but reduces liability as mentioned above. At common law, all unlawful homicides which are not murder are manslaughter.[23] This overview of the defense of extreme provocation sets the stage for a walk through its development by judicial action and relevant statute.

Lord Devlin, in ***R v. Duffy***[24] gave provocation its classic definition as:

"some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable man, and actually causes in the accused, ***a sudden and temporary loss of self-control****, rendering the accused so subject to passion as to make him or her for the moment, not a master of his mind."*

From Lord Devlin's definition, the elements needed for a defense of provocation to succeed can be divided into four. Firstly, there should be a sufficient provocation, secondly, there should be **a sudden and temporary loss of self-control**, thirdly, the accused must prove that the immediate provocative act caused his loss of self-control which triggered his instantaneous reaction and

(c) in causing the death, he acted in the belief, in good faith and on reasonable grounds, that he was under a legal duty to cause the death or to do the act which he did; or
(d) being a woman she caused the death of her child, being a child under the age of twelve months, at a time when the balance of her mind was disturbed by reason of her not fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child.

[18] R v. Cato [1976] 1WLR 110
[19] State v. Kwaku Nkyi [1962] 1 GLR 197
[20] R v Hughes (Michael) [2013] UKSC 56
[21] Act 29 Section 52(b)
[22] Herring, J. *Criminal Law: Text, Cases, and Materials* (8th ed. Oxford University 2018)Press. p.274
[23] Ibid.
[24] [1949] 1 All ER 932

lastly, the defendant's reaction or response to the provocative act should be equivalent to that of a reasonable man in his community who is in his position.

A careful scrutiny of the authorities will demystify these elements. Firstly, in ***Duffy,***[25] the accused was charged with murder. She had killed her husband with a hatchet while he slept. In her defense, she contended that the deceased subjected her to regular violent abuse and on the night in question, a quarrel ensued after which the deceased slept and she fatally attacked him. The Court of Appeal accepted the direction Lord Devlin gave to the jury and dismissed her appeal against a conviction for murder. This case illustrates sufficient provocation, but based on the facts, the second, third and fourth elements cannot be supported. The fracas of the evening had ended which means there was no sudden and temporary loss of self-control, and there was no immediate provocative act which would be the catalyst. The requirement for a reasonable man in her position, therefore, does not arise.

In ***DPP v. Camplin,***[26] the power of self-control was stressed as an important factor in determining whether the defense of provocation should succeed. The respondent, who was 15 at the time of the crime, was convicted of murder after he struck and killed a middle-aged man for forcefully having sex with him and then laughing at him. The conviction on murder was overturned and replaced with manslaughter, whereupon, the prosecution appealed to the House of Lords which dismissed the appeal. Lord Diplock noted that contrary to the direction of the trial judge, the jury ought to have considered the age of the respondent in determining whether he was sufficiently provoked and thus, lost the power of self-control.

Provocation and other partial defenses in Act 29

These common law elements are highly represented in Act 29. ***Section 52*** of the Act provides that the benefit of provocation will be available to an accused if they prove they were deprived of the power of self-control by a provocation given by the deceased. It should be noted that both England and Ghana have codified what can constitute extreme provocation. It is not left to the judge's discretion. Section 53 of Act 29 gives the specific acts which constitute sufficient provocation as to deny one the power of self-control. It provides that

The following matters may amount to extreme provocation to one person to cause the death of another person namely

[25] Ibid
[26] [1978] UKHL 2

(a) an unlawful assault and battery committed upon the accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind, either in respect of its violence or by reason of accompanying words, gestures, or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character and being in the circumstances in which the accused person was, of the power of self-control.

(b) the assumption by the other person, at the commencement of an unlawful fight, of an attitude manifesting an intention of instantly attacking the accused person with deadly or dangerous means or in a deadly manner.

(c) an act of adultery committed in the view of the accused person with or by his wife or her husband, or the crime of unnatural carnal knowledge committed in his or her view upon his or her wife, husband, or child; and
(d) a violent assault and battery committed in the view or presence of the accused person upon his or her wife, husband, child, or parent, or upon any other person being in the presence and in the care or charge of the accused person

Two cases illustrate when the defense of provocation will succeed as a partial defense to a charge of murder. In ***Kontor v. The Republic,***[27] the appellant's conviction for murder was substituted for manslaughter on appeal. As provided by Section 52 (b), a partial defense may be available to an accused if:

"…he was justified in causing some harm to the other person, and, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm ***as in fact deprived him for the time being of the power of self-control"*** **[emphasis mine]**.

The Court of Appeal, speaking through Abban J.A., in allowing the appeal, specifically, **stressed on the absence of the intent to kill.** The court explained that, the conviction on murder cannot be supported in the absence of the said intent.

Abban J.A. remarked:

"*in the case of murder there should be proof of an intention to kill whilst in the case of manslaughter such an intent is absent…if they (the jury) found that the intent to kill was absent, then they should in the circumstances consider a verdict of manslaughter."*

The facts were that the accused and deceased were cousins and only engaged in the fatal brawl over a minor misunderstanding. The two had even shared a meal after an earlier quarrel. In the fatal fight, the deceased was the aggressor and he was also bigger in stature. In support of the requirement of a **sudden and temporary** loss of self-control, Abban J.A. quoted a statement from second prosecution witness who he described as a vital witness. The witness recounted what the appellant said after striking his cousin as: ***"Kofi, you have made me do serious (or grave) wrong,"*****—an expression of immediate remorse after**

[27] [1987-88] 1 GLR 324

regaining control of his mind. All the elements needed to sustain the defense were thus, discharged.

In ***Zinitege v. The Republic,***[28] the appellant struck the deceased, his nephew, with a stick on the head after the latter ambushed and attacked him. There was a record of bad blood between the two and they were previously separated from fighting at a drinking bar hours prior. The deceased was stated as the aggressor in these recorded scuffles. In replacing the conviction on murder with the lesser crime of manslaughter, the Court of Appeal, per Brobbey J.A. explained:

"in the instant case, the three successive attacks must have led the appellant so to lose his self-control as to resort to the one and only move he took which turned out unfortunately to be fatal."

The two authorities are leading cases under the law of provocation and loss of self-control in Ghana and underscore the need for loss of the power of self-control as the celebrated Lord Devlin elucidated in the ***Duffy*** case. It is, therefore, an unobjectionable fact that the defense of provocation cannot be sustained unless there is proof of loss of self-control.[29] In that moment, the accused is believed to have *lost it all* by the extreme provocation given by the deceased.[30] Not every inflammatory behaviour by a provocateur would, however, entitle an accused to the benefit of the defense of extreme provocation where the accused responded in a deadly manner and did in fact, kill the provocateur. Even where the provocation given constituted sufficient extreme provocation under Act 29, the law limits the circumstances under which an accused may successfully plead the mitigating defense—this circumstances, for expediency, are reviewed herein.

Limitations of Provocation

One of the earliest cases to mention the defense of extreme provocation is ***R v. Mawgridge***[31] where the requirement for **loss of self-control** was set out. The court was emphatic that insults and mere words cannot legally provoke one into killing another.

Per Holt CJ,

"no words of reproach or infamy, are sufficient to provoke another to such a degree of anger as to strike, or assault the provoking party with a sword, or to throw a bottle at him, or strike him

[28] [1992-93] GBR 920
[29] Heather Douglas and Alan Reed, "The Role of Loss of Self-Control in Defenses to Homicide" (2021) 72 Northern Ireland Legal Quarterly 276.
[30] Ibid
[31] [1707] 84 ER 1107

with any other weapon that may kill him; [so] if the person provoking be thereby killed, it is murder."

In Section 53 of Act 29, the words of Holt CJ are reflected. As quoted above, the Section accepts words of insult and infamy as constituting extreme provocation only if they are accompanied with an unlawful assault and battery. The limitations proper are captured in Section 54[32] of the Act and are not new to principle laid down by Devlin. The basic requirement which summarizes the defense is that the accused's violent reaction, though unlawful, was equivalent to that of a reasonable man who has been provoked into **losing the power of self-control** and is in the *heat of passion.*[33] The absence of loss of self-control, acting directly from a previous intent to cause harm to the deceased, lapse of time; which defeats the *heat of the moment* requirement and in other cases, acting in excess of what a reasonable man would do, form the basis of the exclusion to the benefit of Provocation in Ghana as expressed in Act 29.

The two most relevant variables which are fatal to the defense of provocation deduced from ***Section 54 of Act 29*** are lapse of time—which proves the accused did not act in the heat of the moment but had time to cool off and regain control of his mind, thus, did not lose the power of self-control when he reacted—and the degree of his reaction, **in respect either of the instrument or means used** or of the cruel or other manner in which it was used, in which no ordinary person would, under the circumstances, have been likely to act.[34]

The ***Duffy*** case, specifically, illustrates the limitation of lapse of time. The appellant had cooled off after the fight with her husband and only returned to attack him when he was asleep. Time had therefore lapsed and she thus, lost the key requirement to have acted in the heat of the moment, being deprived of the power of self-control from an extreme provocation from the deceased. Her

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[32] Cases in which Benefits of Provocation is excluded.
(1) Notwithstanding proof on behalf of the accused person of any matter of extreme provocation, the crime shall not be thereby reduced to manslaughter if it appears—
(a) that he was not in fact deprived of the power of self-control by the provocation; or
(b) that he acted wholly or partly from a previous intention to cause death or harm or to engage in an unlawful fight, whether or not he would have acted on that purpose at the time or in the manner in which he did act but for the provocation; or
(c) that, after the provocation was given, and before he did that act which caused the harm, such a time elapsed or such circumstances occurred that an ordinary person might have recovered his self-control; or
(d) that he acted on a manner, in respect either of the instrument or means used or of the cruel or other manner in which it was used, in which no ordinary person would, under the circumstances, have been likely to act.

[33] Joshua Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale, (1982) 73 J. Crim. L. & Criminology 421

[34] Ibid

killing of her husband, was, thus, premeditated; making it outright murder.[35] It is thus, a settled principle that when time lapses on an extreme provocation, no person shall be entitled to kill, or excused, or partly excused for killing the provocateur due to the said extreme provocation[36]—one must have acted only in the heat of the moment.[37]

Similarly, an accused loses the benefit of the defense of provocation where he reacted to the extreme provocation in a manner that exceeds what a reasonable person in his position would do. The weapon used, the manner in which it was used to strike the deceased—which could be evidenced by number of strikes, should be of relevance to any jury considering the defense[38]. It was based on these requirements that the jury rejected the accused's plea of provocation in ***Larti v. The State***[39]. The Supreme Court dismissed the appeal of the convict. The relevant facts are that after an alleged provocation by the deceased, where appellant averred he was hit by a stick, he returned the blow by inflicting twenty-four machete wounds on the deceased. Bruce-Lyle J.S.C., in delivering the judgment of the court, applied ***Section 54 (d),*** holding that the nature of the response did not match the alleged provocation.

Another circumstance under which the defense of provocation would not suffice is where the accused was merely angry and struck the deceased out of a loss of temper instead of loss of self-control owing to an extreme provocation.[40] Mere anger is not tantamount to loss of self-control from an extreme provocation as to make one not a master of their mind.[41] This position is illustrated in the leading case of ***R v. Parent***[42] where the court held that intense anger alone is not sufficient to reduce murder to manslaughter—it may play a role in determining sufficient provocation but is not an independent defense. In ***Acott*** supra, Lord Steyn, quoting Rougier J, with approval, indicated that

[35] Ibrams (1981) 74 Cr App R 154
[36] Ormerod, D. *Smith and Hogan's Criminal Law* (12th ed. Oxford University Press 2021). p. 495.
[37] Atta v. R (1953) 14 WACA 323. Here, the appellant killed his wife after catching her in the act of adultery. Catching one's partner in the act of adultery was sufficient provocation; however, time had lapsed before he killed her which was evident of him regaining control of his mind after the said provocation. The defense of provocation was rejected and the conviction on murder upheld.
[38] Section 54 (d) of Act 29
[39] [1965] GLR 305, SC
[40] Regina v. Acott [1997] 1 WLR 306
[41] Sarah Sorial, 'Anger, provocation and loss of self-control: what does 'losing it' really mean?" (2019) 13 Criminal Law and Philosophy 247.
[42] [2001] SCC 30

"It is not enough that the evidence should merely indicate that the defendant had lost his temper, possibly as a result of some unidentified words or actions, for people occasionally work themselves into a fury and erupt with no external provocation at all."

How fair are the requirements of this defense?

What some jurists have said

The jurisprudential discussions advanced by feminist jurists are notorious in all critiques of the defense of provocation; the central argument being that it is biased in favour of men and greatly disadvantages women. "The defense does little to properly consider the extreme provocation under which some accused women acted in the homicidal attack on their violent abusive husbands"[43], writes Elizabeth Sheehy. The ***Duffy*** case, on which most part of the current nature of the defense sits, is relevant here. The requirement for the accused to have acted in the heat of passion fails to recognize the relative physical strengths and natural build of a woman against a man[44]. Sheehy further argues that men are more disposed to act instantaneously when extremely provoked whereas women are more tolerable and more disposed to react to provocation after the *heat.* In the present writer's opinion, these are valid concerns which the element of acting under an instantaneous loss of self-control fails to consider.

The rejection of anger as a defense has also courted denouncement. And rightly, so. The matter should be given better judicial or legislative development. Trotter, (2002) writes that

"*Whether anger is capable of negating the intent for murder may be a question that is susceptible to expert opinion. Therefore, if the Court's holding rests on the notion that intent cannot be negated by anger, however intense, there ought to have been a proper empirical foundation to support that conclusion…*"[45]

The killer of Robert Mensah was convicted of manslaughter instead of murder because in the jury's opinion, the celebrated goalkeeper extremely provoked the appellant by launching multiple attacks on him. The jury considered all the events of the night and concluded that despite being initially innocent, the appellant used

[43] E Sheehy, J Stubbs and J Tolmie, 'Securing fair outcomes for battered women charged with homicide: analysing defence lawyering in R v Falls' (2014) 38 Melbourne University Law Review 666

[44] All Answers ltd, 'The Law of Provocation' (Lawteacher.net, May 2023) https://www.lawteacher.net/free-law-essays/criminal-law/the-law-of-provocation.php?vref=1 accessed 28 May 2023

[45] Gary T. Trotter, (2002) 'Anger, Provocation, and the Intent for Murder: A Comment on R v Parent' 47 McGill LJ 669.

excess force to stop the provocation and attack on him by Mensah. The courts refused the plea of self-defense from the killer which would have made him walk out of court as a free man. This writer disagrees with the jury and the Court of Appeal for reasons now set out.

JUSTIFIABLE USE OF FORCE

At the heart of the defense of justifiable use of force is that the accused had the right to defend himself with as much force as was reasonably necessary in the circumstance, even if it leads to the attacker's death. It is a complete defense and leads to the acquittal and discharge of the accused unlike extreme provocation which is only a partial defense[46]. The recent decision of ***Dobbs v. Jackson***[47] has underscored the need to trace any claim of a right to the Constitution. In Ghana, the right to self-defense is provided for in ***Article 13 of the Constitution, 1992.*** It provides as follows:

A person shall not be held to have deprived another person of his life in contravention of clause (1) of this article if that other person dies as the result of a lawful act of war ***or if that other person dies as the result of the use of force to such an extent as is reasonably justifiable in the particular circumstances***[48]

(a) For the defense of any person from violence or for the defense of property

The right to self-defense is further stressed in Section 37 of Act 29.

Section 37—Use of Force for Prevention of or Defence against Criminal offense

For the prevention of, or for the defence of himself or any other person against any crime…a person may justify any force or harm which ***is reasonably necessary extending in case of extreme necessity, even to killing.***

The effect of Article 13 of the Constitution and Section 37 of Act 29 is that where the facts show the accused used force or harm which was necessary in the circumstance, the said harm is not unlawful and he consequently, committed no crime. The accused, thus argues *quod est necessarium est licitum* and the court is to assess the entire circumstance to determine if he should succeed.

An inseverable component of the defense of justifiable use of force as to constitute self-defense is necessity. Necessity itself is a stand-alone defense at

[46] Allen, M. *Textbook on Criminal Law* (16th ed. Oxford University Press 2020). p. 225

[47] No. 19—1392. The case overturned the four-decade old Roe v Wade on grounds that the Constitution of the USA mentions to right to abortion and the states were at liberty to legislate to regulate abortion

[48] Article 13 (2) of the Constitution, 1992

common law but in Act 29, it is not treated as an independent defense[49] but as a vital component in establishing defenses such as justifiable use of force which is under discussion herein.[50] The authorities which will soon be unleashed lend credence to the assertion that in a situation of self-defense, the attacking party put the defending man in fear, either of death or imminent bodily harm that in the reasonable belief of the defending party, a necessity arose for him to strike the attacker to abate the threat and to save his own life or prevent harm to his person[51]. As Mensah-Bonsu, *supra,* explains:

"*…the imperatives of situation as they appear to a person in a difficult situation may look completely different when the situation is later subjected to objective scrutiny";*

…this strictness is why the defense is difficult to sustain—the succeeding paragraphs dismantle the said difficulty.

To further understand the rationale of self-defense and the circumstances under which that blow, which turned out to be fatal would be deemed necessary and thus, lawful, we take a look at one of the earliest cases; ***R v. Dudley and Stephens.***[52] The two accused killed and ate a cabin boy after they were all shipwrecked. They were rescued four days after killing the boy but evidence suggested that they would all have perished before the rescue if they did not kill and feast on the deceased who was weak and would have likely been the first to die. The court refused the plea of self-defense argued on the grounds of necessity. According to the court, per Lord Coleridge CJ:

"*Killing by use of force necessary to preserve one's own life in 'self-defense' was a well-recognized but entirely different case from killing of an innocent person.*"[53]

Cardozo J simplifies it as:

"*There is no rule of human jettison and so where two or more are faced with a common disaster, there is no right to save the lives of some by killing another."*[54]

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[49] Henrietta Mensah-Bonsu, *The General Part of Criminal Law Volume 2* (Black Mask Ltd, 2001)

[50] *The defence of necessity is premised upon the fact that there are times when offences are committed only because a person has been caught in a situation which requires making a choice between two unpleasant alternatives. In that situation, it is understandable when the choice that is made, and which is the lesser of the two evils, involves the commission of an offence. It is not an easy defence to establish since the imperatives of situation as they appear to a person in a difficult situation may look completely different when the situation is later subjected to objective scrutiny.*

[51] *Ibid*

[52] (1884) 14 QBD 273

[53] Ormerod, D. *Smith and Hogan's Criminal Law* (12th ed. Oxford University Press 2021) p. 349

[54] Cardozo J. The Trolley Problem. (1949) 10 N Y U L Q Rev 318, 319.

With that settled, we now assess the circumstances under which force will be deemed necessary, thus, lawful for self-defense, to the extent of killing.

The requirements to prove justifiable use of force

The onus of proving the use of force—in Section 37 of Act 29 to save one's own life or the life of another from an attacker is on the accused.[55] And despite its high threshold, it has succeeded in a number of leading authorities—including ***State v Norman***[56] and ***Palmer v R.***[57] The two cases set out the elements of the defense and discuss it at length.

The threat of imminent death or harm

The court, speaking through Mitchell Justice, in ***Norman,*** states the first requirement of self-defense to be the **threat of imminent bodily harm or death.** Where the threat existed but was not imminent, an accused would not be entitled to rely on self-defense for striking the victim. The facts of the ***Norman*** were that, the accused was married to the deceased who physically and mentally abused her for years in their marriage. The deceased had threatened on multiple occasions to kill the accused. Being in fear of the threat, the accused resorted to self-help and shot her husband three times while he slept. She was convicted for manslaughter and sentenced to six years. On appeal, the conviction on manslaughter was set aside and a new trial ordered with the instruction that self-defense be submitted to the jury. On further appeal to the Supreme Court, in restoring the decision of the trial court, Mitchell J who spoke for the court, indicated that the threat under which the accused killed her husband was not imminent as he was asleep and in no capacity to attack the accused.

