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To The Late Professor Emmanuel Yaw Benneh.

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COMMUNITY SENTENCE AS A TYPE OF PUNISHMENT IN 21ST CENTURY GHANA

Katherine Akpe Aglobitse & Cornelia Selorm Blewusi[1]

ABSTRACT

The principal aim of the institution of punishment for criminal offences is to deter the population from performing acts which society frowns upon. The most common forms of punishment given by the Ghanaian courts are imprisonment, detention, and payment of fines. Almost three decades into the use of the 1992 Constitution, it has become imperative that our law evolves to suit the needs of our ever changing society. The writers suggest that the inclusion of community sentence as a form of punishment will not only suit the demands of the 21st century penal system, but will also expand the objective of the law in protecting and reforming every individual of the Ghanaian society, while maintaining the sanctity and entirety of our Criminal Law rules and procedures. Community sentencing in Ghana seeks to fulfill the aims and objectives of punishment, rehabilitate the offender, and all the while contributing to the entire welfare and development of the society at large.

INTRODUCTION

More and more legal and sociological academics are calling for the review of the adequacy of punishments available in Ghana's penal system, especially in respect of the appropriateness of sentences offence on the lawbreaker. It has been questioned and wondered when the system will be expanded to incorporate more punishments than the law currently stipulates. This was the deliberation of Justice Jones Dotse when he made the following statement in

[1] Writers are LLB Candidates at the University of Ghana School of Law with previous Bachelor's Degree in Sociology and French, and Chinese respectively.

the case of *Kwaku Frimpong alias Iboman v. The Republic.*[2]

"The state institutions must come out with other methods of punishment which will take into consideration society's monitoring mechanism…

The time is therefore ripe for a major and radical reform of sections 296-316 of the Criminal and other Offences (Procedure) Act, 1960 Act 30, which deals with punishment."

The Inter-Departmental Committee on the Business of the Criminal Courts recognized five principal aims of sentencing: to fit the punishment to the crime; to deter potential offenders by example from committing the same offence; to deter the particular offender from offending again; to prevent the particular offender from injuring society again; and to enable the offender to take his place as a responsible and law-abiding member of society[3].

These objectives were otherwise classified into five (5) theories: the retributive, general deterrence, specific deterrence, preventive and rehabilitative theories respectively[4]. Any punishment will therefore be an extremely apt one, if it can fulfill more than one of these objectives/theories. The Ghanaian court also gave its principles for sentencing in the locus classicus case of *Kwashie v. The Republic*[5]:

"In determining the length of sentence, the factors which the trial Judge is entitled to consider are:

i. *The intrinsic seriousness of the offence.*
ii. *The degree of revulsion felt by law abiding citizens of the society for the particular crime.*
iii. *The premeditation with which the criminal plan was executed.*
iv. *The prevalence of the crime within the particular locality where the offence took place, or in the country generally.*
v. *The sudden increase in the incidents of the particular crime.*

[2] (J3/5/2010) [2012] GHASC 3 (18 January 2012).
[3] D. A. Thomas (1964), *Theories of Punishment in the Court of Criminal Appeal*, The Modern Law Review. 27:5, 546-567.
[4] Ibid.
[5] [1971] 1 GLR 488 at page 493.

vi. *Mitigating or aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed."*

With these aims/objectives of punishment in mind, these writers are of the opinion that, upon conviction of an offender, the courts need to consider two main questions in giving out a sentence:

1. Does the punishment fit the crime committed?
2. Will the punishment rehabilitate the offender?

These questions have otherwise been described as the positive and negative aspects of a punishment; the positive aspect concerning the denunciation of the crime and rehabilitation of the offender and the negative aspect concerning the proportionality of the punishment to the crime[6].

The Criminal and other Offences (Procedure) Act, 1960 recognizes six types of punishment: death; fines; imprisonment; payment of compensation; detention; and liability to police supervision[7]. It makes no mention of other non-custodial sentences like community sentence, nor does it make any room or provision for any inclusion of an alternative form of punishment.