The accused must not instigate a situation to self-defend

The second requirement is that **the accused must not be the aggressor or be at a previous fault leading to the confrontation.** This provision is illustrated by the ***Palmer*** case where the accused and two others stole marijuana from the deceased and on a hot chase, the accused, believing to be in danger from the pursuers, fired at them, killing one. The court rejected the self-defense claim *inter alia* because, the accused was at fault in the circumstances and did not discharge the ammunition in *bona fide* belief of being danger.

[55] Ibid
[56] 89 N.C. App. 384, 366 SE 2d 586 (1988)
[57] [1971] All ER 1077

One contentious issue in the question of self-defense is where an accused in a homicide trial was a provocateur. The deceased, being so provoked, lost self-control and attempted to strike the provocateur with a lethal weapon, but the said provocateur—the accused, launches a preemptive strike which kills the person provoked. Should the benefit of self-defense be available to the provocateur? The authorities suggest so. The American restatement of the law[58], for instance, says

"*A person who provokes another may use force to defend themselves if the person provoked replies the provocation with force. However, unless the force threatened by the person so provoked was deadly, a provocateur cannot use deadly force to resist it."*

The reason a provocateur is not allowed to use lethal force unless the person provoked does so first is that it raises issues of premeditation of the deadly strike, with the provocation of the deceased, only being a means to justify the lethal strike. The fundamental principle governing this is that a person cannot benefit from their own wrongdoing.[59]

Proportionality of force and limits

Proportionality

The third element needed for an accused to prove the harm he caused the deceased as to sustain self-defense is the amount of force used to repel the attack—the general rule being that the force must be proportional to the attack.[60] The memorandum[61] to Act 29 underscores this in the words "*the force must always be no more than is reasonably necessary."* The question as regards the amount of force which is reasonably necessary for a victim of an attack to repel his assailant is a question of fact and not of law.[62] This requires the jury to weigh all the evidence adduced and decide if on the facts as presented, the force used in repelling the attack was disproportionate.

In a murder trial where the force is found to be disproportionate, the jury must return a verdict of guilty with no compulsion to consider manslaughter.[63] In determining what amount of force is reasonably necessary to repel an attacker, the requirement is to consider if the person being attacked, reasonably and in

[58] Restatement (Second) of Torts (American Law Institute)
[59] Ex Turpi Casua non oritur actio
[60] Suzanne Uniacke, "Proportionality and Self-Defense" (2011) 30 Law and Philosophy 253.
[61] Criminal Code, 1960 (Act 29) Criminal Procedure Code, 1960 (Act 30) Memorandum
[62] Lord Morris in *Parker* [1971] All ER 1077
[63] Ibid

good faith, believed the force he used was necessary, even if lethal[64]. It would be wholly unjust for a court to hold a person repelling an attack to strict boundaries of what is reasonably necessary owing to the distinct nature of all cases. In Lord Morris' words:

"*If there has been an attack so that defense is reasonably necessary,* ***it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.*** *If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."*

This extract from Lord Morris in ***Palmer***, closes the debate on what amount of force should be considered reasonably necessary in the face of imminent danger where one is not an aggressor or at a previous fault.

Limits

Lord Morris explains where the lines of the reaction to the attack should be drawn.

"*If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. [But] If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression*[65]*…All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defense. If there has been no attack then clearly there will have been no need for defense."*[66]

In ***Alhassan v The Republic***[67] the Court of Appeal, dismissed the appeal against conviction on murder after the facts showed an intent to kill and the absence of necessary force to end the attack. Per the facts, the deceased and appellant engaged in multiple fights on the day and had been separated by neighbours. On the third fight, the appellant ran into his father's room, picked a knife, concealed it and came out to meet the deceased and in the course of the fight, stabbed him. He pleaded self-defense. In rejecting the plea, the court, speaking through Abban (Mrs.) J.A. noted that there was a chance to escape the belligerence which the

[64] *Section 37 of Act 29. For the prevention of, or for the defence of himself or any other person against any crime, or for the suppression or dispersion of a riotous or unlawful assembly, a person may justify any force or harm which is reasonably necessary extending in case of extreme necessity, even to killing.*
[65] *Duffy* [1949] 1 All ER 932
[66] Lord Morris in *Palmer* [1971] All ER 1077
[67] [2007] Criminal Appeal No. 21 / 94

appellant did. He only returned after he was properly armed to strike the deceased in a deadly manner which displays a premeditated intent to kill.

Per Abban (Mrs.) J.A.

"*There is no evidence that when the, appellant alleges that he went into the room to pick the knife, the deceased chased him into the room. What prevented him from locking the door when he entered the room?"*

The query from Her Ladyship underscores the absence of reasonableness of the force used for self-defense to succeed in this particular case; and the court rightly held that the appeal must fail. From the authorities, it is unmistakable that without a proof of force being reasonably necessary, self-defense cannot be sustained.

As discussed above, at the crux of self-defense is that the threat which was repelled by the defender was imminent, where the attacker has been immobilized therefore, there is no justification to further strike him and the justifiability of the force is limited. The court, per Annan J.A. in ***Lamptey alias Morocco v The Republic***[68] succinctly captures this principle in the words:

"*So also where a murderous assailant has been disarmed or disabled in circumstances which show that he is then in no position immediately to resume his criminal purpose or act, then killing cannot be justified."*

The above requirement distinguishes the facts of the killing of Robert Mensah as narrated by the court. The Asante Kotoko goalkeeper still advanced on his killer before he was stabbed. He was not immobilized at the time. The next requirement to succeed on self-defense is equally critical to this paper.

Principle of Duty to Retreat

Fourthly, a controversial issue on the law of justifiable use of force is whether there was any alternative means of reacting to the imminent threat despite the defending party being faultless leading to the attack. Should the accused have opted for a different reaction than striking the deceased? One option which some authorities favour is retreating—running from the scene where possible[69]. How valid is the argument and how does it reflect in legal systems across the world, including ours?

[68] [1974] 1 GLR 165

[69] Eugene Volokh, 'Duty to Retreat: 35 States vs. Stand Your Ground 15 States', The Volokh Conspiracy (Reason, 21 December 2020) https://reason.com/volokh/2020/12/21/duty-to-retreat-35-states-vs-stand-your-ground-15-states/ accessed 12 May 2023.

Contrary to what the phrase suggests, the principle of duty to retreat does not impose a duty on a person attacked to retreat at all cost.[70] He is expected to retreat rather than use force, especially lethal, to defend himself. The principle is popular in the United States of America, although, even there, only a handful of the states apply it. The majority favour 'Stand Your Ground,' where a person threatened by an attacker can use lethal force to repel the attack, once there is proof they were not the aggressor or provocateur.[71]

The authorities at common law reject the duty to retreat. A leading case which demonstrates this is ***R v Bird***[72] in which the appellant, struck her ex-boyfriend, wounding him. The facts were that the ex-boyfriend was the aggressor when a fight ensued between the two; he pinned her against a wall and slapped her. She hit him as well, just that there was a glass in her hand which seriously injured him. At trial, the judge directed the jury to return a verdict of not-guilty only if there was evidence she demonstrated an unwillingness to engage in the fight. In allowing her appeal against conviction, Lord Lane CJ noted that although retreating was good evidence that she was unwilling to engage, there was no such duty on a person attacked to retreat. In ***Palmer,***[73] Lord Morris, after a litany of authorities, also rejected the duty to retreat.

Ghanaian authorities reject the duty to retreat as well. In ***Lamptey alias Morocco,*** the Court of Appeal ruled:

"If he (the person attacked) found himself in such a situation in an open space, a person ***may*** *retreat as far as he can go and then turn upon his assailant. However, it cannot be the law that in every case, even in an open space, a victim of a murderous or other serious felonious attack must provide some evidence that he had retreated to some distance."*

The facts were that the deceased and appellant had previous bad blood owing to relations between the appellant's wife and the deceased. In addition, the deceased regularly rained insults on the appellant, to the point of insulting his mother. One of such instances led to a fight where the appellant testified that the deceased wanted to strike him with a cutlass whereupon he launched a preemptive attack and bludgeoned him with a cudgel he snatched from the deceased. The appellant's conviction on murder was reduced to manslaughter.

Based on the duty to retreat in Ghanaian law, it is clear that Robert Mensah's killer was not bound to run away. That notwithstanding, the facts show he even

[70] Ibid
[71] Ibid
[72] [1985] 1 WLR 816
[73] Ibid

left the scene initially but was followed by the sportsman. Now, the focus turns to the specific provisions in Ghana's criminal code.

Justifiable Use of Force in Act 29

Part Two, Chapter One of Act 29 extensively deals with justifiable use of force.[74] The relevant portions are highlighted below where necessity is seen as a key component for the defense as Mensah-Bonsu, *supra*, asserts.

Section 37—Use of Force for Prevention of or Defence against Crime, Etc.

For the prevention of, or for the defence of himself or any other person against any crime…a person may justify any force or harm which ***is reasonably necessary extending in case of extreme necessity, even to killing.***

Section 32—General Limits of Justifiable Force or Harm.

Notwithstanding the existence of any matter of justification for force, force cannot be justified as having been used in pursuance of that matter—

(a) Which is in excess of the limits hereinafter prescribed in the section of this Chapter relating to that matter; or

(b) Which in any case extends beyond the amount and kind of force reasonably necessary for the purpose for which force is permitted to be used.

One leading case which captures the essence of Sections 37 and 32 is ***Anguyan v. The Republic***[75] where the appellant unnecessarily struck the deceased multiple times with a cutlass after a fight between the two. On the evidence adduced, it was apparent that at the time the appellant dealt the deadly blows, the deceased had already been immobilized and posed no further threat to the appellant. The plea of self-defense could, therefore, not be supported. The court, per Forster J.A., in his summing up of the judgment put it simply that

"*Even assuming that danger to life was still threatened, was the nature of the wounds inflicted (particularly to the head)* ***reasonably necessary*** *for the purpose for which force is permitted to be used under section* ***32(b) of the Criminal Code 1960 (Act 29)****?"*

His Lordship answered in the negative and dismissed the appeal.

The requirement in Section 32 on reasonable force necessary for the purpose for which is was used does not entitle the prosecution or the judge to exclude any

[74] The Chapter covers a wide variety of circumstance in which force may be used including self-defense, defense of property, execution of a court order, the arrest and re-arrest of a felon among others. The common law, as discussed above, informs most of these statutory provisions.
[75] [1992-93] GBLR 997

class of weapons which the accused used in self-defense (unlike in provocation). ***Bodua alias Kwata v. The State***[76] illustrates this. As per Ollennu JSC:

"*The learned [trial] judge misdirected the jury when he told them that what they had to consider was the nature of the instrument used in the self-defense…the plain language of the section shows that what may take away the defence is the amount and kind of force used, and not the nature and kind of implement used. It cannot be otherwise, because if to ward off a heavy blow aimed at his head with a piece of iron bar, a man in possession of a two-edged dagger so wields the dagger gently so that it only inflicts a superficial wound on the arm of his assailant, his defence of self-defence must succeed."*

As demonstrated by the authorities, only a woefully disproportional force which displays such cruelty or some malicious forethought or launching further attacks on an already immobilized attacker, should disable a person defending himself from the benefit of the complete defense of justifiable use of force.

The similarity between when a reaction to an attack would be deemed self-defense and when the court would interpret it as a reaction from loss of self-control is now apparent. The next section addresses the very thin lines between the two and why the writer avers that the court was wrong to reject Robert Mensah's plea to succeed on self-defense.

PROVOCATION OR SELF-DEFENSE? –THE FINE LINES

Many scholars agree that there remains many uncertainties on the boundary between murder and manslaughter.[77] The lines between striking another in self-defense and doing same on sufficient provocation from a dangerous assault and battery or threat of imminent harm which causes loss of self-control are as faint as they could get. One variable which has not suffered such atrophy is the requirement for loss of self-control.[78] A person may be justified and completely exonerated if they consciously use as much force as is necessary in the circumstances to defend themselves from an aggressor, including lethal force. However, if the aggressor only succeeded in provoking the defender as to cause them to lose the power of self-control, the crime of murder is only reduced to manslaughter, this is because, it is assumed the loss of self-control clouded the defender's judgment to less lethal options and the law aims to reduce the

[76] [1966] 2 GLR 51, SC
[77] Ormerod, D. *Smith and Hogan's Criminal Law* (12th ed. Oxford University Press. 2021) p. 515
[78] Wendy Chan, *Access to Provocation and Self Defence in Women, Murder and Justice* (Palgrave Macmillan, 2001) 108-149.

instances of people killing out of passion.[79] The loss of self-control is reflected in how passion-filled killers react as seen in the cases above where they strike their attacker multiple times even after they become immobilized.

Where there is no loss of self-control, it is assumed the defender used the lethal force consciously in defending the attack and only its reasonableness in the circumstance would be questioned. In the ***Palmer case,*** Lord Morris stressed this in asserting that there is no general rule to convict on manslaughter if the defense of self-defense fails. *The verdict should be guilty of murder or not guilty of murder.* However, in certain cases where the accused was clearly entitled to use force to defend themselves but the force used was woefully disproportional in the circumstances, an accused's plea of self-defense will fail and murder **may** be substituted for manslaughter.[80] The manslaughter element arises because there was loss of self-control in responding to the attack. Cynthia Lee[81] describes this distinction as act reasonableness and emotional reasonableness[82]—explaining that a person full of emotions may be only partially excused in killing their provocateur, if the reaction was reasonable. She continues that in self-defense, only the magnitude of the responding act is questioned as there is a prima facie belief that a person acting in self-defense of an imminent attack should defend themselves with necessary counterforce.

Act 29 illustrates this distinction as regards self-control in Section 37 and Section 52 (b).

Section 37, which says f*or the prevention of, or for the defence of himself or any other person against any crime…a person may justify any force or harm which* ***is reasonably necessary extending in case of extreme necessity, even to killing—***demonstrates the requirement to use necessary force in the circumstances and its proportionality while

Section 52 (b) –which reads: *the defense of provocation may be available to an accused if he was justified in causing some harm to the other person, and, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm* ***as in fact deprived him for the time being of the power of self-***

[79] Ibid
[80] Ibid
[81] Professor of Law, George Washington University Law School
[82] Cynthia Lee, 'Reasonable Provocation and Self-Defense: Recognizing the Distinction Between Act Reasonableness and Emotion Reasonableness' in Paul H. Robinson, Stephen Garvey, and Kimberly Ferzan (eds.), Criminal Law Conversations (Oxford University Press, 2009).

control—demonstrates the requirement for the accused, or the jury to find loss of self-control for the defense to succeed.

Secondly, while an accused in a homicide trial relying on self-defense must prove that it was necessary to use lethal force and that the force used was reasonable or proportionate in the circumstance, an accused pleading provocation need not prove that their action was necessary[83]; all they need to prove is that the force they used was not unreasonable[84]. In the ***Alhassan case,***[85] the court dismissed the appeal because it found no necessity for the appellant to return from his room just to stab the deceased.

Finally, ***Lamptey alias Morocco***[86] stresses the distinction between the two defenses; stating that necessity was needed to sustain a plea of self-defense while sufficient provocation supports the defense of provocation. In his assessment of the self-defense plea, Annan J.A. indicated that

"*What amounts to extreme necessity has not been defined in the [Act] and this must have been on purpose, and no useful purpose would be served by attempting a definition. What may be done is to give instances of what may amount to extreme necessity, and care must be taken by the judge not to give the impression to a jury that circumstances of extreme necessity could only arise in the instances enumerated by him.*"

He further summarized the core of the defense as thus:

"*The essence of self-defence is the right of a man to protect himself against any criminal attack on his person. A man has the right to the preservation of his whole person or any part thereof. Where that right is immediately invaded or threatened by criminal conduct he is entitled to repel the invasion or nullify the threat.*"

On the defense of provocation, Annan J.A. had this to say on the circumstance of the ***Lamptey* case**:

"*That was an unlawful assault and battery committed against the appellant by the deceased who was the aggressor. That unlawful assault and battery was of a very violent nature and was inflicted with a heavy instrument — the same instrument which was later used by the appellant on the deceased. Again apart from the violence of that unlawful attack on the appellant, there were words and other circumstances of insult accompanying that act. The deceased had made a rude exclamation about the mother of the appellant and one which a good many people may well find difficult to let pass. It seems reasonably clear that in the particular circumstances of this*

[83] Ibid
[84] Ibid
[85] Ibid
[86] Ibid

case, the appellant was greatly provoked by the initial conduct of the deceased. The verdict of guilty of murder, therefore, cannot be supported."

The two defenses also differ in reference to the weapon used in striking the deceased. Whereas self-defense does not consider the weapon used,[87] Act 29 expressly mentions that the weapon used could disable the accused from relying on the defense of extreme provocation[88].

In summary, for self-defense, loss of self-control is replaced with proportionality with which the accused repelled the attack, and as mentioned, that balance is determined by the reasonable belief of the man defending himself in the moment and not with the benefit of hindsight. Extreme provocation simply rides on the assumption that the deceased undermined the accused's power of self-control, causing the latter not to think through his reaction which the authorities term the accused was not *"a master of his mind."* In self-defense, the accused, acted voluntarily with support of all his faculties.

How these laws reflect in Robert Mensah's killing.

THE ROBERT MENSAH CASE *(MELFA)* IN FOCUS

The facts of ***Melfa***[89], the analysis of which the above exposition will provide context are simple and not at all difficult to grasp. Robert Mensah, described by Sowah J.A., as an international football star was at a drinking bar with some friends when a fight developed between him and one of his friends. The appellant, who was also at the bar—on a different table, did what any reasonable man would do and tried to separate them but the deceased turned on the appellant and beat him up and threw him into a fence. The appellant was advised to retreat and leave, which he did. Shortly after, the deceased followed him and resumed the attack on him. He picked up a broken bottle and warned the deceased to stop the attack but the deceased still advanced, whereupon, in the face of the imminent threat, he stabbed the attacker. Robert Mensah died in the hospital from the wound.

The trial judge indicated the stabbing was a crime of violence, for which he imposed eight years for manslaughter and the Court of Appeal reduced the

[87] *Bodua alias Kwata,*
[88] Section 54 (d)
[89] [1974] 1 GLR 174

sentence to four years after dismissing the appeal against conviction. To this, Sowah J.A. responded *"each crime of violence should be considered on its own merits;"* I agree. However, was a crime committed by the appellant in the violent episode? The discussion to this point will aid in drawing a conclusion. In the introduction, the paper mentions the formula used to arrive at criminal liability which is Mens Rea plus the Actus Reus and the absence of a **valid** defense—which negates the Mens Rea or intent, in this case. A complete defense will thus, discharge an accused of liability. In applying the authorities discussed, the first question is did the appellant lose the power of self-control as to rely on provocation? The answer is in the negative. As provided for in Section 53 and applied in ***Lamptey,*** assault and battery must be of a kind, in respect of its violence or by reason of accompanying words, gestures, insults or other circumstance, actually cause the accused to so impassioned, thus losing the power of self-control. The facts in ***Melfa*** suggest no loss of self-control—especially where the appellant took the pain to warn the deceased instead of just pouncing in rage as the cases discussed above illustrate.

Section 52 (b) *supra,* which is another matter of partial excuse also does not apply here. It provides that the accused *"was justified in causing some harm to the other person, and, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self-control"*

The ***Anguyan case***[90] has already demonstrated what constitutes excess force. That is where the attacker was already immobilized and the defender still struck him. In ***Melfa***, the only time the appellant struck the deceased as the judgment shows is when the deceased still advanced—posing the imminent threat, the harm was therefore not in excess.

Section 52 (b) also requires that the threat deprives the accused of the power of self-control. ***Anguyan***, again demonstrates what actions a court should assess to determine loss of self-control. In the case, it is stated clearly that the appellant struck the deceased multiple times, even after he became incapacitated—confirming he was momentarily not a master of his mind. In ***Kontor,*** there is an immediate expression of remorse from the appellant after he struck the deceased, also affirming a brief moment of losing the power of self-control. None of these are present in ***Melfa***. The conviction on manslaughter which the Court of Appeal upheld can therefore, not stand and should have been quashed; for the decision

[90] Ibid

was against the weight of evidence. As explained by the ***Palmer case***[91]**,** there is no general rule that where the plea of self-defense fails, manslaughter be substituted.

Where the elements of provocation fail as evident in the preceding paragraph, only two options remain, guilty of murder or not guilty of murder. The requirements to succeed on self-defense, having been discussed at length, will now be applied to the facts of the case under review.

Firstly, does the appellant have a right to self-defense? That is an affirmative. Was the threat imminent as required by ***Act 29, Norman, Anguyan, Palmer*** and the other authorities? Yes, as the deceased was not immobilized and still advanced on the retreating appellant. Was there a duty on the appellant to run away from the scene? The persuasive foreign authorities and binding home authorities lead us to answer this in the negative. Lord Lane CJ in the ***Bird case*** minces no words when he says there is no duty on a person being attacked to retreat. Lord Morris approves this in ***Palmer*** and Annan J.A., in ***Lamptey alias Morocco*** stresses the point which is repeated here that

"***It cannot be the law that in every case, even in an open space, a victim of a murderous or other serious felonious attack must provide some evidence that he had retreated to some distance."***

And even if there court required some proof of retreat in this specific circumstance, the appellant did retreat from the club when asked to do so; only to be pursued by the deceased. Lastly, the accused in a self-defense plea, must prove that in the particular circumstance, they did not use unreasonably disproportionate force. If there is any doubt as to the proportionality of the force, the fundamental principle is that the doubt must go in favour of the accused[92]. What is proportional force always depends on the circumstances of the case;[93] there is no general rule except in the circumstances, it should not be disproportionate.

Should the appellant have used a weapon or engaged the deceased in a fist fight to defend himself? Sowah J.A. describes the deceased as a man of violent temper; he is a sportsman and is physically fit as all active sportsmen are—would a reasonable man engage a physically fit man of "violent temper" in a fist fight when he is not the aggressor? It does not appear so. More so, In the ***Alhassan***

[91] Ibid
[92] The Presumption of innocence until proven guilty beyond reasonable doubt
[93] Ibid

case,[94] the appellant ran into his father's room to retrieve a knife before coming out to continue the fight which was evidence that he could have locked the door and disengaged the fight as Abban (Mrs.) J.A noted.

In the instant matter, as Sowah J.A. recounted, the appellant merely picked up the broken bottle with which he stabbed the deceased and being around a drinking bar, broken bottles lying around are not out of the ordinary—there is no mention of the appellant picking the broken bottle before exiting the club which would suggest premeditation as ***Alhassan*** illustrates. And as ***Bodua alias Kwata***[95] explains, what might take away the plea of self-defense, is the amount of force used and not the nature of the weapon. The question of the broken bottle is, thus, defeated.

On the manner in which it was used and whether the appellant could have struck a less delicate part of the deceased's body, the relevance of Lord Morris in ***Palmer*** is brought to fore.

The judge says:

"It will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If…a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

Professor Lee, in her article *supra*, agrees. She argues that the test of proportionality of the defensive action is in the reasonable belief of the person so defending himself against an unprovoked aggressor, to which the present writer concurs.

The basic human instinct is to survive and not to navigate the fine grains of legalese. How just then, would it be, for a court to expect an adrenaline-filled man, seeking only to survive an attack, to pause and consider the niceties of what a jury would consider proportionate before fending off the attack? Ridiculously unjust! In the present circumstances, therefore, it is reasonable to conclude, with all the authorities applied to the facts, that the force applied was reasonable and proportional; and if at all, any doubt remains in the mind of the court, which this writer disputes, the principle is that the doubt must lead the court to acquit. From the foregoing, this writer asserts that Sowah's Court, respectfully, erred in dismissing ***Melfa's*** appeal.

[94] Ibid
[95] Ibid

CONCLUSION

It is good law that no legal system permits impulsive homicide on the least provocation. Be that as it may, the law cannot as well stymie a non-belligerent party in the face of imminent bodily harm or death. All life is sacrosanct but if one person puts another in fear of losing theirs or in fear of being so harmed as to lose the goodies of a fully functioning body, no impediments placed on the defending party's right to resist such threats should be justified as the list of authorities at odds with ***Melfa*** demonstrate.

A proposed accurate direction which should be given to juries and which should guide the courts, garnered from the list of authorities appraised for this paper should be or substantially similar to: where the facts show that the defending party had enough time to retreat, and did so but then turns around to re-engage the initial attacker, this time with a lethal weapon, it is enough proof of premeditation and both defenses of extreme provocation and self-defense must fail. Where the facts show that the defending party further struck the attacker after the latter had become immobilized, it is evidence of excessive force for revenge and not self-defense and both defenses must fail. Where the evidence shows that on persistent attacks, the defending man dealt a grievous blow on an aggressor, the jury should assess the surrounding circumstances to conclude if he did so upon losing control of his faculties, if so, provocation must succeed, unless where it was not a single strike and further blows were dealt after the attacker had become immobilized or the weapon used displayed some forethought or cruelty, then both defenses must fail. Finally, where the facts show the defending party only struck the aggressor while the attack was still imminent, that is enough evidence that only reasonable and proportionate force was used and self-defense must succeed. ***Melfa*** falls within the last scenario.

The so-called social contract notwithstanding, the great libertarian philosopher, John Stuart Mill wrote: *"each is a proper guardian of his own health, whether bodily or mental or spiritual.*[96]. The right to self-defense is, therefore, fundamental and inalienable; this is the writer's position.

POSTSCRIPT

First of all, it is without doubt that the killing of Robert Mensah pained the nation. Football, undoubtedly, is a passion of this nation and Robert Mensah's prowess were not in doubt. The Black Stars could have gone places with him in the posts. The sentiments of the nation was high and the people cried for

[96] Mill, J.S. *On Liberty* (Dover Publications 2002) p. 27

vengeance against his killer. It is, therefore, understandable, the difficult situation in which their Lordships found themselves. Were they just going to let the killer off the hook? Would Ghanaians have understood or would they say well, some money probably exchanged hands? These sentiments, notwithstanding, we should always be guided by the dictum of Edusei J in ***Allasan Kotokoli v. Moro Hausa:***[97]

"Sentiments must not have a place in the administration of the law otherwise the growth of the principles of the law as enunciated in courts' decisions would be stifled and jurisprudence would be worse for it."

Secondly, the two-page decision fails to mention the legal arguments advanced in favour of the appellant.[98] The direction given to the jury by the trial judge is also not referenced—which does a disservice to anyone seeking to critique their Lordships' conclusion. However, the opening lines of the decision which read:

"*We have listened carefully to the able submission made by Mr. Okyere-Darkoh in his attack on the conviction of the appellant…"* supports an assumption that self-defense was argued. A thorough discussion on those arguments could have aided later generations to appraise the judgment better.

[97] [1967] GLR 298
[98] Attempts to retrieve same from relevant authorities yielded no results.

INTERPRETING THE 1992 CONSTITUTION: A PEEP INTO THE MIND OF THE JUDGE.

A VALEDICTORY BY:

KABU NARTEY[1]

INTRODUCTION

In the administration of justice, the judge plays an important role by giving judgment mostly after listening to legal submissions by lawyers. These submissions are borne out of issues either between two parties who put two different meanings to a particular provision in a constitution (per se) or after a party singly invokes the exclusive jurisdiction of the Supreme Court pertaining a specific provision. In all these, the judge would have to interpret the law. What he says becomes the law unless and until set aside. However, unlike specific rules governing Statutory Interpretation, Constitutional Interpretation is radically different from the interpretation of an ordinary legislative provision. More so, "no principles or guidelines were [EXPRESSLY] provided for by the Constitution by which the Supreme Court was to exercise the above jurisdiction".[2]. In addition, the keys to interpretation of the Constitution lied within the Interpretation Act of 1960 which has been described as an inferior law and thus, an upfront to the concept of Constitutional supremacy[3]. Meanwhile, Justice Date-Bah in his *Reflections on the Supreme Court of Ghana 2015*,[4] observes that

[1] Acknowledged proof-reader of Prof E.K Abotsi's Constitutional Law of Ghana : Texts, Cases & Commentary (p. xvii) and Research Assistant to Manasseh Azure in book "The Fourth John; Reign, Rejection and Rebound ; MA, Development Communications; Kufuor Scholars Fellow ; GJA Student Journalist of the Year, 2018 ; NUGS Honorary Awards Recipient 2021 ; Fmr. UG Law Student Rep. to the General Assembly ; 2022 National Champion of Philip C. Jessup Int. Moot Competition & Recipient, 2022 UGSol Most Versatile Law Student.

[2] E.K Quansah. The Ghana Legal System. 2011. **But author introduces "EXPRESSLY" because Article 34 of the Constitution, 1992, provides a context for the interpretation of the Constitution**.

[3] The Memorandum to the new Interpretation Act, 2009 (Act 792) **described the initial arrangement where the interpretation of the superior law like the constitution is subject to the Act 1960 as contradictory, hence the new Act was to give more room for judges to broadly interpret the law.**

[4] p.170

this function of the Supreme Court has become an important innovation in the administration justice and the development of the law in the Fourth Republic.

The question therefore is, are judges themselves bound by rules when interpreting the Constitution? And if they are, what are these rules, how unique, and which of them goes on in the minds of these very important persons when giving judgments, some of which may turn out to be controversial and some, highly persuasive? The author attempts to answer these questions using the following chronology:

The brief first defines concepts such as Interpretation and Rules of Interpretation, whilst situating its foundation on the Realism Theory of Law. It then discusses judicial pronouncements that have led to rules guiding Interpretations of the Constitution. Further, it distills a common rule from the various judicial pronouncements to arrive at the Modern Purposive Approach (MOPA) which has fast gained popularity. Lastly, it identifies the advantages and disadvantages in the MOPA whilst concluding with a summary of findings.

Interpretation, When & Why?

John Edzie [5] defines Interpretation as involving the rational process of determining the legal meaning or normative message of a legal text, often for the purpose of applying it to set of fact(s) or to a situation(s) before court or interpreter. The importance of this juridical exercise is to reveal the intentions of the Legislator.[6] In Ghana, the Supreme Court has the exclusive original jurisdiction in interpreting the Constitution[7]. And though there has been emerging confusion about interpretation and application of the Constitution, the Court of Appeal in **Ex-Parte Akosah[8],** established four circumstances that call for interpretation. They are when:

(i) Where the words of the provision are imprecise or unclear or ambiguous; (ii) Where rival meanings have been placed by the litigants on the words of any provision of the Constitution; (iii) Where there is a conflict in the meaning and effect of two or more Articles of the Constitution, and the question is raised as

[5] See John Kobina Edzie, Modern Purposive Approach to Interpretation in Ghana (ed.) Albert Adaare, Sone Life Press, Accra. 2015

[6]See RE AGYEPONG (DECD.); DONKOR AND OTHERS v. AGYEPONG [1973] 1 GLR 326

[7] Article 130(1) of the Constitution, 1992

[8] REPUBLIC v. SPECIAL TRIBUNAL; EX-PARTE AKOSAH (1980) GLR 592 CA.

to which provision should prevail; and (iv) Where on the face of the provision, there is a conflict under the Constitution and thereby raising problems. Indeed, Bannerman CJ in the **Maikankan case**[9] emphasizes that "A lower court is not bound to refer to the Supreme Court every submission alleging as an issue the determination of question of interpretation of the Constitution or of any other matter contained in article 106(1) (a) or (b). If in the opinion of the Lower Court the answer to a submission is clear and unambiguous on the face of the provision of the Constitution of laws of Ghana, no reference need be made since no question of interpretation arises and a person who disagrees with or is aggrieved by the ruling of the Lower Court has his remedy by the normal way of appeal, if he chooses…"

The concept of Interpretation strengthens the Realism school of thought of law [10] which, inter alia, suggests that what the Judge say is the law, is law albeit, guided by the original intentions of the law maker[11]. Oliver Wedell Holmes under his Prediction Theory best explained this that, "'"[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[12]

Generally, Interpretation or Construction of Constitutions, Statutes, Deeds and Documents is guided by some rules. These rules were formulated by the Judges and not enacted by Parliament. They include the Mischief Rule, the Literal Rule, the Golden Rule… [And] now to the Purposive Approach[13]

According to the Memorandum to Act 792, the Mischief Rule was enunciated in the **Heydon's case**[14]**.** The case established four criteria for which the Rule should apply – (a) the common law before the making of the Act; (b) the defect for which the common law did not provide; (c) the remedy prescribed and (d) true reason for the remedy. The Literal Rule was enunciated in the **Sussex Peerage case**[15]**.** This approach adopts the popular, ordinary, natural, dictionary or grammatical meaning of words and gives them that meaning in a statute. The

[9] Republic V. Maikankan (1971) 2 GLR 473, SC.
[10] According to Krapa H. in a private lecture at UGSol 2021, "Meaning Nature and Functions of the Law, 2021", the Judge plays a powerful role in the Realism school with factors such as the inarticulate value premises, norms, ethics and et cetera influence their rulings.
[11] See Haruna V. Republic [1980] GLR 189 – on discretion of the court on the question of years of sentencing. See also the Ransford France case cited supra on the Nuclear Meltdown Theory by Date-Bah JSC (as he then was)
[12] Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457,460-61 (1987)
[13] Memorandum to the Interpretation Act, 2009 (Act 792)
[14] [1584 3 Co Rep. E.R. 637].
[15] [(1844) 11 Co & F 85; E.E 1034]

Golden Rule was enunciated in **Grey v Pearson case**[16]**.** It allows the judge to depart from the literal rule especially when words in legislations are ambiguous or when such provisions could injure other parts of the constitution; a development that the constitution would not have contemplated. The Modern Purposive Approach (henceforth, MOPA) is common among courts in the Commonwealth in recent years. It has been applied to many cases which the author shall refer in the cause of this brief. Essentially, this approach takes account of both the words, context and background of a provision.

On the other hand, per dictum of Date-Bah JSC in **Asare v AG,** [17] rules are not to be misconstrued to mean the ratio of cases because the former are not binding. They are "all mere aids to interpretation…Judges, depending upon their judicial philosophy, will pray in aid particular principles or rules of interpretation"

Principles or Rules of Constitutional Interpretation

The Constitution has been described in many uncommon terms. In some instances, it is referred to as the extraordinary law of the land and that it embodies the aspirations and souls of the people in a way that ordinary laws cannot.[18] Sometimes, it is described as an organic law capable of growth, having a spirit and a letter[19]. In other instances, it is known as the "safest leader of the army of judges – not esoteric legal philosophies"[20] as well as the law that knows neither mother, father, government, inter alios, but knows only the truth and what it says by itself. [21] It is the supreme law of the land, to which the validity or nullity of all other laws are measured[22]

The above descriptions go a long way to suggest that the Constitution is unique and consequently, its interpretation must be clearly defined to cure any possible mischief on the part of any judge. Although Quansah cited supra, alleges that

[16] [(1957) 6 H.L.C 61; 10 E.R. 1216]
[17] [2003-2004] 2 SCGLR 823; See also dictum of Lord Reid in Maunsell v Ollins [1975] All ER 16 at p. 18.
[18] Dictum of Atuguba JSC in ASARE V ATTORNEY-GENERAL (2012) Writ No. J1 /6/2011, in reference to f.n12 supra
[19]Orbiter of Sowah JSC in TUFFUOR V ATTORNEY-GENERAL [1980] GLR 637
[20]"Constitutio est exercitus judicum tutissimus ductor" per Archer JA in SALLAH v. ATTORNEY-GENERAL (1970) GLR
[21] "Constitutio non novit patrem, nec matrem, nec magistratum, sokim veritatem et qued constitution dicet" per Sowah JSC in MEKKAOUI v MINISTER OF INTERNAL AFFAIRS [1981] GLR 664 -722
[22] Article 1 (2) of the Constitution, 1992

the Constitution, 1992, itself did not provide for aides and ways through which the judge should make meaning out of its provisions, there are some mentions in the constitution as well as judicial pronouncements on the principles governing its interpretation.

Bennion[23] started off with the Constitution, 1960 where he gave some four principles that should guide the interpretation of the said constitution:

i. It [Constitution, 1960] is a mechanism, and all of its operative provisions are intended to have the precise effect indicated by the words used – no more no less ;
ii. It is drafted on the assumption that the words used have a fixed and definite meaning and not a shifting or uncertain meaning ; that mean what they say and not what people would like them to mean ; and if they prove unsuitable they will be altered formally by Parliament and not twisted into new meanings by "interpretation" ;
iii. It assumes that legitimate inferences will be drawn by the reader, but that he will not transgress the rules of logic – as by drawing an inference from one provision which is inconsistent with the express words of another provision; and
iv. It needs to be read as a whole, and with care.

Over the past years, the courts have consistently made juridical pronouncements to directly or indirectly reformulate or restate the above rules. Four cases readily come to mind - **Tuffuor v AG [1980]; Asare v AG [2012]; Mekkaoui v Minister of Internal Affairs [1981] and NPP v AG [1997]**

In all these cases although majority were within the context of statutory interpretation, the courts first described the unique nature of the Constitution, and then further provided for how its provisions should be understood and applied (directly or indirectly):

The often-cited dictum of Sowah J.SC **in Tuffuor v AG [1980]:** [24]

"The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms

[23] Bennion F.A.R. Constitutional Law of Ghana, London, Butterworths (1962) at p.111-112
[24] [1980] GLR 637

of government possesses and exercises. It is a source of strength. It is a source of power. Its language, therefore, must be considered as if it were a living organism capable of growth and development. Indeed, it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development" (emphasis supplied)

Associating with the Memo to Act 972, Atuguba J.SC **in Asare v AG [2012]** reproduces parts that speaks to the Constitution:[25]

"It [Constitution] is organic in its **conception** and thus allows for **growth and progressive development** of its own peculiar conventions…" (Emphasis supplied)

In Mekkaoui v Minister of Internal Affairs [1981], [26] the Court through Sowah JSC in settling the issue of Nationality and Citizenship in the 1979 Constitution, inter alia, described the "character of the Constitution" as "…laws which are live". It also described it as "forward-looking document".

In NPP v AG[27], Bamford-Addo JSC said "…provisions of the Constitution should be given a liberal and broad meaning, rather than a narrow or doctrinaire one, to suit the changing social and political development of the nation"

Quansah tried to compile these rules with reference to a number of case law. Although all ten [28] identified are relevant, three are more relevant for the purposes of this brief, more so when majority of these rules listed are renditions of

[25] (2012) Writ No. J1 /6/2011
[26] [1981] GLR 664 -722
[27] - [1997-98] 1 GLR 378
[28] According to E.K Quansah, other rules include interpreting the Constitution in a benevolent, broad, liberal and purposive manner so as to promote the policy underpinnings of it. But in compelling cases, this general rule will not apply (See R v Yebbi & Avalifo [2000] SCGLR 132 p 140. Therefore, generally speaking, cases on fundamental human rights and freedoms lend themselves to a more liberal or generous interpretation, while cases involving the exercise of power would admit of more restrictive interpretation (See Then-Addy v. EC [1996-7] SCGLR 589 ; The Constitution should be understood as a political document that grows (See Tuffuor v AG cited supra); The Constitution should be interpreted according to principles suitable to its character (See Ex parte Adjei inter alia); The Court should avoid importing into the Constitution what does not appear therein (NPP v AG (31st December case));The Interpretation Act, 2009 may come in handy in understanding provisions; The court should ascertain the intentions of the law maker; Provisions in the Constitution should be given a holistic view ; On matters of constitutionality or otherwise of any law, the court should not concern itself with the propriety of the impugned law, rather what the law says itself (See NMC v AG, opinion of Bamford-Addo JSC)

Bennion's rules identified above. Noteworthy, a few more of these ten rules are seen appearing in discussions in parts of this brief:

1. **Deriving this rule from case law such as Tuffuor v AG cited supra, the court is expected to always "take into account the spirit of the Constitution as a tool for constitutional interpretation":**

Sowah JSC in the case cited above explained that the court at every point should be guided by the aspirations and will of the people which are embodied in the Constitution. This should give room for the growth of the constitution as a living organism. In allowing for its growth, a broad and liberal "spirit" is required for its interpretation.