Meanwhile, Article 19 (11) of the 1992 Constitution provides that, "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". Consequently, this limits the courts to stay within the options provided in Section 294 of Act 30, in punishing an offender, and community sentence cannot be a punishment in Ghana until it is stipulated in our laws.

Community Sentence is a newly discovered form of punishment that 'punishes' the offender for his wrong, reforms his criminal mind, and enables him to pay his debt to society by contributing to its development. This paper hopes to delineate the concept of this sentence for the reader, and convince

[6] Supra 2.
[7] Section 294 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30).

him of its usefulness to the judicial and socio-economic development of the country.

In his address to the conference of Chairmen and Legal Officers of the Board of Public Tribunals in Ghana in 1987, the Hon Mr. G. E. K. Aikins, former Attorney- General and Secretary for Justice, noted:

"*It seems to me fines, payment of compensation and liability to police supervision are fair and proper. In the Commonwealth and other countries, a new type of punishment has been evolved and it is working very satisfactorily for the benefit of both the offender and society. It is the community service order. After conviction, the offender is not sentenced to imprisonment or fined, instead he is ordered to render service at a specified place for specific periods.*"[8]

THE CONCEPT OF COMMUNITY SENTENCE

The definition of community sentence varies in the professional literature. Carter, Cocks, and Glaser (1987) define it as "a court order authorizing an offender to perform a specific number of hours of unpaid work or service for a non-profit communityorganization, or a tax- supported agency".[9] Although definitions vary, the ideology has come to acquire common factors across cultures.

Generally, community sentence is now understood as a collective name in criminal justice for all the different ways in which courts can punish an offender who has been convicted of committing a crime, other than through a custodial sentence or capital punishment. It is considered a non-custodial form of sentence; this means it does not require the offender to be in mandatory custody in an institution.

[8] Eric Nyavor, *Seminar on the Treatment of Offenders: The Mechanics of Sentencing*, [1989-90] VOL. XVII RGL 139—148.

[9] Carter, R. M., Cocks, J., & Glaser, D. (1987). *Community Service: A Review of the Basic Issues*. Federal Probation, 51, 4-10.

The objectives of the system lean more towards the tenets of the utilitarian theory of punishment: specifically deterring the offender from repeating his crime and generally deterring others in society from committing that offence.[10] Utilitarianism also views punishment as a way to encourage the offender to abstain from criminal behavior in the future by providing him with the social, educational and/or vocational training necessary to enable him conform to the social pattern from which his delinquency departs.[11] The requirements of community sentence as a punishment seek exactly to fulfill these purposes.

Some Ghanaians often misconceive this punishment as 'hard labour' during imprisonment as captured by Section 296 (6) of Act 30[12], where prisoners work within the community, cleaning and doing other odd jobs, while serving their sentences in prison. However, it must be understood that this sentence means that (in most cases) almost no time at all is spent in jail.

According to the Criminal Justice Act of the UK Public General Acts, where a person aged 18 or over is convicted of an offence, the court by or before which he is convicted may make an order imposing on him any one or more of the following requirements: an unpaid work requirement; a rehabilitation activity requirement; a programme requirement; a prohibited activity requirement; a curfew requirement; an exclusion requirement; a residence requirement; a foreign travel prohibition requirement; a mental health treatment requirement; a drug rehabilitation requirement; an alcohol treatment requirement; an alcohol abstinence and monitoring requirement; in a case where the offender is aged under 25, an attendance centre requirement; and an electronic monitoring requirement.[13] The unpaid work requirement is what is well-known as 'community service'.

[10] Supra 2.
[11] *Ibid.*
[12] Criminal Offences (Procedure) Act, 1960 (Act 30).
[13] Section 177 (1) of UK Criminal Justice Act 2003.