This rule can be said to stem from the Historical school of thought owing to F.K Von Savigny's nationalist spirit (Volksgeist) concept. The unique custom, values and aspirations of the Ghanaian people which animated the Constitution should always be at the back of the mind of a judge when giving meaning to provisions therein. The struggle for independence and democracy which characterized the political movement should also influence the judge. The clarion call of the people against dictatorship and protection of the fundamental human rights are also to be engraved on the mind of the judge. The Memo to Act 792 stresses on the need to take into account the cultural, economic, political and social developments of the country without recourse to amendments which can be avoided if the spirit of the Constitution is given its due prominence.

Noteworthy that, although some of the following cases are statutory interpretation authorities, the author discusses them in context of Constitutional interpretation because the principle set therein are common to Constitutional interpretation (established earlier).

Emphasis mine: For instance, when giving meaning to **article 14 of the Constitution (Protection of Personal Liberty)** and **article 19 of the same Constitution (Right to Fair Trial)** per se, I contend that together with the letter of the current Constitution, 1992, which already strictly upholds the freedoms of the people, the judge may have to also bear in mind the dark history of Ghana where people were imprisoned without trial[29], arrested without

[29] Criticisms about ruling in Re Akoto continues to be a good guide for the courts. Akoto and 7 others were arrested and detained for 5 years without trail under Nkrumah's Preventive Detention Act for allegedly instigating and inciting citizens in various parts of the country at the expense of the peace and security of the country.

warrants [30]and the general culture of silence owing to a one-party state, among others. The dictum of Lord Simonds in **Christie v Leachinsky [1947]** as relied upon by Justice Charles Crabbe in **Ex parte Salifa** [31] is persuasively instructive in construing the above provisions cited above; that 'Blind, unquestioning obedience is the law of tyrants and slaves: …arrested with or without a warrant the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as will enable him to regain it".

The spirit of the Constitution is what gives the judge the liberal and a broad base to construe the meanings of the provisions since the letter of the Constitution can be restrictive to the text. But this broad base as seen in one of the ten rules listed by Quansah, should be put within the confines of the constitution. In order words the courts should avoid importing meanings outside the constitution. This can only be possible when provisions are read not in isolation but within context of other provisions. In **Ex parte Salifa** supra, the court explained that it must be done within its four corners – *ex visceribus actus* [32]

2. Constitutional Interpretation should be made within the Directive Principles of State Policy in Chapter 6, Article 34 of the Constitution, 1992:

This provision spells out a broad-based framework within which all citizens including the Judiciary and "other bodies and persons in applying or interpreting this Constitution or any other law… should be guided"[33]. This framework covers Political, Economic, Social, Educational, Cultural, International and Civic duties[34]. Each area has a number of objectives that the nation seeks to achieve and obliges all citizens and persons in capable positions to help achieve them.

On whether article 34 is justiciable, in his dictum in **New Patriotic Party v Attorney-General (31st December case),** Justice Adade[35] described these

[30] In R V DIRECTOR OF SPECIAL BRANCH; EX PARTE SALIFA [1968] GLR 646. In this case, Salifa was detained under the National Liberation Council. He was granted habeas corpus by the Court but he was re-arrested for attempted subversion.
[31] [1968] GLR 646. Although this is a statutory interpretation case, it presents a persuasive context for the history of Ghana which, among other events, formed the legislative intentions of the law maker
[32] See fn.27 supra
[33] Article 34 (1) of Constitution, 1992
[34] Articles 35, 36, 37, 38, 39, 40 and 41 respectively.
[35] Dictum in NPP v AG [1993-94] 2 GLR 35

directive principles as justiciable. He contends that if the Constitution, 1992, is a wholly justiciable document, Chapter 6 which is an element of the constitution should also be construed as such unless otherwise stated

3. **Furthermore, Justice Date-Bah[36], argues that the supremacy of the Constitution should be the first rule that should guide a judge when interpreting the law:**

According to him, this fundamental doctrine of constitutional law should double as principle of interpretation, hence the "Courts should so interpret the Constitution as to preserve its primacy over all other laws". He used the "dog and tail" analogy to illustrate this supremacy in that, the tail of the dog should not be the one to wag the dog. Article 1(2) of the Constitution, 1992, establishes this supremacy – "The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void" (e.s)

Distilling the Common Rule(s): Modern Purposive Approach to Interpretation

A common ground could be arrived at after a closer look at the general rules identified by Bennion, Quansah, and Date-Bah[37] cited. They all seem to feed into the broad and purposive approach – the Modern Purposive Interpretation Approach (MOPA). This approach defines the combination of all three rules identified previously in this work.

According to the Memo to Act 792, the courts have actively moved away from the strict constructionist view of interpretation to finding the purpose of every legislation which forms the basis of the approach. In using this, judges do not rely solely on the linguistic context, but consideration is also given to the subject-matter, the scope, the purpose and, to some extent, the background. This approach has gained widespread application among judges specially justices of the Supreme Court of the Fourth Republic. It has been considered as the most effective rule to propel justices.[38] Among others, this approach has effect even on the judicial precedent among courts. It was established in **Ex parte**

[36] Date-Bah S.K. Reflections on the Supreme Court of Ghana. 2015
[37] Refer to intext notes 22, foot notes 27 and 35
[38] Samuel Date-Bah. Reflections on the Supreme Court of Ghana. 2015. p.170 -171

Odeneho[39] that under the modern purposive approach to interpretation, the constitutional provisions imply "the courts established under the 1992 Constitution are only absolutely bound by decisions of other courts established under the same Constitution".

In illustrating this approach in the context of another case law, the author reviews the case – **Commission of Human Rights and Administrative Justice v. Attorney-General & Baba Kamara**[40]**:**

The 2nd Defendant, Mr. Kamara had questioned the jurisdiction of Plaintiff (CHRAJ) alleging that CHRAJ had no powers to investigate him for any wrongdoing since according to him, at the time of the alleged acts, he was not a public officer. CHRAJ sued the office of the AG as a nominal defendant and the 2nd Defendant and prayed the court to declare that Mr. Kamara as being within the jurisdiction of CHRAJ under Article 218 (e) of the Constitution, 1992. This called for the interpretation of the said article. For purposes of emphasis, I shall reproduce article 218 (e):

"The function of the Commission shall be defined and prescribed by Act of Parliament and shall include the duty – (e) to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General and the Auditor-General, resulting from such investigations ;…" (e.s)

In declaring the 2nd Defendant as being within the jurisdiction of CHRAJ, the court led by Date-Bah JSC (as he then was) rejected the literal meaning of article 218 (e) explaining that "the facts of this case cry out for purposive interpretation of the enactment in issue". The court held that it would be unreasonable to construe the said article to mean that a private person who collaborates with a public officer in a contract which has been alleged to be corrupt, is nevertheless excluded from investigations that are aimed at exposing corruption. The principle therefore was that private persons who participate in a public transaction that has become a subject of corruption, will be subject to the ambit of CHRAJ

Indeed, still within the extended context of MOPA, the author associates with this ruling owing to the importance of the work of CHRAJ as an anti-corruption

[39] **Republic V. National House of Chiefs; Ex Parte Odeneho A. Krukoko Ii (Osagyefo Kwamena Enimil VI, Interested Party [2010]) SCGLR 134**.

[40] [2011] 2 SC GLR 746

institution. Formerly called the Ombudsman, Chapter Fourteen of the Memo to the Proposals of the Constitutional Commission for the Constitution of Ghana, [41]explained the rationale behind the present day CHRAJ aimed at eliminating various degrees of administrative injustices. Therefore, it was imperative for the courts to strengthen such an institution by always recounting the purpose for which it was set up. This perhaps was a major consideration for the court in arriving at this ruling

Merits and Demits of the Modern Purposive Rule

According to Date-Bah JSC[42], the emphasis and application of this rule by the apex court of the Fourth Republic is one of the highpoints that has helped the court's contribution to the development of Ghanaian law and justice administration. Though it was used by courts of earlier republics (as established in this brief), it has become widespread in the current republic. The Modern Purposive Rule stresses on context of the law. It creates a balance for competing interest and rules of interpretation and also creates a more flexible room for the judge to show dynamism even though this should be within the confines or as close as it can get to the legislator's intentions.[43] The Constitution is considered broader than the text [literal rule] and included more sources that could be mined for judicial opinions [MOPA] provided sources are not inconsistent with the Constitution. [44]

However, a possible threat to the growth of the MOPA is the rule that the various rules discussed above are generally not binding on judges. Consequently, though every judge is highly encouraged to apply the MOPA, s/he can use either of the rules based on his "judgment" wholly or partly including departing from the MOPA.

CONCLUSION

As Oliver Wendell Holmes puts it in his Prediction Theory, what the courts, led by the judge, say, is what law is. Admittedly, this is "always complex".

[41] See paragraph 732 of the Proposals of the Constitutional Commission for a Constitution of Ghana
[42] Refer to f.n35
[43] Refer to f.n 41 supra. See also Kasser-Tee C B. K. in Private Lecture at UGSol "Legal Method General Principles of Statutory Interpretation"
[44] Ronald Dworkin, A Matter of Principle (Cambridge, MA: Harvard University Press,1985), pp. 34-38.

[45]Interpretation and construction of laws are generally approached by the Mischief Rule, Golden Rule, Literal Rule or the Modern Purposive Approach.

Whilst these rules are applicable to statutory interpretation, the interpretation of the Constitution which is the supreme law of the land is often guided by the modern purposive approach albeit these rules are not exclusive of themselves. This is due to the supremacy and uniqueness of this constitution as expressed by Constitution and the esteemed justices.

This essay has traced judicial pronouncements on interpretation of the Constitution through jurists such as Bennion and Quansah through to the courts of the Fourth Republic. The highlight has been need for the Judge to give the Constitution a broad, purposive interpretation in order to aid its growth as a political document and an organic law that embodies the wills, aspirations, struggles and history of the people

The Judge is therefore required to keep in mind these rules which are largely situated within the MOPA. The author identifies some merits of the MOPA which included a more flexible room offered the judge to reflect or as much as possible, get closer to the legislator's intensions. Also, the author identifies a major challenge in MOPA which comes from the same flexibility and non-exclusivity of this rule of interpretation.

POSTSCRIPT

Alas! An article that was to be my maiden at the UG Faculty of Law, has become my valedictory piece, perhaps a nunc dimittis (Luke 2: 29-32)

Like a valedictory of a judge, I make few reflections: This becomes my 7th legal publication @ faculty, and there's no better way to retire than to take a curios peep into the mind of the modern judge, the Creator of man-made supreme law like the Constitution, 1992.

When I compare the first manuscript in 2021 to this final draft, l can only acknowledge one of the then chief editors of the University of Ghana Student Law Journal, T, (name withheld) whose critical reviews made me overhaul what initially was without form. I would discover during my vacation in first year that, Constitutional interpretation was radically different from statutory interpretation, perhaps something I didn't really catch in class.

[45] Justice Date-Bah, Reflection on the Supreme Court of Ghana, (2015).

Providence would have it that after this first blind encounter with T, I became one of T's student Research Assistants in later years. I served and continue to serve T, inter alios, contributing to one of T's major recent manuscripts, currently under continental reviews. Above all, I served this faculty and the UG community - FROM class-senator; a law student rep to the SRC General Assembly where Hassan Timtooni and I tried to redefine student legal activism; an in-house student counsel to Radio Univers; TO representing UG, Faculty and Country in 3 major inter-national competitions, literally dedicating my entire 3-year Post First Degree law course to service. Though I did not get the opportunity to serve my colleagues in the capacity of an LSU President, I continued to make my skill, leadership and mentorship available, to the LSU, Faculty and all who called upon me.

It's my nunc dimittis to scholarship and legal student activism during my generation, 2021-2023 LLB class. And as a last prayer, my supplications to all who gave me a name, shoulder, love and lessons.

Kabu Nartey
Under my Ink, Blood & Sweat!
A Humble Black Salute!

THE TRAJECTORY OF EQUITABLE DISTRIBUTION OF MATRIMONIAL PROPERTY IN GHANA: WHAT IS NEW?

CINDY OHUI DUORDOE[1]

INTRODUCTION

The never-ending question on the minds of some people is: will gender equality be a reality? This quest for gender equality has been fought by gender activists, feminists, and women groups for decades. Goal five (5) of the Sustainable Development Goals seeks to promote gender equality and the rights of women within a stipulated period.[2] One important area that will promote gender equality is the property rights of women after the dissolution of marriage after its subsistence for several years or the demise of their spouses. Thus, it is unfortunate, that spouses especially wives look to the courts to distribute matrimonial property between them for serving their spouses and offering emotional and psychological support in the marriage in absence of adequate legislation[3]. There is some form of pre-existing legislation on the distribution of matrimonial property which is seen in Section 19 of the Matrimonial Causes Act, 1971, Act 367. However, the reach of the law is limited and may not the provisions of the 1992 constitution. There have been decisions of the courts on distribution of matrimonial property which promote gender inequality and the subjugation of the rights of women. The main aim of this paper is to talk about the recent developments on right to spousal property and the issues that arise from such developments. To achieve this goal, existing legislation on spousal right to property and the past developments on marital property will be analysed.

Legislation on Matrimonial Property.

Section 19 of the Matrimonial Causes Act, 1971, herein Act 367, deals with financial provision for spouses. It states that "The court may, whenever it thinks just and equitable, award maintenance pending suit or financial provision to

[1]The author is an LLB student at the University of Ghana and holds a Bachelor of Arts Degree in Philosophy and Political Science. She took inspiration from Professor Mensa Bonsu and Professor Dowuona-Hammond's articles on matrimonial property.

[2] D. Griggs, 'From MDGs to SDGs: Key Challenges and Opportunities, Futurearth Research for Global Sustainability.

[3] Note, the term spouse is a gender inclusive language which denotes neutrality.

either party to the marriage, but no order for maintenance pending suit or financial provision shall be made until the court has considered the standard of living of the parties and their circumstances".

Section 20(1) of the 1971 Act gives the courts discretionary powers in divorce cases to settle the proprietary rights of the parties on a "just and equitable basis." The provision states: "The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks just and equitable."

Section 21 of Act 367 talks about conveyance of title. Per Section 21(1) of Act 367, when a decree of divorce or nullity is granted, if the Court is satisfied that either party to the marriage holds title to movable or immovable property part of which rightfully belongs to the other, the Court shall order transfer or conveyance of the interest to the party entitled to it on the terms that the Court thinks just and equitable.

Section 21(2) of Act 367 states that the Court may order the registrar of the Court to enact the appropriate transfer on the part of the party if the party ordered to make the conveyance is unable or unwilling to do so.

Article 22 of the 1992 Constitution makes the following provisions on property rights of Spouses:

(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.

(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.

(3) With a view to achieving the full realization of the rights referred to in clause (2) of this article:

a. spouses shall have equal access to property jointly acquired during marriage.

b. assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage."

The Development of the Law on Spousal Property Rights

The law on matrimonial property began with the law that property acquired with the assistance of a wife was regarded as the individual property of the man. This

position was held ***in Quartey v Martey***[4] by Ollennu J. The customary law position was that a wife and children had the domestic responsibility of assisting the husband/father with his business and as such the wife could not claim any interest in any property, she assisted her husband to acquire.

In *Quartey v Martey*[5], H.A. Martey and Evelyna Quartey were married under customary law for 25 years. During the marriage, the plaintiff assisted her husband both physically and financially until he died. After some time, Martey died intestate, and the relatives of her husband denied her the right to her late husband's properties although she assisted him financially during his lifetime and had given to him assistance in all the jobs he did. Upon the death of Martey, the defendants claimed that the plaintiff was not married to Martey. The widow also issued a writ of summons directed to the defendants claiming expenses incurred during the funeral, one-third share in 70 cattle, one –third share in the house at Official Town, Accra, and one-third share in the sum of £1,305 8s. 6d., which stood to her late husband's credit at the time of his death.

The court presided by Ollennu J, held that:

".. by customary law it is a domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, e.g. farming or business. The proceeds of this joint effort of a man and his wife and/or children, and any property which the man acquires with such proceeds, are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or the children. The right of the wife and the children is a right to maintenance and support from the husband and father".

The judgment in *Quartey v Martey* by Ollennu J paints a picturesque view of the suffering of women in relation to spousal rights. The learned judge was reinforcing the patriarchal notions that have been embedded in him through societal influence. This judgment which is over sixty-two years old is disheartening from a judge who is supposed to be the bastion of rights. The fact that the widow must be "married" to someone else in order to remain "relevant" or qualified for the collection of maintenance allowance gives the lucid impression that women are subordinate to men just by being different in gender. However, the era of the judgment speaks volumes about the judiciary upholding archaic customary practices that belittle women and abuse them physically,

[4] [1959] GLR 377
[5] [1959] GLR 377-383

psychologically, emotionally, and mentally. It was unfortunate that abuse against women were institutionalized under the guise of customary law.

Then, the law moved to the principle of substantial contribution in the case of ***Yeboah v Yeboah***[6]. In this case, the court had to decide what amounted to "substantial contribution" in order to determine whether the contribution could have exceeded the Quartey v Martey threshold of a wife's duty customary law to support her husband in the arena of life, thereby entitling her to a definite amount of property acquired during the subsistence of a marriage.[7]

In the case, the court made a pronouncement on what should happen to a property jointly owned by a couple by stating:

If a wife by contributing to the acquisition of the matrimonial home or any other property becomes a joint owner with her husband, then by application of the doctrine of right of survivorship she becomes sole owner in the event of her husband predeceasing her. The rights which the family have hitherto claimed in the estate of the deceased's husband would have to be re-examined accordingly in order to ascertain more carefully what forms part of that estate. In such circumstances, the matrimonial home would not form part of the estate of the deceased[8].

In Yeboah v Yeboah, Hayfron Benjamin J (as he then was) held that there was no customary law preventing the creation of joint interest by persons not related by blood. The current position of the law regarding joint property is that substantial contribution by a spouse to the acquisition of property during subsistence would entitle that spouse to an interest in the property.

The Yeboah case added fuel to the debate on matrimonial property by giving impetus to other cases either occasioned by divorce or intestacy in which there were inequity of existing rules by denying one party access to matrimonial property acquired when the marriage is subsisting.

Again, the law on spousal property rights moved to the principle of equality in the case of ***Mensah v Mensah***[9]. The court applied the equality principle to determine which proportions of the couple's joint property would be shared.

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[6] 1974] 2 GLR 114

[7] Henrietta J A N Mensa-Bonsu, 'Ensuring Equitable Access to Marital Property When the Holy Estate Becomes an Unholy Ex-State: Will the Legislature Walk the Road Paved by the Courts' (2011-2012) 25 U Ghana LJ 99

[8] Supra note 10, p. 112

[9] [1998-99] SCGLR 350

Bamford- Addo JSC

"Thus…the principle that the property jointly acquired during marriage becomes joint property of the parties and such property shared equally on divorce; because ordinary incidents of commerce have no application in marital relations between husband and wife who jointly acquired property during the marriage"[10].

It would appear that the decision from Mensah v Mensah, that the court favoured equal sharing of joint property in all circumstances. However, this position has been modified and clarified in the case of ***Boafo v. Boafo***[11]. This phenomenal case also raised the issue of what amounts to a "just and equitable" portion, when entitlement based on substantial contribution was in issue.

In that case, the parties who had first contracted a customary marriage in 1982, converted it into an Ordinance marriage in 1990. They cohabited first in Kumasi, then in Dortmund in Germany and then returned to Kumasi, where the marriage eventually broke down. The husband petitioned for divorce in 1999. The wife also cross-petitioned and the marriage was dissolved. On the question of the distribution of property acquired during the subsistence of the marriage, trial court found that the properties had been jointly acquired; the couple conducted their finances jointly, but it was unclear what the exact contribution of the wife to the acquisition of the joint properties was. The trial judge awarded the matrimonial home, a plot of land and their two businesses to the husband. He then awarded one house and ten million cedis in lieu of a share in the two businesses, to the wife. The wife successfully appealed against the distribution of the assets and the Court of Appeal varied the award, awarding her one half of the property. The husband then appealed to the Supreme Court.

The learned judge, Date-Bah JSC analysed the *Fundamental Human Rights* provisions and concluded that *"...what is 'equitable', in essence, what is just, reasonable and accords with common sense and fair play is a pure question of fact, dependent purely on the particular circumstances of each case".* Hence, the Court dismissed the husband's appeal and affirmed the decision of the Court of Appeal.

Again, the court moved to the doctrine of equality in the sharing of marital property in the case of Mensah v Mensah.[12] In (Gladys) *Mensah v (*Stephen)

[10] Ibid pg. 335
[11] [2005-2006] SCGLR705.
[12] [2012] 1 SCGLR 391

Mensah[13], the parties were married under customary law in 1987 which was then converted into a marriage under the Ordinance in 1989. The man was a junior Accounts Clerk at the Comptroller and Accountant-General's Department, and the woman was a trader in rice, sugar, and other such goods at the Krobo Odumase market. During the subsistence of the marriage, the couple jointly traded in sundry goods. The business prospered and a number of properties were acquired. Upon the dissolution of the marriage, the woman petitioned for a half share (50%) of the property so acquired. The man resisted the claim, contending that the woman had been a housewife throughout the marriage and had contributed nothing to the business. Trial court found for the Petitioner. The Respondent unsuccessfully appealed to the court of appeal which affirmed the decision of the trial court. Upon further appeal to the Supreme Court, what the court set down as the sole matter for its attention was whether the equality principle used by the trial and appellate courts in the distribution of the marital property acquired during the marriage following the dissolution of the marriage between the parties was sustainable under the current state of the laws in Ghana. The Supreme Court made short shrift of the contention that the woman had made no contribution to the acquisition of the property.

In the unanimous judgment, which was delivered by Dotse, JSC.

The court held, We believe that, common sense, and principles of general fundamental human rights requires [sic] that a person who is married to another, and performs various household chores for the other partner like keeping the home, washing and keeping the laundry generally clean, cooking and taking care of the partner's catering needs as well as those of visitors, raising up of the children in a congenial atmosphere and generally supervising the home such that the other partner has a free hand to engage in economic activities must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved. ... In such circumstances it will not only be inequitable, but also unconstitutional ... to state that because of the principle of substantial contribution which had been the principle used to determine the distribution of marital property upon dissolution of marriage in the earlier cases decided by the law courts, then the spouse will be denied any share in the marital property which it is ascertained that he or she did not make any substantial contributions thereof. (Emphasis in original).[14]

[13] Gladys Mensah v. Stephen Mensah Civil Appeal No. J4/20/201 1; judgement delivered on 22" February, 2012 coram Akuffo, JSC (presiding) with Date-Bah, Adinyira, Dotse and Akoto-Bamfo, JJSC; Unreported.
[14] Ibid. p. 9.

In ***Mensah v Mensah,*** it was held that 'we are therefore of the considered view that a time must come for this court to institutionalize this principle of equality in the sharing of marital property of spouses, after divorce, of all property acquired during the subsistence of a marriage in appropriate cases. This is based on the constitutional provisions in article 22 (3) and 33(5) of the Constitution 1992, the principle of Equality and the need to follow, apply and improve our previous decisions in Mensah v Mensah and Boafo v Boafo". Thus, the petitioner should be treated as an equal partner even after divorce in the devolution of the properties.

Again , in the case of ***Mensah v Mensah [2012] 1SCGLR 391***, it was held that the Jurisprudence of the International Association of Women Judges in their November, 2006 USAID Rule of Law Project in Jordan as "application of international human rights treaties and laws to national and local domestic cases alleging discrimination and violence against women", such that the rights of women will no longer be discriminated against and there will be equal application of laws to the determination of women issues in all aspects of social, legal, economic and cultural affairs.

Article 22(3) (a) and (b) of the 1992 envisaged the principle of having equal access to the property acquired during marriage and that of equitable distribution of property upon marriage. Article 33(5) also reinforced the protection of all fundamental human rights and freedoms of all. Thus, it follows from the argument that the petitioner deserved an equal share in the properties in question. The court also reasoned that in common sense, the wife performs certain functions like reproductive roles (catering for the children) in the home such that the other partner has a free hand to engage in economic activities. Hence, a spouse should not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved. The court also affirmed that Ghana is a signatory of the Elimination of All Forms of Discrimination against Women (CEDAW) and applied its principle in affirming the decisions of the lower court.

This case is a landmark case against the discrimination of women in the society in general. It also compensates women after divorce. Thus, the ruling deviated from the customary law position which stated that the wife and the children had a domestic responsibility of assisting the father/ husband with his business as such a wife could not claim any interest in any property, she assisted her husband to acquire as established in ***Quartey v Martey.***

However, the challenge with this equality principle is that its application to polygamous marriage would not amount to anything under customary law and Islam. It is simple to divide a property equally between parties, but it may not be easy to divide joint property between a man and two or more wives.

After the decision in ***Mensah v Mensah,*** then came the decision in ***Quartson v Quartson***[15]. In this case, though the Supreme Court took into consideration, the equality principle in ***Mensah v Mensah and Boafo v Boafo***, it upheld the reasoning of Date -Bah in Boafo v Boafo that the equality principle may be waived if the circumstances of a particular case, the equities of the case would demand otherwise. The Supreme Court held that with the equities of Quartson v Quartson case does not call for a half and half sharing of the marital home. Thus, the judgment given was that the petitioner's interest in the matrimonial home is adequately covered in the award of a double plot of land to her by the courts below.

It is worth noting that the Supreme diverged from the equality principle in ***Mensah v Mensah*** by asserting that:

The decision in Gladys Mensah v. Stephen Mensah, supra is not to be taken as a blanket ruling that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect will continue to be shaped and defined to cater for the specifics of each case. The ruling, as we see it, should be applied on a case-by-case basis, with the view to achieving equality in the sharing of marital property. Consequently, the facts of each case would determine the extent to which the judgment applies.

Thus, though the Supreme Court agreed with the ruling in ***Gladys Mensah v Stephen Mensah*** that the inability to quantify the appellant's wife's assistance does not itself bar her from an equitable sharing of matrimonial property, the learned judges decided to consider the facts of the case as well as the equities prevalent to make a decision. ***Quartson v Quartson*** highlighted the decision that the jurisprudence of equality principle may not apply in all cases.

[15] [2012] 2 SCGLR

What's New: Recent Decisions on Matrimonial Property

Arthur (No.1) v Arthur (No.1)[16] is a case that emerged after the landmark decision of ***Mensah (No.2) v Mensah (No.2).*** This case is an appeal of the unanimous judgment of the Court of Appeal. The facts of the case are as follows:

The petitioner, Patience Arthur and the respondent, Moses Arthur entered into a customary marriage which was converted into an ordinance marriage in 1998 at the Emmanuel Presbyterian Church in Dansoman, Accra. The couple were blessed with three children. During the marriage, the couple constructed a matrimonial home and a storey building at Weija in Accra. The petitioner had asserted part ownership of these properties on the basis of her housekeeping, her role as a driver and her supervision of the construction of the buildings. The respondent on the other hand, resisted the claims of the petitioner and insisted that the properties in Weija are his and that he financed their acquisition through his income from his football career. Thus, the petitioner filed for a dissolution of the marriage, sought for sole custody of the children, an order for joint ownership of the matrimonial property among other reliefs.

The prior judgment of the High Court per Ankamah J, the trial judge was that "… as a fact that though the petitioner did not contribute money to the acquisition of the properties, she helped in the acquisition and development of the two properties. She later on operated the two salons and the supermarket to cater for the needs of the family when the respondent had retired from football." Ankamah J thus ruled that since the respondent purchased a house for the petitioner and contributed to the purchase of a house for the petitioner's mother, he should be entitled to the matrimonial house where he currently resides and the hairdressing salon in the house. However, the court ruled that the petitioner should be given a half share of the storey building and the equipment and appliances in the second salon at Lapaz. This ruling was overturned in the Court of Appeal.

Hence, in ***Arthur (No.1) v Arthur (No.1)*** supra, the Supreme Court unanimously allowed the appeal and restored the judgment of the learned trial judge in its entirety. It is interesting to note that the Arthur (No.1) v Arthur (No.1) follows the ratio-decidendi ***in Mensah v Mensah*** on the jurisprudence of equality principle with slight variations. Owing to the fact that the respondent purchased a house for the petitioner and contributed to the purchase of a house for the petitioner's mother, was awarded the matrimonial home. Despite, the fact

[16] [2013-2014] 1 SCGLR 543

that the petitioner did not provide financial contribution to the purchase of the matrimonial home, she was not left empty-handed. Patience Arthur was given a half-share of the storey-building and the equipment and appliances in the second salon on the rationale that though she did not contribute financially to the purchase of these properties, she assisted in the acquisition and development by her house-keeping role, her services as a driver, her consortium, and her supervision of the construction of the buildings.

The court of equity considers the fact that it will be unjust if the petitioner is left empty-handed because she did not make monetary contributions to the matrimonial properties. The dicta in ***Mensah v Mensah that*** the petitioner created a congenial atmosphere for the respondent through house cleaning, sweeping, cooking etc. to enable the respondent to acquire these properties was taken onto consideration in the Supreme Court's ruling. However, the rationale for a slight deviation of the ratio decidendi in ***Gladys Mensah v Stephen Mensah (supra)*** was because of the ratio-decidendi in Quartson v Quartson. In ***Quartson v Quartson***, the honourable judge held that the Court's decision in ***Mensah V Mensah*** should be taken as a blanket ruling that would afford spouses unwarranted access to spousal property when it is not merited and the application and effect of the decision in Mensah (No.2) v Mensah (No.2) will be designed according to the facts of each case. Thus, on case-by-case basis, this case was decided according by its peculiar facts.

Arthur (No.2) and Arthur (No.2) [2013-2014] SCGLR 569 is a review application of Arthur (No.1) and Arthur (No.1). The Supreme Court led by Justice Dotse reviewed the decision of the ordinary bench and upheld its decision. Dotse JSC held that the review jurisdiction of the Supreme Court should not an avenue of an appeal of a dissatisfied decision of the Supreme Court since the Supreme Court is still the final appellate court.

Justice Dotse held in Arthur (No.1) v Arthur (No.1) that:

Learned Counsel then sought to refer to bits and pieces of evidence to support this ancient archaic and backward proposition of law, to wit the substantial contribution or contribution principle to qualify for a share in property acquired during marriage upon dissolution of the said marriage.

What should be noted is that the Courts in Ghana have for some time now started whittling down the over reliance on the contribution / substantial contribution principle as a basis for the sharing of properties acquired during marriage upon dissolution of the marriage.

Cases like Clerk v Clerk [1981] GLR 583, Boafo v Boafo [2005-2006] SCLGR 705 and the very recent decision of this Court in Mensah v Mensah [2012] 1 SCGLR 391 just to mention a few, show the gradual shift in the decisions of this Court which culminated in the ordinary bench decision in Arthur v Arthur which is now on review in this application.

By these decisions, it is clear that the Supreme Court has now endorsed the "Jurisprudence of Equality" principle in the sharing of marital property upon divorce. In this regard, it is very difficult for us to appreciate any exceptional circumstances that have arisen to warrant a review of the ordinary bench decision rendered on 26th July 2013.

The case of Arthur (No.2) v Arthur (No.2) is a reiteration of Arthur (No,1) v Arthur (No.1). Thus, it is commendable that equality is equity principle in ***Gladys Mensah v Stephen Mensah*** was somewhat followed in the case of Arthur v Arthur. However, the equality is equity principle is not supposed to be automatic by giving spouses unmerited access to matrimonial property. An analysis of the peculiarities of the case will ensure that an equitable distribution is reached.

Another case on equitable distribution of matrimonial property is ***Gloria Odartey Lamptey v Nii Odartey Lamptey***[17] which started at the matrimonial division of the High Court and then moved to the Court of Appeal. The facts are as follows:

The petitioner Gloria Odartey Lamptey petitioned for a dissolution of the marriage on the grounds of the respondent's appetite for violence and assault. The petitioner averred that the assault had caused her to suffer grave emotional and psychological stress. Again, the respondent's affairs with several women including a teacher at Glow Lamp International School and one Ruweida made living with the respondent unbearable. The petitioner also sought for property distribution from the court. As part of the ancillary reliefs, the petitioner claimed a total sum of One hundred and four thousand and Nine Six Ghana Cedis (114,096.00 cedis) consisting of feeding, allowance, utility bills, maintenance, and outstanding allowance from running the school. She also claimed a lump sum of settlement of Five Hundred Thousand Ghana Cedis (GH₵ 500, 000.00) as alimony and presented a list to which she claimed a fifty percent (50%) share. These properties include two (2) plots of land located at Adjirigano (East Legon) Accra, House number 18 Dadekotopon Road, Bawaleshie, Mempaesem, Accra, located or situated at Dodowa, shares in Glow Lamp International School at 22

[17] BDMC 454/2013 (unreported)

Hospital Lane Baatsona, Accra, cattle located at Somanya with an estimated herd of eight hundred (800), a number of vehicles, some funds in Unibank, Ecobank and Barclays Bank proceeds of tax refund from Belgium and Personal and household effects including but not limited to air conditioners, television sets, beds etc.

The basis of her claim of fifty percent (50%) of the listed properties on the basis of having sold the idea of investing in landed properties in Accra, to the Respondent and getting her relatives involved in searching, identifying, and facilitating the acquisition of houses and other properties owned by the respondent. The petitioner claimed that the school enjoyed some help from her family, not forgetting her good self as the brain behind the establishment and its administrator. As a matter of fact, the fruits from the school had birthed the Respondent's cattle ranch, football academy, expensive cars and other properties. Additionally, her fifty percent (50%) claim was founded on the performance of wifely duties and the assistance in establishing and running the school. On the other hand, the respondent cross-petitioned asking for the dissolution of the marriage and other reliefs. The basis of the respondent's claim was that the property situated at Dome was founded on being self-acquired before the marriage, the five acres of land at Dansoman was actually a two-acre land which belonged to the school and the Barclays and Ecobank account referred to by the petitioner also belonged to the school. Again, the petitioner's immoral conduct of having three children out of adultery whilst making the petitioner believe they were his biological children.

There were several issues for the court's determination but the issue which is of great importance is, whether or not equality is equity was to be applied in distributing the properties listed by the properties? The petitioner did not get the 50% share of the properties, she listed and claimed to. The honourable court in reaching the conclusion considered a number of principles and factions. Agbevey J said the performance of duties as a wife was "expected" of a wife and her family and not meant to be paid "for". Thus, the petitioner's claim of fifty percent (50%) share of the properties listed on the basis of the duties performed as a wife was considered by the court. Thus, although the petitioner's contribution was considered by the court. Thus, although the petitioner's contribution was considered by the court, her failure to adduce any evidence to verify that she made any monetary contribution to the acquisition of the properties was very much noted by the court. However, the court considered the fact that during the

time of the respondent as a professional footballer, the petitioner was required by the petitioner to stop working, became a full-time housewife and supported him emotionally and psychologically to enable him to perform well on the field. Additionally, the petitioner, was the emotional and self-esteem pillar behind the respondent who had boosted the self-confidence of the respondent by grooming him, improving his manners and being helpful with respect to communicating in the Queen's language.

Agbevey J stated that for the period of the marriage, the petitioner satisfactorily performed the duties of a wife. The court was guided heavily by Section 20(1) of the Matrimonial Causes Act, 1971, (Act 367), Obeng v Obeng (2013) 63 GM 158, Mensah v Mensah (supra) , Arthur v Arthur (supra) and Boafo v Boafo [2005-6] SCGLR 705. These crucial authorities ensured that the court had to be just and equitable in making a property or financial settlement on a party. Her Ladyship Agbevey J espoused that "…… in determining what is just and equitable, the court is to take due regard for all the circumstances of the case. The income, future earning capacities of the parties, property and resources of the parties, their standard of living, ages of the parties, duration of the marriage and the contribution of each of the parties are some of the factors which are taken into consideration in determining what is just and equitable".

The basis of Her ladyship's decision on what was equitable was heavily dependent on the decision of the court in ***Boafo v Boafo (supra). In Boafo v Boafo***, "what was "equitable" in essence, is what was just, reasonable, and accorded with common sense and fair play was a pure question of fact dependent purely on the particular circumstances of each case. The proportions would therefore be fixed in accordance with the equities of each given case".

In respect of the petitioner, the court settled the Dome house on the petitioner which was to be vacated and given to her within fourteen days. She was awarded GHS 200, 000.00 as financial settlement, a Toyota Venza with registration number GE 6455-12 and a Toyota Yaris with registration number GT 2013-11. The said vehicles were to be transferred into the petitioner's name within 30 days. However, the respondent was awarded the matrimonial home H/No 18 Dadekotopon Road, Mempeasem, Accra on the respondent in addition to two cars.

The peculiar facts of the case were carefully considered and analysed as well as the conduct of the parties were seriously taken into consideration. According to

Mensah-Panford, [18]peculiar circumstances should have alerted the court to include the conduct of the spouses particularly that of the offending spouse (the petitioner) as one of the factors to be considered in determining what was just and equitable in the instant case. He further noted that the petitioner's adulterous conduct was considered by Her Ladyship in her judgment as a factor. Although the petitioner failed to make monetary contribution to the acquisition of the properties, her wifely duties were not ignored by the court. The totality of the petitioner's contribution was considered, and the court did not limit herself to only financial contribution or performance of spousal duty. Again, the petitioner helped in grooming the respondent and had to quit her job to ensure the career success of the respondent.

It should be noted that the court adopted an all-inclusive approach to debunk the mistaken assertion that without careful consideration of the circumstances of the case, a spouse is entitled to obtain fifty percent (50%) share of the matrimonial property. However, the performance of wifely duties by the petitioner, largely informed the court's judgment. One good thing which is commendable is that Agbevey J, was not swayed by the court of public opinion which would not accord the petitioner any property based on her adulterous conduct.

The rationale for the court's judgment would have been to give access to the petitioner, and her mobility and provide her some resources to start a new life considering her age and the standard of living that she had been accustomed to during her marriage to the respondent. The learned author, Yaw D. Oppong agreed to some extent to the decision of the court in this present case. In page 456 of his book Contemporary Trends in Law of Immovable Property in Ghana, he asserted that the learned judge had resolved the issues with commendable legal skill but argues that the judgment failed to consider the petitioner's adultery.

The petitioner, Gloria Odartey Lamptey was dissatisfied with the ruling of Agbevey J and this led to an appeal in the Court of Appeal where she sought to set aside the case. This led to the case of Gloria Odartey Lamptey v Nii Odartey Lamptey[19] in the Court of Appeal. The Court of Appeal in the first instance

[18]Prapgel, Mensah-Panford. Untying the knot : A breakdown of the notorious case of Gloria Odartey Lamptey v Nii Odartey Lamptey. Accessed August 2021. Retrieved @https: ssm.com/abstracts/39/2673.

[19] (Suit no. HI/146/2018)

dismissed the appeal under Rule 20(2) of CI 19 of non-compliance. The second appeal was struck out on the merits. Thus, the petitioner/ appellant's attempt to obtain the respondent's seven-bedroom house at East Legon as part of her alimony was dismissed by the Court of Appeal which ordered her to vacate the premises.

The Court of Appeal was heavily guided ***by His Lordship Dr Date-Bah JSC***'s speech through the Supreme Court where he said as follows: "The question of what is "equitable" in essence what is just, reasonable and accords with common sense and fair play, is a pure question of fact, dependent purely on the particular circumstances of each case. The proportions are therefore fixed in accordance with the equities of each given case"[20]. The Court of Appeal asserted that the trial judge Agbevey J, equitably distributed the properties and they endorsed the reliefs made by the trail judge. The Court of Appeal found no fault with the trail judge's ruling because the judgment was based on evidence and not by the court of public opinion. Also, the myriad of authorities used by the trial judge to arrive at its conclusion was commendable.

In addition, the Court of Appeal held that after evaluating the case, they found no justification for interfering with the findings of the trial court. The trial judge had taken special consideration of all the peculiarities and circumstances of the case. Again, the trial judge did not make moral judgment, a criterion for the settlement of the properties. Lastly, the petitioner failed to adduce evidence to her claims with regards to the amount received as tax refund from Belgium, the various accounts, and her role as administrator.