Community service is an effective way for offenders to pay the price for their offences and repay their debts to society by contributing to its development at the same time. It is widely used as the punishment for minor crimes in place of jail-time and payment of fines. The background and capabilities of the offender are considered, including the entire circumstances surrounding the commission of the crime.[14]

From cleaning the streets and helping institutions which care for the aged or special children to working in technological departments, the sentence will be based on the skill of the offender as well as all the other factors noted above. In one case in England, a professional football coach found guilty of assault was sentenced to 120 hours of community service, which he spent coaching a children's football team, after the courts overturned an earlier jail sentence.[15]

Sometimes the sentencing is specifically targeted to the defendant's crime; for instance, a person caught littering or destroying public property may have to clean the streets or assist construction workers.

The other aspects of community sentences also serve various reformation purposes. The rehabilitation activity and programme requirements mostly have first-time and habitual offenders as their targets; the offender may be required to attend a group or individual programme to help the offender change their pattern of behaviour.[16] A habitual unlawful drug user may be asked to join a reform programme for substance abusers[17], or someone convicted of assault may be asked to join an anger management course. The same idea applies for an offender notorious for alcohol abuse.[18] Programmes may also be geared towards equipping offenders with new skills and

[14] Section 199 (3) of UK Criminal Justice Act 2003.
[15] "*Cantona to Train 700 Young Players as his Sentence* ". Independent, UK. 7 April 1995. Retrieved 26 February 2020 https://www.independent.co.uk/news/uk/cantona-to-train-700- young-players-as-his-sentence-1614516.html
[16] Section 200A (8) of the UK Criminal Justice Act 2003.
[17] The drug rehabilitation requirement according to Section 209 of the UK Criminal Justice Act 2003.
[18] The alcohol treatment and alcohol abstinence and monitoring requirements according to Section 212 and 212A of the UK Criminal Justice Act 2003.

qualifications to help them fit better into society.

The prohibited activity requirement restrains the offender from indulging or engaging in activities that are either pleasurable to him, or noted as a contribution to the commission of his offence. The offender may receive a court order not to drink alcohol, or the offender may be prohibited from carrying firearms.[19] On the other hand, a curfew requirement enjoins the offender to remain indoors within certain stipulated hours[20], and it goes hand in hand with the electronic monitoring requirement.[21] The electronic monitoring system involves the use of a monitoring device to remotely keep track of an offender's every move. Some of the modern devices even allow the monitor to test the alcohol concentration level of the wearer. Thus, electronic monitoring is usually an option when the sentence involves probation house arrest, drug testing, or a curfew or exclusion requirement. An exclusion requirement prohibits the offender from entering a place specified in the order for a period so specified[22] – not going to pubs, for example.

A community sentence of residence requirement demands that the offender, during a period specified, must reside at a place specified in the order.[23] The foreign travel prohibition requirement simply prohibits the offender from travelling outside a territory specified by the courts.[24] The mental health treatment requirement means that the offender must submit, during a period or periods specified, to treatment by or under the direction of a registered medical practitioner or psychologist (or both) with a view to the improvement of the offender's mental condition.[25] This requirement is aimed at offenders who the courts suspect are suffering from some questionable mental

[19] Section 203 (3) of the UK Criminal Justice Act 2003.
[20] Section 204 (1) of the UK Criminal Justice Act 2003.
[21] Section 177 (3) of the UK Criminal Justice Act 2003.
[22] Section 205 (1) of the UK Criminal Justice Act 2003.
[23] Section 206 (1) of the UK Criminal Justice Act 2003.
[24] Section 206A (1) of the UK Criminal Justice Act 2003.
[25] Section 207 (1) of the UK Criminal Justice Act 2003.

conditions.[26]

Lastly, for offenders under the age of 25, the English law requires that the offender must report at an attendance centre for a required period, which is where they may serve out their sentence.[27] The aim is to punish the young offender by loss of his leisure time and provide a disciplined learning environment for education and training, including a specific restorative justice perspective.