The Case of *Gifty Esinam Adjei v. Daniel Akpor Adjei*[21]

In ***Gifty Esinam Adjei v Daniel Akpor Adjei***, [22] the Supreme Court had held that equitable distribution of spousal property is not static or cast in stone. Thus, it should be determined by the facts and the circumstances of particular cases. Anin Yeboah CJ (Presiding), Pwamang JSC, Amegatcher JSC, Honyenuga JSC, and Kulendi JSC were empaneled to adjudicate this matter. Based on the dictum of Date- Bah JSC in the case of Boafo v Boafo, Honyenuga (JSC) held that Ghana' statutes referred to the equitable distribution without indicating the

[20] [2005-6] SCGLR 705
[21] Gifty Esinam Adjei v Daniel Akpor Adjei. Civil Appeal No. J4/54/2020. [2022] DLSC11698 judgement delivered on 15th June, 2022 per the narration of Dennis Law on 16th October 2022.
[22] Ibid

proportion to be distributed and hence have to be done on a case-by-case basis. Adjei v Adjei (supra) is an appeal of the court's decision filed by Gifty Esinam Adjei in a divorce petition seeking inter alia, an order for the dissolution of her ordinance marriage. The facts of the case as follows:

The parties were customarily married for 16 years of customary marriage before they later converted the said marriage into an ordinance marriage. There were no issues during the marriage. The husband was a mason, and the wife was a seamstress. Madam Esinam averred that the husband had four children whom he brought to the matrimonial home, and it was she who cared for them from infancy and treated them as her children. During the marriage, the marital home was constructed, and thus, she asserted that she also contributed some money. She asserted that she carried mortar and blocks towards the construction and cooked for the laborers while her husband was responsible for the construction. According to Madam Esinam Adjei her husband behaved unreasonably and that she could not be expected to ever live with him as a wife. She particularized the unreasonable conduct of her husband to include insults, physical assault, casting of insinuations by alleging that she is a prostitute who is in an adulterous relationship which she denied. As a result, Madam Esinam sought an order for the dissolution of the marriage, one-half of their matrimonial home located at Tebibiano, Teshie near Accra among other reliefs.

At the High Court, the court of first instance, the trial judge held that the wife is entitled to 50% of the properties acquired in the course of marriage and that the building was to be valued and she is given her one-half share and other financial awards. The High Court held that the marriage was to be dissolved and that it will be just that the petitioner be awarded a financial provision of five thousand Ghana Cedis. The petitioner did not lead evidence on the fact that the Respondent owes her seven thousand Ghana cedis. Thus, her claim for the said amount fails. Finally, costs of three thousand Ghana Cedis (GHC 3, 000.00) were awarded to the petitioner.

The respondent, Daniel Akpor Adjei was dissatisfied with the decision of the High Court and appealed at the Court of Appeal but lost per a unanimous decision. The Court of Appeal in dismissing the appeal noted that "the orders made by the court below are valid and should be carried out. Thus, the appeal by all indication lack merit and should be dismissed. The decision of the High Court was therefore affirmed.

There was a further appeal at the Supreme Court by the dissatisfied appellant Daniel Adjei. At the Supreme Court, the findings of fact made by the High Court which were also affirmed by the Court of Appeal were upheld. The court noted that the decision in Mensah v Mensah was to the effect that there was a presumption in Ghanaian law in favour of the equitable distribution of matrimonial property in all appropriate cases after the divorce. It was however held per its decision in Quartson v Quartson [23]that the decision in Mensah v Mensah "is not to be taken as a blanket ruling that affords spouses unwarranted access to the property when it is clear on the evidence that they are not entitled and should be applied on a case-by-case basis". Even though the court upheld that the Court of Appeal's evaluation and findings were not perverse, it varied the award on property settlement and in their place, awarded the wife three self-contained rooms or their value for the husband to buy them out. Thus, the appeal was dismissed.

It should be noted from this case that the distribution of matrimonial property in Ghana is not fixed since parliament has failed per Article 22 (2) of the 1992 constitution to deal with the distribution of spousal property. Thus, the courts have been saddled to distribute spousal property per Section 20(1) of the Matrimonial Causes Act, Act 367 in a just and equitable manner. The courts per Adjei v Adjei which is one of the recent decisions have decided to do it on a case-by- case basis to ensure equity. This is because the peculiarities of matrimonial cases differ from one another and in other to ensure equity, a case- by- case analysis is necessary. Also, the courts have decided to consider the performance of wifely duties as a form of substantial contribution, though financial contribution is most paramount as a factor in matrimonial cases. This shows from the trajectory of matrimonial cases that there has been a massive improvement in the way the courts are willing to distribute matrimonial property. We have been able to thus move from the ***Quartey v Martey*** threshold which seems archaic to a more gender friendly manner of distributing matrimonial property. The caveat is that the fact the performance of wifely duties is a major factor in the distribution of matrimonial property does not mean that spouses who do not deserve certain reliefs should be awarded.

[23] Supra

Recommendations

As a country, we have come a long way in promoting gender equity and equality through various methods such as affirmative action. However, one lacuna is the lack of legislation to deal with the distribution of matrimonial property. It may be a deliberate or indeliberate move to rob gender activists of the joy of promoting gender equality in Ghana. In my observation, it seems the courts have usurped parliament's role in distributing matrimonial property. It is commendable to note that the courts have done a very good job. Notwithstanding, there is more room for improvement.

Going forward, parliament should perform their mandated duty as stipulated in Article 22(2) of the 1992 constitution. Parliament should provide a fixed criteria to guide the courts clearly on how to distribute property so that the courts will not be left with the onerous responsibility of doing that. The legislation should be passed after extensive consultation with experts such as lawyers and jurists. The law should be drafted in such a way that it will meet the complexities and peculiarities of the Ghanaians. This is because the essence of law is not to be detached from society but rather to meet the changing needs of the people that it seeks to serve.

In addition, the performance of house chores by women should not be disregarded in marital property distribution. This is because since the performance of house chores is not remunerated as agitated by the Marxist and Socialist Feminists, it is imperative that women are compensated for the consortium and other wifely services to their husbands. It is not a disputed fact that Ghanaian courts have moved from Ollennu JSC's dictum that a wife is only entitled to maintenance to consider other non-financial contributions of wives during marriage that lead to the acquisition of property. In my humble opinion, the performance of house chores should be a made a compulsory factor in marital distribution in both parliamentary legislation and the judgments of courts. Such legislation would enable women who are not financially independent during marriage to be given adequate compensation to start their lives again. However, we should be careful as a nation that this solution is not used as a ploy by unscrupulous women to extort money from their ex-husbands after marriage.

Furthermore, legislation on matrimonial property should take into consideration polygamous marriages. It has become apparent that most legislation like the Intestate Succession Law (PNDCL 111) did not take into consideration, the

changing family trends of the Ghanaian populace. Thus, some scholars like Professor Dowouna-Hammond and Professor Mensa-Bonsu have argued that as result of this oversight, the PNDCL 111 has not served its purpose. Similarly, the legislation on spousal property which may be enacted by parliament should provide a formula for property distribution in a polygamous society. The learned scholar Professor Dowuona-Hammond provides more information about this solution in her article.

In furtherance, it should be noted that the fight for equity in matrimonial property should not make woman lose the battle and the war. Thus, spousal property distribution should not be implemented in a way that it would benefit a section of women to the detriment of other women. It should be noted that there are different classes of women who have diverse hopes and aspirations. Mostly, legislation that concern women tend to favour the upper class and economically empowered women to the detriment of other local women. Thus. it is imperative that in making a law on property distribution, the views of traditional women are also collated and analysed.

CONCLUSION

On the whole, the trajectory of cases on marital property have been analysed and solutions and recommendations have been made. This work is a further addition on cases on matrimonial property and the writer takes responsibility for all mistakes and inaccuracies. This work should be an invitation for further research to be conducted in this area.

THREE SIX FIFTEEN; THE CIRCLE DISASTER AND THE APPLICABILITY OF THE RULE IN RYLANDS V. FLETCHER

DOMINIC OHENE OFORI[1] **AND AKUA ADUWAA BRIFO**[2]

INTRODUCTION

On 3rd June 2015, Ghana recorded one of its most tragic events in history. There was a downpour in the country's capital, Accra which resulted in the flooding of some areas of the city. At the GOIL filling station located at the Kwame Nkrumah Circle, was fire explosion which caused substantial damage to neighboring persons and property. According to Joy News, the explosion was as a result of a leakage from one of the fuel tanks which had spread over the water hence causing a catastrophic scene of fire and flood in their worst elements.

The result was fatal. Over one hundred and fifty persons lost their lives and were burnt beyond recognition. Adjoining buildings and property were also razed to the ground. Indeed, it was a sad day for Ghana and until this day her inhabitants are trying to recover from the grief. Families lost their breadwinners, parents lost their children, and friends lost their loved ones. The government and other NGOs supplied relief items to the persons affected. People and owners of property affected have called for compensation, and for someone to be held responsible for the tragedy. This raises a number of important questions that require prompt answers.

Could GOIL be liable in torts? Could the persons affected seek legal relief? How about the owners of adjoining property that were destroyed? Can the affected persons still bring an action seven years after the disaster? These are the questions that this essay seeks to resolve.

Is GOIL liable under the Rylands rule?

The rule propounded in this case is one of the remnants of the ancient concept of strict liability in the law of torts. The background to this rule is that a person

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acts at his own peril, that is, one will be held liable for his actions regardless of the fact that he may have acted intentionally or negligently.[3]

In the case of ***Rylands v. Fletcher***[4], the plaintiff was an occupier of a mine while the defendant owned a mill which was situated on land adjoining that of the mine. The defendant decided to construct a water reservoir on their land. However, unbeknown to them, there were certain disused underground shafts and passageway connected to the mine. The construction was supervised by an engineer and a contractor who did not take reasonable steps in ensuring that the old shafts will not affect the operation of the reservoir. Subsequently, when the reservoir was filled with water the pressure of the water broke the shafts and eventually entered the plaintiff's mine thereby flooding it and causing considerable damage to the mine. The plaintiff sued and the Court of Exchequer, in holding the defendants liable, said through Blackburn J that;

"We think that the true rule of law is that the person who for his own purposes, brings on his own land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."[5]

The defendants appealed and the House of Lords dismissed the appeal. The House of Lords per Lord Cairns applied Blackburn's test in the Court of Exchequer but narrowed the test to a non-natural user of the land, which means that the thing must have been brought unto the land and not acquired naturally.

Street summarizes the rule thus*; "a person who, in the course of a non-natural user of his land, accumulates or is held to be responsible for the accumulation on it of anything which he knew is likely to do harm if it escapes, is liable for the damage to the use of the land of another, which results from the escape of the thing from his land."*[6]

We will surgically analyze the key elements (non-natural user, things, accumulation, and escape) as derived from the rule and in doing so determine whether GOIL is liable under the rule.

[3] Kumador, Introduction to the Law of Torts in Ghana 103(Black Mask Ltd, 2019).
[4] (1868) L.R. 3 H.L. 330.
[5] (1866) L.R. 1Ex 265 at 279.
[6] Margaret Brazier, Street on Torts 344(London: Butterworth,1989).

NON-NATURAL USER

"Non-natural user" under the rule was comprehensively explained in ***Rickards v. Lothian.***[7]

The defendant was a lessee of an entire building while the plaintiff was a tenant of the same building. On the fourth floor was a lavatory which contained a basin. Someone maliciously opened the basin tap and blocked the waste pipe causing an overflow and subsequent considerable damage to the plaintiff's stock in trade.

The Court held that for there to be liability in the Rylands v. Fletcher rule, there must be *"some special use bringing with it increased danger to others and must not merely be the ordinary use of land or such a use* ***as is proper for the general benefit of the community."***[8] The Court also stated that the defendant having on his premises *"a proper and reasonable supply of water"*, which of course benefitted the Plaintiff, *"was an almost necessary feature of town life…recognized as being so desirable* ***in the interest of the community"*** thereby making it an ordinary use of the land.

This case sheds new light on the concept of natural and non- natural use of land. Lord Moulton therein seems to suggest that if a thing was acquired unto the land, and that thing was a necessity to human life in that particular community, the defendant ought not be liable even if that thing escaped. According to him, it would be unreasonable for the law to regard those who install or maintain such a system of supply as doing so at their own peril; for these things have become *"a necessary feature of town life"*.

It can be inferred from the above opinion that the concept of non-natural use can vary over time in a particular society since the needs of man can change as a result of circumstances like the advent of technology. This is why we agree with Archer JSC when he said in ***Vanderpuye v. Pioneer Shoe Factory***[9] that;

"In deciding the question whether the user is natural or not, all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances"[10].

In light of these cases, one might then cast doubt as to whether GOIL could be liable under the rule, because they were involved in the supply of fuel which was

[7] [1913] A.C. 263.
[8] Ibid at 280.
[9] [1981] G.L.R. 181.
[10] Ibid at 192.

to the general benefit of the community at the time of the explosion for fuel is an essential commodity in today's Ghanaian society.

However, we are still of the firm belief that regardless of the benefit that fuel serves to the society, GOIL could still be held liable under the rule. In the case of ***Cambridge Water Company v. Eastern Counties Leather***[11], Lord Goff of Chieveley was of the view that if the courts were to apply the concept of non-natural use in accordance to changing circumstances, the law will be swaying to the rhythm of social change instead of being recognizable on the basis of principle. In order to avoid this, Lord Goff averred that foreseeability of harm must be a prerequisite to an action under the rule and once that has been proved, it would be irrelevant to consider the vague concept of natural or non-natural use of land. We agree with Lord Goff's position since it would fly in the face of all fairness and justice if top companies would be made to go scot free for the grave damage done to lives and property on mere grounds that they supply essential services or they provide huge employment to the community.

This is because we believe that human life takes preeminence over everything. Companies that supply essential commodities like fuel and gas for the general benefit of community owe a duty of care to the general public to ensure that these commodities do not cause harm.[12] Therefore, although GOIL supplied essential services to the community and which might have been a "natural use of the land" under the RICKARDS case, they could still liable under the Rylands v. Fletcher rule per the CAMBRIDGE CASE[13]as foreseeable harm.

THINGS

'Things' as espoused in the rule need not be dangerous per se, but should have the capacity to cause injury once they escape.[14] The courts have considered 'things' to be water,[15] fire[16], and explosives within the import of the Rylands v. Fletcher rule.[17] Interestingly, the Courts in the case of ***Attorney-General v. Cork***[18] have held humans to be 'things' under the Rylands rule. The facts were

[11] [1994] 1 All E.R. 53.
[12] Rylands v. Fletchers (1866) L.R. 1Ex 265
[13] Supra.
[14] Kumador, Introduction to the Law of Torts in Ghana 105(Black Mask Ltd, 2019).
[15] Rylands v. Fletcher (1868) L.R. 3 H.L. 330.
[16] Vanderpuye v. Pioneer Shoe Factory [1981] G.L.R. 181.
[17] Read v. Lyons [1946] 2 All E.R. 471.
[18] [1933] Ch.89.

that the defendants leased a piece of land to a group of caravan dwellers whose lifestyle interfered with neighbors' ordinary comfort and enjoyment of their property, the issue raised was whether or not the defendant could be held responsible for the nuisance which was caused to the neighborhood by persons licensed by him to dwell in caravans on the land. The court was of the view that the caravan settlers, moving about from place to place, had habits of life many of which were offensive to those who had fixed homes and when collected together in large numbers on a comparatively small piece of land the caravan settlers had the capacity to cause harm.

Considering the circumstances under review it is indisputable that fuel, when it escapes has the tendency to cause damage due to its inflammable nature. Such was what happened on 3rd June, 2015; there was an explosion which caused a fire to start and the fire was spread by the fuel that had leaked and mixed with the floodwaters. GOIL could therefore be liable under the Rylands rule for the escape of the fuel.

ACCUMULATION

The third component necessary for a claimant to succeed under the rule is by showing that there was an accumulation of the "thing"[19]. In grasping the term accumulation, Lord Cairns helped in the Rylands case when he used the phrase *"...introducing into the close…."*[20] In the case of ***Vanderpuye V. Pioneer Shoe Factory***[21] the Ghanaian court asked; "Did the Defendants bring to their land things…?[22]" The indication therefore is that a "thing" should be introduced unto the land by the Defendants.

In the case of ***Pontardawe Rural District Council v. Moore-Gwyn***[23], where a rock broke away and fell down the slope; crashing into the Plaintiff's dwelling house and causing damage, the Plaintiff's action under the rule failed on grounds, inter alia, that the rock which broke away to cause the damage to the Plaintiff was naturally found on the land and was not "introduced" by the Defendant. Also, in the case of ***Dublin v. Ghana Housing Corporation***[24], the action for damages failed on ground that the water which had caused damage to the Plaintiff's land

[19] Rylands v. Fletcher (1866) L.R. 1Ex 265.
[20] Ibid at 339.
[21] [1981] G.L.R. 181.
[22] Ibid at 196.
[23] (1929) 1 Ch. 656.
[24] [1975] 2 G.L.R. 337.

had not been deliberately accumulated by the Defendant. Therefore, to found a claim under this component, it seems to us that there ought to be ***a deliberate act of introducing and 'keeping a thing unto the land.***

In the Circle disaster, there was a deliberate introduction and keeping of petrol, gas and other things unto the land by GOIL company. These "things" were brought by tankers, offloaded into underground storage tanks and distributed through pipes; hence satisfying the accumulation test.

ESCAPE

It is not enough for there to be a (non-natural) thing accumulated unto the land, in addition there ought to be an escape of the thing. The case of ***Read v. J. Lyons***[25] captures aptly the component of escape. In the case, the Plaintiff pursuant to a public duty of inspecting the factory on the Defendant's premises sustained damages due to an explosion. The action failed on grounds, inter alia, that the explosion had occurred on the Defendant's premises and not outside of it. It seems to us that to constitute an escape, the "thing" "deliberately introduced unto the land (occupied or controlled by the defendant)" must leave the land *to a place outside the occupation or control of the Defendant.*

In applying this to the Circle disaster, there is no doubt that the resulting fire borne out of the explosion was from the fuel escape outside the confines of the filling station; giving rise to a possible cause of action. One might argue that GOIL did not accumulate and keep the fire which caused the subsequent damage to adjoining property. To this argument, we adopt holding (6) of ***Vanderpuye v. Pioneer Shoe Factory***[26], where it held that a defendant would be liable, *"if he brought onto his land things likely to catch fire and kept them in such conditions that if they ignited, fire would be likely to spread to the plaintiff's land"*[27].

In the present case, petrol, a thing likely to catch fire was brought onto the land and it ignited fire, causing damage. We think under such a circumstance it would be quite immaterial to raise the argument that since the fuel did not by itself destroy property the Rylands rule should fail. Taking such a stand would ipso facto bar all future actions resulting from fire damage, since no one ordinarily introduces fire onto land.

[25] [1946] 2 All E.R. 471.
[26] [1981] GLR 181 at 183.
[27] See headnote of Vanderpuye case.

Having carefully considered the essential components of the Rylands rule, we are of the firm opinion that the Circle Disaster, like many other similar scenarios, which claimed lives and destroyed properties, falls squarely within the Rylands rule and gives entitlement to all who are legally capable of bringing an action against GOIL We shall now take a look at the possible defenses to be raised by GOIL and the remedies available to affected persons.

ARE THERE ANY DEFENCES AVAILABLE TO GOIL?

Satisfying the Rylands rule, as we have aforementioned, does not take away any defenses available to a Defendant. In the Rylands case Blackburn J after stating the rule, added that a defendant may *"excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of viz major, or the act of God".*[28]

In the cases of ***Rickards V. Lothian***[29] and ***Perry v. Kendricks Transport***[30], interference by third parties is a good defence which spare a Defendant.

With regards to the Circle Disaster, we honestly find no proper defence available to GOIL filling station, however for the sake of objectivity we shall consider the subject. Looking at the available defenses, we find the defence 'Act of God' the most appealing defence available to GOIL. We have scanned through a number of decided cases on Acts of God and we find it necessary to settle on the case of ***Nichols v. Marsland***[31], perhaps because the Defendant succeeded under the defence. In the case, an extraordinary rainfall had caused the defendant's ornamental pools to overflow, causing considerable damage to the plaintiff's adjoining property. It was held *that "A defendant…. cannot be properly said to have caused or allowed the water to escape if the Act of God…was the real cause of its escaping* ***without any fault on the part of the Defendant****."* It was also held that the defendant ought not to be liable for she could not have anticipated that the reservoir would overflow.

We think therefore that to rely on this particular defence (Act of God) a defendant ought to satisfy the two principles espoused in the Nichols case. Firstly, the defendant ought to prove that the Act of God was the real cause of its escape without any fault on the part of the Defendant, and secondly that the

[28] (1866) 1 Ex 265 at 280.
[29] [1913] A.C. 263.
[30] [1956] 1 W.L.R. 85.
[31](1876) 2 Ex.D. 1.

defendant could not have anticipated the escape. From the above, it means that the slightest fault (negligence) on the part of the defendant takes away this defence.

In applying the principles, GOIL would be successful and escape liability if they are able to prove that the heavy rainfall on that day was the real cause of the disaster in the absence of any fault on their part and also that they could not have anticipated the escape of the petrol and the consequent explosion. There seem to be conflicting stories regarding the real cause of the disaster; whereas some witnesses have attributed it to a nearby cigarette, others have pointed to an explosion from the filling station.

Whichever the case, we have to keep two things in mind; first, that there had to be the absence of fault (negligence) on the part of GOIL and secondly that GOIL ought not to have reasonably anticipated the escape. Therefore, any evidence of negligence on the part of GOIL would thus take away the defence and make them liable under the rule. The crucial question to ask at this point, therefore, is whether there was negligence on the part of GOIL?

One common line running through the various stories is that there was a downpour for which a number of people sought refuge at the GOIL filling station. This in itself is evidence that the rain, qua rain, could not have on its own generate fire. In the case of ***Kussasi v. Ghana Cargo Handling Co***[32] where the court had to establish whether or not there was negligence on the part of the Defendant who had in accident dropped a pallet of bags of rice on the Plaintiff, the court per Sarkodee J stated that "…*the unexplained and unaccounted fact that the pallet fell as it was being lowered is evidence of negligence in the person responsible for the operation*."[33] By this the learned judge meant that the fact that there had been a fall of the rice and in the absence of any explanation or account for its fall was in itself evidence of negligence.

Coming back to the GOIL case, there was evidence that the leaked petrol was the cause of the spread of the fire in addition to the gas explosion from GOIL's premises.[34] There was therefore no explanation and or account for the escape of the petrol and explosion, for fuel contained in a tank does not have the capacity (without a negligent act or being tampered with) of escaping itself. Perhaps if

[32] [1978] G.L.R. 170.
[33] Ibid at 174.
[34] Myjoyonline.com.

there were any explanation for the escape of the petrol or explosion, we could have considered the explanation. In the absence therefore of any explanation for the escape, we conclude, relying on Sarkodee J in the ***Kussasi*** case (supra) that: "*the unexplained and unaccounted escape of the fuel outside the confines of GOIL is evidence of negligence…"*

Having thus established negligence, we shall also consider the second requirement, that is, whether GOIL anticipated the escape of the fuel. Let us keep in mind that the escape of the fuel was facilitated by the rain. To satisfy the defence of the Act of God, it must be shown that the natural occurrence must have been absolutely unforeseeable, and that a man could not have possibly anticipated its occurrence.[35]

It must be the kind that rarely happens. There are two rain seasons in southern Ghana. The heaviest rain is from April until June and a lighter rain between September and October. During the heavy rain season, most parts of the capital city Accra such as Kaneshie and Agbogbloshie are often flooded due to poor drainage systems and poor town planning amongst others. Therefore, the issue of flood in the country is no news to its inhabitants for it occurs during almost every rainy season. To say that GOIL did not anticipate rain and perhaps subsequent flooding in Accra during the rainy season is tantamount to averring that one did not know that a fish could not breathe on land.

Besides, GOIL brought the fuel and kept it on their land at their own peril, knowing very well that its escape would be undesirable. Knowing that the rains were heavy during that time of the year, they should have taken reasonable measures in ensuring that their fuel tanks were properly secured. They failed to take such reasonable measures and due to their carelessness, as established relying on the KUSSASSI case supra, over 150 people lost their lives. We are of the firm belief that GOIL should have anticipated the escape of the fuel, taking into consideration the time and circumstances surrounding the explosion.

We therefore conclude by saying that the defence of an Act of God cannot be relied on due to the evidence of fault or negligence on the part of GOIL and also that GOIL should have anticipated the escape.

[35] Nichols v. Marsland (1876) 1 Ex. D.1.

REMEDIES; who has the capacity to sue? And for what reliefs?

The Circle explosion primarily claimed lives and destroyed properties; therefore, we can narrow the remedies to only those necessary in settling the issues. We shall tackle first the issue of property and second "personal injuries". Decided cases on suits claiming damages for property destruction are chiefly smooth. In the Rylands case, the Plaintiff succeeded in recovering damages to its mines. In the case of HALSEY V. ESSO PETROLEUM[36], the Plaintiff succeeded in claim for the damage of his garment and car (albeit car was not on his land but on a highway) by the emission of acid smuts from the defendant's broiler house.

However, in a trend of cases including CATTLE V STOCKTON WATERWORKS[37], the Plaintiff's action failed on ground that the Plaintiff had no interest in the land on which the harm had been done. These cases affirm the position that an owner or a person with an interest in any adjoining land or property, damaged by the escape from a defendant becomes entitled to a claim against the defendant provided the damage is a direct and natural consequence of the escape.

Applying this to the Circle disaster, Vienna City which is an adjoining building, the storey building next to the filling station, cars parked on the road (per Halsey case supra) and all other property which directly got destroyed as a result of the natural escape of the fuel resulting in fire give rise to owners of such properties to sue under the rule.

The next hurdle to cross has to do with personal injuries. By personal injuries, we mean those who lost their lives or all those who sustained various forms of injuries due to the natural escape of the fire. Are such people entitled to a remedy in law under the rule? There is a visibly chequered struggle as to whether personal injuries should be recoverable under the rule. On the one hand, the cases of HALE V. JENNINGS BROTHERS[38], PERRY V. KENDRICKS TRANSPORT LTD and READ V. J LYONS emphasize that personal injuries are recoverable. On the other hand, cases including READ V. J LYONS (per Lord MacMillan) and WELLER V. FOOT & MOUTH DISEASE RESEARCH INSTITUTE[39] indicate that injuries to the person ought not be recoverable. A

[36] [1961] 2 All E.R.145.
[37] (1875) L. R. 10 QB 453.
[38] [1938] 1 All E.R.579.
[39] [1966] 1QB 569.

careful consideration of both schools of thought reveal that the latter position is quite inaccurate. This shall be shown in our consideration of the READ V J LYONS and WELLER V FOOT & MOUTH DISEASE RESEARCH INSTITUTE cases.

Lord MacMillan on his part in the READ case[40] dismissed the suit on grounds *that "…persons injured by the explosion inside or outside the Defendant's premises would alike require to aver and prove negligence to render the Defendant liable*". According to the learned judge the doctrine of Rylands, "*when studied in its setting is truly a case on the mutual obligations*" and should be exclusively limited to adjoining lands. We tend to disagree with the learned judge and it shall be proven on two grounds.

Firstly, the learned judge by implication seems to be saying that 'damages to land is justiciable whereas damages to human life or personal injury is non justiciable'. In other words, the judge is certainly implying that destruction of property is remediable but destruction of the human person is not remediable under the rule and that any claim for damage due to personal injury ought to lie elsewhere (by proving negligence). Are the laws protecting human property at the expense of human lives? Do the laws care more about some property and have no such care for human life? Averring that personal injury should lie elsewhere (until where negligence should be proved) whereas damage to property should readily avail an owner seems to us, even if correctly applied, harsh and unreasonable. In certain circumstances where there has been injury to a person but in absence of negligence should a court turn away such person and only admit situations where damages are made to property? Such a proposition as espoused by Lord MacMillan, to our minds, is repugnant to natural justice, equity and good conscience and should have no place in our legal dispensation. It is therefore not surprising that even in the same case (READ case), Lord Porter, although refraining from that discussion cited numerous cases where personal injuries were recoverable under the rule.

Secondly, since the learned judge in his judgment purported to rely on the Rylands case we deem it necessary to reiterate the Ryland rule espoused by BLACKBURN J;

"*We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at*

[40] *Supra*

his peril, and, if he does not do so, is prima facie ***answerable for all the damage which is the natural consequence of its escape.***"[41] (Emphasis ours)

We find it necessary to reecho "*answerable for all the damage which*…" We form the view that all damages be it land, cattle, garment, motor vehicle, personal injuries naturally arising from the escape falls within the ambit of the rule and should give persons affected a cause of action. This "expansion" was accepted by Lord Goff in the case of ***Cambridge Water Company v. Eastern Counties Leather***[42] where he opined that the rule "*should logically apply to liability to all persons suffering injury by reason of the ultra-hazardous operations*". On the two grounds carefully explained, we respectfully conclude that Lord MacMillan and his likes erred in law and that position is clearly repugnant to good conscience.

The WELLER V. FOOT & MOUTH DISEASE[43] case which is often cited in support of the exclusion of personal injuries needs to be considered here. In that case, there had been an escape of a virus from the Defendant's premises which affected cattle in the entire neighborhood leading to the closure of all markets. The Plaintiffs who were auctioneers and made a living out of the opening of markets sued the defendant for damages. Under the rule in the Rylands case, the court relied on the case of ***Cattle V. Stockton Waterworks***[44] and held that the Defendants could not be liable to the Plaintiffs for escape of the virus from their land because the Plaintiffs had no interest in the land to which the virus could have escaped. We again think that the court therein failed to distinguish the case before it from the CATTLE case (supra) which it relied on.

In the Cattle case[45], the Plaintiff had been employed by the landowner to make a tunnel. Due to a leakage in the Defendant's pipe, water filled the landowner's soil and delayed the Plaintiff's work. He sued for damages. The case was summarily dismissed on grounds, inter alia that no injury had been made to the Plaintiff's property; the land belonging to the landowner. This case is clearly distinguishable from the Weller case. In the Cattle case, the property affected (land) was not owned by the Plaintiff but in the Weller case, the virus had caused injuries to ***cattle*** and ***not land***.

[41] (1866) L.R. 1Ex 265 at 279.
[42] [1994] 1 All E.R. 53.
[43] [1966] 1QB 569.
[44] (1875) L. R. 10 QB 453.
[45] *Supra*

Therefore, the court therein, relying on the Cattle case and further holding that "*the Defendants could not be absolutely liable to the Plaintiffs for escape of the virus from their land because the Plaintiffs had no interest in the land to which the virus could have escaped*" is quite strange. The court in the Weller case ought to have recognized whilst discussing the Rylands rule that the injury had been caused to ***cattle*** and issues of land did not arise. Altogether the court held mainly when discussing the issue of duty that the Plaintiffs would only have had a claim should they have owned any of the cattle which had suffered. The ***Weller case itself recognizes*** that the care of duty, which the Ryland rule lies, is available not only in instances of land but also all other direct damages arising out of an escape (in this case cattle).

In summary we think the proper position, considering the cases and discussion made, is that ***all direct damages naturally caused by an escape should be recoverable*** and the Weller case itself as explained, demonstrates that an owner of a cattle can maintain an action if her cattle suffered injury from an escape from a defendant. Since a damage to cattle (Weller case), shirts and cars (Halsey case), mines or lands (Rylands case) gives rise to an action, then, as we have carefully explained, direct personal injuries also (should) give(s) rise to an action.

Having harmonized and settled on the best principle to apply, we can conclude that all persons who directly suffered injury from the escape of the explosion have a cause of action. However, we deem it necessary to intimate that all those who sustained injuries whilst on the premises of GOIL filling station would have no action under the rule due to the rule in ***Read V. J Lyons***[46] and can only maintain an action if they can aver and prove negligence on the part of the filling station.

Can an action under the rule be maintained 6 years after the Circle disaster?

Now, it is important to find out whether the persons affected by the Circle Disaster can bring an action under the rule in ***RYLANDS v. FLETCHER*** after six years or whether the action is statute-barred by reason of lapse of time.

[46] [1946] 2 All E.R. 471.

The Limitation Decree[47] "provides for the automatic termination of litigation after a fixed period of time"[48], as a rule of public policy[49]. Section 3 stipulates that an action for damages for negligence, nuisance or breach of duty shall not be brought after the expiration of three years from the date on which the cause of action accrued. The same section also sets forth the rule that an action by the dependents of a deceased person shall not be brought after the expiration of three years from the death of the deceased.[50] The purport of the section is to bar any litigation which is found on the tort of negligence in any form or character. This at least brings an end to litigation and avoids situation of instigating overly remote cause of action.

It is our considered view that GOIL, owners of the filling station, who brought unto their land a fuel tank, owed a duty to the world to prevent the escape of the fuel, for they should have reasonably foreseen that the escape of the fuel was likely to do harm to adjoining property. They collected the fuel and kept it in at their own peril and must be held liable whether the act that led to the escape of the fuel was intentional or negligent. Since section 3 of NRCD 54 prevents one from bringing an action for breach of duty three years after the action accrues, persons affected as well owners of adjoining property cannot bring an action against GOIL by reason of lapse of time.

However, if similar events, like that of the Circle disaster, where a dangerous thing escapes and causes mischief to adjoining property happen in the near future persons affected can bring an action under the ***RYLANDS v. FLETCHER*** rule within three years of the occurrence. There have been many of such explosions even before and after the Circle disaster. In these circumstances we find this article potent of solving future similar occurrences.

CONCLUSION

This article has attempted to establish the principle under which victims of the Circle disaster could bring an action under the rule under ***Rylands V. Fletcher*** and has espoused that although such an action is statute-barred by reason of lapse of time, victims of similar incidents in future can bring an action under the rule. The article has also sought to demystify the age-old notion that one can bring an

[47] Limitation Decree, 1972 (NRCD 54).
[48] Ibid. See first paragraph of Memorandum at (i).
[49] Ibid.
[50] See section 3 of the Limitation Decree, 1972 (NRCD 54).

action against another under the Rylands rule to recover only property and sheds new light on the proposition that an action can be brought for the recovery of personal injuries citing and critically analyzing cases. We believe that this article has highlighted the claims that victims of such incidents are entitled to and we are of the firm belief that in the event of any such occurrence, the general public is now seized with the relevant information to seek legal relief.

THE BATTLE OF RIGHTS: SILENCE vs. FEAR AND PANIC: DISSECTING GHANA'S REGIME ON FREEDOM OF SPEECH & EXPRESSION AND MEDIA FREEDOM

OSWALD AZUMAH[1] & COMFORT ANTWI[2]

"Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear[3]" - Harry Truman, 33rd President of the United States.

ABSTRACT

The laws regulating free speech and independence of the media in Ghana are not quite as straightforward and libertarian as one would expect of a growing democracy. Buried in the legal regime are anachronisms which a country struggling to maintain its status as one of Africa's most successful democracies[4] can no longer ignore. In other words, political leaders should be disempowered from silencing dissenting opinions with the aid of laws which essentially torpedo true democratic values. Despite decades of efforts at achieving tolerance of divergent thoughts and expressions, Sections 207 and 208 of the Criminal Offenses Act, 1960 (Act 29)[5] have enjoyed much relevance recently. The provisions empower prosecutors to proffer criminal charges against persons who make statements *with intent to cause fear and panic.* These provisions, the writers herein argue, are fragments of totalitarian-like regimes—such as the Preventive

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[2] Comfort Antwi, 3rd Year LLB, University of Ghana School of Law

[3] Harry Truman, 'Special Message to the Congress on the Internal Security of the United States' (1950). https://www.goodreads.com/quotes/17832-once-a-government-is-committed-to-the-principle-of-silencing .

[4] Isaac Ofosu Debrah, 'Why Democracy Promoters Must Pay Close Attention to Ghana and Africa's Other Growing Democracies' (2015) WCAP 1

[5] The Criminal Offenses Act, 1960 (Act 29) is the primary document governing Ghana's criminal regime.

Detention Act, 1958[6] (PDA) and the Criminal Libel Laws[7] which have been denounced and toppled, the last of which were expunged from our laws two decades ago; fragments which should urgently be swept away.

BACKGROUND

The government of Ghana has recently faced criticisms of being anti-media friendly with some critics suggesting the repealed criminal libel laws are being reintroduced through the backdoor. The allegations follow multiple arrests, prosecutions and harassment of journalists and other critics of the regime. A few of these are presented below.

Mensah Thompson, the Executive Director for Alliance for Social Equity and Public Accountability (ASEPA) who has been very critical of the government was arrested[8] on 9th February 2022 on charges of publishing false news with intent to cause fear and alarm. He alleged some relatives of the President used the Presidential jet for unofficial purposes. He later withdrew the allegation and apologized. He was nonetheless, arrested.

Accra FM's Bobbie Ansah was also arrested on 10th February 2022[9] for claiming that the First Lady had appropriated some state lands to herself. The prosecutors proffered charges of publication of false news with intent to cause fear and alarm.

Godsbrain Smart aka Captain Smart has been in police grips multiple times in the past couple of years with similar charges of publishing false news with intent to cause alarm. One of the claims is that the President is complicit in the illegal mining menace. Prosecutors said he impugned the name of the president[10].

Noah Dameh of Radio Ada was put on the same charges[11] for posts he made about a salt mining company in the community.

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[6] The Act has been decried as a draconian dent on human rights and freedoms.

[7] The Criminal Libel laws in Ghana existed in Sections 183 and 185 of Act 29. They were repealed by the Repeal of Criminal Libel and Seditious Laws (Amendment) Act, 2001 (Act 602)

[8] -- 'Ghanaians arrested for allegations they made against Akufo-Addo and his family in 2022' <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghanaians-arrested-for-allegations-they-made-against-Akufo-Addo-and-his-family-in-2022-1685852> accessed 24 February 2023

[9] Ibid

[10] Ibid

[11] -- 'Yet another Ghanaian journalist arrested over false news charges' <https://www.mfwa.org/country-highlights/yet-another-ghanaian-journalist-arrested-over-false-news-charges> accessed 24 February 2023

In a bizarre event, the Ghana Education Service (GES) dismissed[12] some minors from high school for insulting the president in a viral video. After a backlash, the Presidency directed the GES to reverse its decision

These are but a few instances where the state deployed its force to fight alleged abuse of free speech since 2017.

INTRODUCTION

The matter of free speech is probably the most controversial issue in a developing democracy. For thriving and widely praised democracies such as the United States of America, it is not even up for debate—the First Amendment to the US Constitution[13] makes it near-impossible for any prosecutor to level charges against a journalist or just any other exuberant citizen for their expressions, no matter how charged up their diction may be. That is why the US prides itself as the citadel of democracy, perhaps. Of course, hate speech and its likes would not be tolerated in any civilized society.

In a developing country such as Ghana, which has a strong totalitarian history[14], the case is different. In fact, multiple social media polls conducted by media houses with national coverage have turned results with respondents suggesting restrictions on the free press. Respondents suggest journalists and their reports are part of the country's woes. Of course, little credence is given to such polls due to their tendency to be manipulated. There have been considerable approvals to the arrest and prosecution of the journalists mentioned above from sections of the public. Even the dismissal of the minors from school on accusations of insulting the president divided public opinion.[15]

[12] Ernest Arhinful, '8 Chiana SHS students dismissed for insulting Akufo-Addo' <https://www.myjoyonline.com/8-chiana-shs-students-dismissed-for-insulting-akufo-addo/> accessed 24 February 2023

[13] The First Amendment to the US Constitution is part of the Bill of Rights which entrench basic human freedoms in the Constitution of the USA.

[14] Ghana, until 1992 suffered the brunt of military takeovers of government, events which saw the imposition of autocracy by the military juntas which deposed the constitutionally elected governments.