Clearly, it is possible to sentence an offender to more than one of the requirements at the same time such that a person, who under the effects of excessive alcohol decides to empty the contents of his dustbin at the doorstep of a neighbour he dislikes, may be ordered to attend alcohol treatment and alcohol abstinence and monitoring requirements within the rehabilitation requirement, andat the same time be given 100 hours of community service of aiding the refuse collectors who work in his neighbourhood with their job. This sort of punishment is likely to be more effective in deterring this person and everyone else in the neighbourhood from ever committing a similar offence than the payment of a fine – which he can probably afford – would be.

In some cases, a community sentence is actually issued together with a fine, especially where the actions of the offender caused a casualty.[28] This way, the offender is able to pay his debt to both the victim and the entire society.

GHANA NEEDS COMMUNITY SENTENCE

The most obvious and important reason for the introduction of the community sentence into Ghana's criminal justice system is to alleviate the strain on our prison structures.

[26] Section 207 (3) of the UK Criminal Justice Act 2003.
[27] Section 214 (1) of the UK Criminal Justice Act 2003.
[28] Hilary Moss. "Jessica White Gets Anger Management, Community Service & Fine After Assault Charges". HuffPost. 16 August 2011. Retrieved 26 February 2020. https://www.huffpost.com/entry/jessica-white-anger- management-assault_n_877960.

You are a stranger to Ghana if you do not know that our prisons are overcrowded, run-down and in desperate need of re-structuring. Calls have been made by several governmental, non-governmental, and human rights oriented bodies for the inclusion of community sentence in Ghana to avoid congesting the prisons by throwing every Tom, Dick and Harry into 'Nsawam'.[29]

In 2018, the Ministry of Interior reported that there were a total of 15,094 prisoners being held in custody against a total structural capacity of 9,875, with a corresponding general overcrowding rate of 52.9 per cent.[30] Giving community sentences in place of detaining offenders will reduce the prison population and alleviate the pressure on the prison system to enable a functional reconstruction of the system to better serve the purpose for which it was created.

According to the Deputy Commissioner of the Commission on Human Rights and Administrative Justice, Mr. Richard Quayson, the Commission has consistently advocated for alternative sentencing for persons who commit minor or petty offences.[31]

Additionally, community sentencing will take away the stigma of conviction/imprisonment.[32] Often, spending time in jail results in the inability of a person to go back to normal life after leaving a prison. Ex-convicts are consciously or unconsciously treated differently and dishonourably as people become afraid of them or do not want to be known to be associated with them.[33]

They are sometimes even shunned by their own families and end up homeless.

[29] Iddi Yire. "CHRAJ advocates for non-custodial sentencing". Ghana News Agency. 13 October 2018. Retrieved 23 February 2020 https://chraj.gov.gh/news/chraj-advocates-for-non-custodial-sentencing/
[30] *Ibid.*
[31] *Ibid.*
[32] James R. Davis (1991). "*Community Service as an Alternative Sentence*" Journal of Contemporary Criminal Justice. 7:2, 107 – 114.
[33] *Ibid.*

They may be refused jobs, ending up unemployed and unable to make a living for themselves. It is most likely that, desperate to make ends, an unemployed ex-convict will end up becoming a career criminal. By engaging in a rehabilitation programme or engaging in community service, offenders may learn a trade, develop a skill or yet discover a talent they never knew they possessed. This training will better equip them to join the working class of society with ease, and contribute to the country's economic growth.

The introduction of this non-custodial sentencing has proven an effective way to prevent the 'revolving door syndrome' otherwise known as recidivism, and research has shown that recidivism is fast becoming an issue in the Ghanaian penal system.[34] The common tendency is to put such recidivist offenders away for a very long time, with the hope that they become better citizens by the time they come out.[35]

This is also because the tariff system of sentencing in Ghana means that petty habitual offenders would have a series of relatively short sentences which may not be useful in terms of rehabilitation or deterrence.[36] The issue is whether this 'solution' will actually deter other criminals from committing similar offences. The writers answer this in the negative.