[15]Kabah Atawoge, 'Dismissed Chiana students remorseful, plead for forgiveness' <https://citinewsroom.com/2023/01/dismissed-chiana-students-remorseful-plead-for-forgiveness/> accessed 24 February 2023

The basic question to be addressed here is: are civil remedies[16] exhaustive of claims of abuse of free speech? If not, to what extent would or should the state go in interfering with free speech while pursuing a tolerant society? In this paper, attempts have been made to understand the concept and importance of free speech and its origin and evolution in Ghana. The trajectory highlights the multiple limitations on free speech through the decades, juxtaposed with other jurisdictions and the present state of affairs in Ghana. The writers also highlight the challenges with the present laws and opine on why they must change. The essay concludes with suggestions on how the defect in the law should be addressed and why this should be treated with urgency.

What we mean by free speech

Freedom of speech and expression is a democratic principle whose essence to permit minority groups to live freely in a society.[17] In contemporary societies, democracies especially, the principle has been co-opted as the friend of the journalist. This is so primarily because the journalist, and by extension the media, has become an avenue for the said minority groups to channel their views to the larger population. In the absence of a free and independent media, democracy is nonexistent. The power of minorities and critics to vociferously decry the majority opinion without being prosecuted or suffer vilification is free speech. The majority may be the government of the day and their followers. Only when free speech is fully achieved, can we hope for a thriving society. In opining on the topic, Thomas Jefferson[18] wrote:

"…the people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty…the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the

[16] Tortious processes such as Defamation and Slander Laws under the Common Law remain available to anybody claiming an attack on his reputation by another

[17] Eleanor Brooks, 'Why Is Freedom of Speech Important in a Democracy: 5 Reasons' <https://www.liberties.eu/en/stories/why-is-freedom-of-speech-important/44136> accessed 05 March 2023

[18] Thomas Jefferson (April 13, 1743 – July 4, 1826). 3rd President of the United States of America

latter[19]." The European Court of Human Rights[20] espoused the scope of the right to express oneself in every democratic dispensation in the popular case of ***Handyside v. The United Kingdom***[21] 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 ours).**

The Legal Evolution of Freedom of Speech in Ghana

Ghana's political history with free speech is one of a roller coaster ride; a long detailed journey with which the authors decline to bore readers.[22] However, this complex journey can simply captured in four phases of legal establishments: The Preventive Detention Act 1958, The Criminal and Other Offenses Act 1960 (Act 29) which birthed the Criminal Libel Laws, the Constitution 1969 and finally, the Constitution 1992 and the attendant repeal of the criminal libel laws.

Even before *Ghana* came into existence in 1957, dissenters suffered arrest and prosecution for expressing views contrary to what the government propagated. None other than journalists were at the centre of these persecutions. Editors of the *Evening News, Daily Mail and the Morning Telegraph* suffered various forms of attack from the colonial government for publishing literature which was sympathetic to the independence struggle.[23]

Based on the above, the culture of scaring dissenters into a state of inertia was arguably inherited by the independence rulers. The Preventive Detention Act which left the indelible mark of *Re Akoto and 7 others*[24] is the starting point for an

[19] -- 'Jefferson Quotes and Family Letters. Extract from Thomas Jefferson to Edward Carrington' <https://tjrs.monticello.org/letter/1289 > accessed 25 February 2023

[20] The Court applies the European Convention on Human Rights. Its task is to ensure that States respect the rights and guarantees set out in the Convention. https://www.echr.coe.int/documents/questions_answers_eng.pdf

[21] 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 24 February 2023. 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'.

[22] For more details of the political journey of Free speech in Ghana, refer to Kabral Blay Amihere's I spoke for Freedom : History and Politics of the Ghana Press

[23] Kwame Nkrumah, *Ghana: The Autobiography of Kwame Nkrumah* (PANAF 1957) 119

[24] [1961] GLR 523

argument that Ghana at its birth knew not the concept of freedom of speech and expression. The infamous incarceration of the appellants in *Re; Akoto*[25] and their inability to obtain justice from the law courts owing largely to the jurisprudential tangent of the court lay the foundation for further narrowing of the rights on free speech.

In the Criminal Offenses Act, 1960 (Act 29), the PDA partly metamorphosed into criminal libel in Ghana. Act 29 provided in Section 183 *inter alia* that: 183 (2) wherever the President is of opinion

(a) that there is in any newspaper, book or document which is published periodically a systematic publication **of matter calculated to prejudice public order or safety, or the maintenance of the public services or economy of the Republic**, or **(emphasis ours)**

(b) That a person is likely to publish individual documents containing that matter,

the President may make an executive instrument requiring that a future issue of the newspaper, book, or document shall not be published, or, that a document shall not be published by, or by arrangement with, that person, unless the matter contained in the answer or the document has been passed for publication in accordance with the instrument.

Section 183A of the Act barred, *inter alia,* insults against the President.

It is worth pointing out that such repressive measures against the press were not unique to Ghana. Lee Kuan Yew of Singapore who had around the same time, led the small island country to independence has boasted of multiple machinations to restrict media freedom including requiring licenses for newspapers to operate and withdrawing such licenses when they became too critical.[26]

In Ghana, the change came with the advent of the Constitution 1969[27]. This overturned Parliamentary sovereignty and entrenched human rights in the

[25] Ibid

[26] Lee Kuan Yew, *From Third World to First* (HarperCollins Publishers 2000) 189

[27] Justice Abdulai v. Attorney-General (J1 7 of 2022). Kulendi, JSC writes in the case: In the Light of the above, the Supreme Court, under The 1957 And 1960 Constitutions could not question the laws made by parliament even when they were arbitrary laws, on grounds of parliamentary sovereignty. A classic example of the lack of limits to the law making power of Parliament under this constitutional dispensation can be found in the infamous case of Re: Akoto and 7 Others…1969 constitution introduced constitutional supremacy.

constitution. *(The detailed changes in media rights in the previous Constitutions, can be appreciated in Blay's book).*[28] This tradition was carried on into the third and fourth Republic which has an expanded provision for human rights where Article 21 (1) (a) and Article 162 of the Constitution 1992 further entrench Freedom and Independence of the Media which paved way for the repeal of the four-decade-old criminal libel laws. President Nana Akufo-Addo, who was Attorney General when the criminal libel laws were repealed, made a remarkable speech to Parliament while championing the expulsion of the anachronistic laws.

"It is good that the initiative that we have taken today be supported because, Mr. Speaker, that is what the nation wants. The Bill before this house is very much in accordance with the sentiments of the Ghanaian people; and those who still yearn and hanker for the return or maintenance of the status quo which allowed governments to prosecute journalists, are completely out of step with public opinion in our country today[29]*."*

Sections 183 and 185 were thus, expelled from the books[30]; prosecutions were discontinued[31] and journalists, and indeed all citizens and residents of Ghana could enjoy freedom of speech as thought by the framers of the Constitution 1992, or so was presumed. Indeed, the step taken by the John Kufuor administration earned the government points among the intelligentsia. But even before then, the judiciary took steps to protect and promote dissent. Shortly after the promulgation of the fourth republican constitution, the Supreme Court, per Amua-Sekyi JSC quoted the classical statement of Hall in ***New Patriotic Party v. Ghana Broadcasting Corporation***[32] in his bid to highlight the need to accommodate dissent. "The democratic tradition that divergent views and dissenting opinions be given free expression may be summed up in the words…*"I*

[28] Ibid

[29] Nana Akufo-Addo, Attorney General (As he then was) Speech to Parliament. Accessed https://www.youtube.com/watch?v=gbEYYSmCU3w

[30] The Criminal Code, Repeal of Criminal Libel and Seditious Laws (Amendment) Act 2001 (Act 602)

[31] Republic v. Tommy Thompson Books Ltd, Eben Quarcoo and Kofi Coomson *(Unreported).* The accused persons were prominent journalists who were fervent supporters of the opposition. They were charged with publishing false reports likely to injure the reputation of the State, contrary to section 185(1) of the Ghanaian Criminal Code (Act 29), 1960. They had alleged in their publication that the wife of the head of State was involved in drug smuggling. The charge sheet was dated 14 February 1966. In December 2000, the general election was won by the opposition NPP, and after assuming office the new Attorney General entered a nolle prosequi to discontinue the case.

[32] New Patriotic Party v. Ghana Broadcasting Corporation [1993-94] 2 GLR 354—393

disapprove of what you say, but I will defend to the death your right to say it"[33]. The foregoing paragraphs highlight the development of the legal regime which on free speech in Ghana up until 2001, an establishment which remains till today, February 2023.

The ghost of the libel laws lingers

In his charismatic speech to Parliament in 2001[34], denouncing any law which permits prosecution of journalists, Nana Akufo-Addo essentially ruled out using the state apparatus to fight alleged abuse of free speech in lieu of the more appropriate civil process[35]. How then did the ghosts of the criminal libel laws resurface to haunt journalists under his presidency[36]? Did the lawmakers deliberately leave out Sections 207 and 208 of Act 29 while repealing the others or was it an oversight? These are hypotheticals which the authors decline to engage in. Be that as it may, the protégés of the repealed libel and seditious laws have awoken to avenge the death of their ancestors, the Preventive Detention Act and the Criminal Libel Laws in Sections 183 and 185.

The operative query here is, can Ghana pursue true democratization with these laws lurking in its books or must legislators revisit their notes from 20 years ago; or journalists and indeed, everyone else should probably just be circumspect in their publications and utterances? It is the opinion of the writers that law is categorized not only for academic ease but for instances such as this. State power should not be deployed where individuals should pursue their own civil claims in court. This country has experienced a crackdown on dissent in multiple ways and the authors opine that with the state seeking to try journalists for allegations which can only qualify as defamation, it won't not belong before the country's history and recent gains would be soiled with another *Re: Akoto*[37].

What exactly do Sections 207 and 208 say?

207 - Offensive conduct conducive to breaches of the peace

A person who in a public place or at a public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of

[33] Hall, Evelyn Beatrice, 'The Friends of Voltaire'. (1907). G. P. Putnam's Sons. Pg. 199
[34] Ibid
[35] Ibid
[36] Ibid
[37] Ibid

the peace or by which a breach of the peace is likely to be occasioned, commits a misdemeanour.

208 - Publication of false news

(1) A person who publishes or reproduces a statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace knowing or having reason to believe that the statement, rumour or report is false commits a misdemeanour. (Emphasis ours).

(2) It is not a defence to a charge under subsection (1) that the person charged did not know or did not have reason to believe that the statement, rumour or report was false, unless it is proved that, prior to the publication, that person took reasonable measures to verify the accuracy of the statement, rumour or report.

How different are the essence of these provisions from the repealed laws? Nkrumah justified the Preventive Detention Act as an attempt to preserve public order amidst growing violence among dissenters. The criminal libel and seditious laws prided themselves with the onus of preventing publications which were **"calculated to prejudice public order or safety."** This did not save them from being repealed. Their expulsion indeed is in line with the best international practice and objectives of international law.[38]

How then do we repeal the libel and seditious laws from our criminal law and permit the proffering of charges for allegations that the president and his family used the presidential jet for recreational purposes? The ludicrousness of the charges could not be over stated neither could the overbreadth of the provisions which allow the charges to be levelled. In his attempt to define the scope of the Section 208 in ***Adusei II v. The Republic***[39] Osei-Hwere, J stated that *"we may do well to remind ourselves…that section 208 comes under the head, "Offences against the Peace,"* and takes its place among sections relating to offences against the public peace and tranquility. The judge overturned the conviction of the appellant for alleged publication of false news with intent to cause alarm.[40]

[38] Universal Declaration of Human Rights (1948) Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
[39] Adusei II v. The Republic [1975] 2 GLR 225
[40] In the Adusei II case, the appellant wrote a letter to the Asantehene alleging that certain persons were plotting to overthrow the government. The police investigated the report and found it to be

The Doctrine of Overbreadth

The doctrine of overbreadth also found its traces in the decision of the court in the ***Adusei II*** case. The doctrine of overbreadth, arises when a criminal statute is unconstitutionally overbroad.[41] This may cause prosecutors to charge and arraign alleged defaulters for actions or omissions not originally contemplated by the crime creating provision of the statute or that the provision itself is vague, giving room for unrestrained discretion. In this context, the doctrine concerns itself with laws which are calculated to restrict free speech and expression[42]. It decries attempts by governments to rely on these laws, most of which are vague and gives prosecutors a wide range of discretion to arrest and arraign critics of the government for taking on the said government and its key figures. Justice Osei-Hwere narrowed the overbreadth effect of Section 208 of Act 29 in his explanation of the provisions, arguing that: the test whether the offence is committed is not the actual result, but whether the false statement was likely to cause a breach of the peace. This, position gives prosecutors the charge of proving that their accused actually intended to disturb the peace instead of relying on the reception that greeted the accused's expressions. The lingering of Sections 207 and 208 of Act 29 in our laws have however, enabled the arrest and prosecution of journalists and dissidents since the repeal of 183 and 185.

The United States Supreme Court in ***Papachristou v. City of Jacksonville*** gave more credence to the doctrine of overbreadth when it set aside the conviction of the appellants. Justice Douglas, in delivering the decision of the SCOTUS[43] stressed that the vagrancy ordinance under which the appellants were arraigned was unconstitutionally void for vagueness for two reasons. Firstly, that it failed to provide adequate notice to individuals about what conduct was forbidden by the law and secondly that, it encouraged arbitrary arrests and convictions. How different is the situation of Papachristou et al. from journalists and critics who

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false. He was convicted of publishing false news and deceit of public officer. On appeal, it was held that the mere making of a false statement was not the crux of the offence, but its publication to the general public **in such a way to cause alarm and fear [emphasis applied]** and the prosecution had failed to prove that.

[41] Richard H. Fallon, Jr. 'Making Sense of Overbreadth' [1991] YLJ <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/8597/41_100YaleLJ853_January1991_.pdf?sequence=2 >

[42] Keith H. Holland, Doctrine of Substantial Overbreadth: A Better Prescription for Strong Medicine in Missouri (2014) Missouri Law Review, Volume 79. Pg. 197. Available at: https://scholarship.law.missouri.edu/mlr/vol79/iss1/6

[43] Supreme Court of the United States

are being arrested and arraigned under the vague and overreaching provisions of the twin sections of 207 and 208? In the opinion of the writers, there is none; these provisions and its recent deployment, drastically exposes the real dangers and capacity for mischief-trials embedded in vague and overly broad statutes.

Where do we go from here?

The way forward lies in revisiting the very document that binds us together as a people and which mirrors our future.[44] The provisions on freedom of speech and expression are well-known in the constitution. Where to focus on are the ideas which underpinned these provisions which can be found in the report of the Committee of Experts for the Constitution 1992.[45]

The Committee based its championing of a free, vibrant and independent media on the libertarian arguments of John Stuart Mill[46] who advocated the freedom and liberty as against a strong state. In his essays on the free press, Mill argued *"if all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."*[47] The committee of experts quote J.S. Mill with approval while they made the case for freedom of the press. And indeed, J.S. Mill shared the idea of the writers herein that without the free press, democracy would be nonexistent. As Mill puts it: in the modern world, **freedom of thought and expression including freedom of the press;** the rule of law and the independence of the judiciary; and fair and free elections are considered to be three pillars on which the edifice of democracy stands.

All these three pillars are interdependent and inter-connected. Destruction of them can undermine the whole structure of democracy and lead to its collapse. Indeed, any successful attack human rights by governments often starts with a suppression of freedom of the press. Once this is achieved, governments are free to abuse basic human rights with impunity and without any publicity, Mill observes.

As Dotse, JSC *(as he then was)* observes in ***Ghana Independent Broadcasters Association (GIBA) v. The Attorney General and National Media***

[44] Tuffuor v Attorney General (1980) G.L.R 637 per Sowah JA
[45] Committee of Experts, Report on Proposals for a Draft Constitution of Ghana [179]
[46] J.S. Mill (1806 to 1873); English Philosopher and Lawmaker
[47] John S. Mill, *On Liberty: Of the Liberty of Thought and Discussion* (Batoche Books Limited 1859) Ch. 2 Pg. 18

Commission[48]: there is also no doubt that the history of this country during the first Republic was also not lost on our forebears in the provisions to ensure and guarantee free speech. I believe that, it is that sordid history that guided the Consultative Assembly to include provisions in article 162, clauses 1 to 5 on Freedom and Independence of the media as one of the few provisions of the Constitution 1992 that are considered and labeled as entrenched provisions.

This belief enabled the repeal of Sections 183 and 185 and for which no logical or legally justified reason exists for the continuous stay of Sections 207 and 208 of the Criminal Offenses Act in our statute books. Indeed, the Constitution's preamble underscores the desire of Ghanaians to hold their leaders accountable by affirming the commitment to: *Freedom, Justice Probity and Accountability*—and as already discussed in detail, these principles can only exist in a society which does not proffer criminal charges for critical journalism and fierce dissent.

Citizens must boldly confront actions of their leaders without fear of being whisked away on a vague appreciation of what constitutes fake or false news *with an intent to cause fear and alarm*. The easiest route to cure this overbreadth and allow journalists and critics enjoy their constitutional right is to repeal the provisions under review. But in order to protect the sanctity of the populace against unwarranted *fear and panic* lawmakers should properly define what conduct constitutes the offense rather than the status quo which targets journalists and regime critics. In lieu of that we are burdening the courts with applying the so-called *reasonable man's test*[49], among others.

Winding up

It is long settled that human rights are not absolute and that one's right end where another's begin. The repeal of the libel laws and indeed these writers do not champion a license to irresponsible speech and unpunished defamatory statements. This, notwithstanding, the art of deploying the state to enforce civil violations and crack down of boisterous dissent in the name of preserving public order is demonstrably an overused excuse for totalitarian regimes and this has no place in a country striving to achieve complete democratization.

[48] (J1 4 of 2016) [2017] GHASC 45
[49] Kofi Kumado, *Introduction to the Law of Torts in Ghana: Who is the reasonable man?* (Black Mask Limited 2019) Pg. 148

Resources are replete with which aggrieved persons can seek redress against alleged acts of defamation without involving the state's prosecutorial apparatus; the courts and the Media Commission being only some of these. Recent sanctions from social media giants and strengthening of their community guidelines have also underscored steps being taken to ensure civility in activism, which means the state needn't be obsessed with enforcing community standards with its justice department/ministry. Besides, the Constitution itself foresaw instances of abuse of the freedom of expression and media and thus, established in Article 166, a Media Commission with its functions being, among others, to ensure high journalistic standards. More so, Article 164 of the Constitution also paves way for enacting laws which may limit the extent of free speech in the interest of public order and the right of others[50]. These provisions of the Constitution can be exploited in a manner which would not fall victim to the overbreadth effect, thereby, limiting the tentacles of critical journalism and dissent which the Constitution 1992 envisaged.

CONCLUSION

To paraphrase Frederick Agaaya,[51] the arguments for and apparent deployment of state machinery to enforce alleged defamatory language and vociferous dissent are not only fundamentally flawed, they are a cruel manipulation of common sense, singularly rationally inexplicable, morally scandalous and, above all, a manifest violation of the constitutionally guaranteed right to freedom of speech and expression.

We cannot continue to pretend that we want a democracy while championing ideals which are obsolete and only useful to Nazi-like regimes. Dissent remains the most effective means of building a democracy and the court in *Handyside v. The United Kingdom*[52] has settled it that democracies must be ready to deal with all forms of dissent including those that offend, shock or disturb the state.

[50] Article 164 of the Constitution, 1992: The provisions of articles 162 and 163 of this Constitution are subject to laws that are reasonably required in the interest of national security, public order, public morality and for the Purpose of protecting the reputations, rights and freedoms of other persons.

[51] BL Candidate; Ghana School of Law, LLB University of Ghana School of Law

[52] Ibid

The time has come where Ghanaians must rise up and tell their leaders that the two ghosts of the preventive Detention Act which continue to haunt dissenting citizens must be banished from the laws of the country. We can no longer operate a system of you may talk but do not talk.

We end with the wisdom of Dotse, JSC *(as he then was)* in *GIBA v. The AG and National Media Commission*[53] Our only security as a country lies in a free press, and any attempt to muzzle the press and return to the days of old by unconstitutional restraint on this invaluable right must not be allowed to see the light of day.

[53] Ibid

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