If the offender is a habitual one because of personal problems like poverty and unemployment, spending 2 to 5 years in prison with the surety that one would eventually be free – hard labour or not – will not deter him (and other offenders) from their habits. Because they can afford it, some offenders do not care that they have to pay fines over and over again when they are found guilty of some crimes. The better solution is to focus on curing the cause of the habit of the criminal, which is what therapy and rehabilitation as well as skills-

[34] Akua Kuenyehia, *Problem of Recidivism in The Ghanaian Penal System*, [1978-1981] UGLJ Vol XV 84-96.
[35] *Ibid.*
[36] *Ibid.*

training under the community sentence requirements aim to do.[37]

For an economy that relies greatly on its working class, the entire country stands to gain with the employment opportunities that this type of sentencing can offer. As already mentioned, community service may provide the offender with the necessary craft or vocational or skill training needed for him to become 'employable', thus enabling him to join the working class upon completion of his sentence.[38]

In addition to this, it also creates jobs for those who have the task of ensuring the completion of the community service by the offender – the Service Manager, and all other associated roles. The Service Manager is an individual trained in social welfare and law enforcement who will monitor the progress of the offender throughout the stipulated period. There mayalso be the need to create a department for the electronic monitoring of all offenders serving under the sentence across the country. This will lead to the employment of several innovative Ghanaian youth, and prevent their indulgence in social vices which may lead to the commission of more crimes.

To the writers, another significant benefit the country stands to gain from non-custodial sentence, is its contribution to national development and maintenance culture. The average Ghanaian is not oblivious to the adverse effects of pollution on the populace; floods, disease outbreaks, and other man-made disasters which result in needless death. The entire society will be better off when, by substituting short term sentences with community service, offenders are required to clean the streets, parks and gutters and aid in the recycling and incineration of our waste, including all other forms of cleaning, which is equally punishment enough. This is a primary source of cheap labour which will not require the government to expend sums of money to serve the same purpose.

[37] Hudson, J., & Galaway, B. (1990). "*Community Service: Toward Program Definition*". Federal Probation, 54.

[38] Karen Harrison (2006). "*Community Punishment or Community Rehabilitation: Which is the Highest in the Sentencing Tariff?*" The Howard Journal, 45:2. 141–158.

Additionally, many roads all around the country are in very deplorable states, which have the citizens crying for maintenance. A noted reason for this situation, aside funding, is the lack of labour – both skilled and unskilled.[39] The present authors share the view that the challenge of unskilled labour can be eliminated[40] if offenders, in place of serving short terms behind bars, are made to join road construction companies to reseal and resurface our roads at zero wage.

This method can be employed and be seen as killing two birds with one stone – meting out punishment and achieving an end in itself that benefits the nation. It will indeed be an ingenious way to fulfil the wishes of the 1992 Constitution as citizens, by contributing to the well-being of the community where the offender lives.[41]

WALKING THE TALK

A common punishment in many primary and secondary schools in Ghana is 'writing lines', which either admit to the wrongdoing of the offender or contain a promise by the offender not to repeat the offence. Non-custodial sentencing was/is a highly efficient form of punishment by non-judicial bodies like disciplinary committees in schools or private corporate bodies, and traditional leaders to punish those who disobey the norms.[42]

In an evaluation of community service programs in the United States, a study revealed that the sentence could be operational at different stages of the criminal justice system; pre-trial and post-adjudication. It could also be administered as an alternative to a fine or jail, or supervised probation, or

[39] Austin Brako-Powers. "*Minister Decries Lack of Funds for Road Maintenance*". Myjoyonline. 21 June 2016. Retrieved 1 March 2020. https://www.myjoyonline.com/politics/2016/June- 21st/minister-decries-lack-of-fund-for-road-maintenance.php.

[40] Hudson, J., & Galaway, B. (1990). "*Community Service: Toward Program Definition*". Federal Probation, 54, 8

[41] Article 41(g) of the 1992 Constitution.

[42] Acquah G.K. "*Customary Offences and The Courts*" [1991-92] VOL. XVIII RGL 36—67.

administered together with them.[43]

Over the decades, numerous institutional bodies and individuals have called for the inclusion of community sentences into the Ghanaian penal system. This includes the former Minister of Interior, Mr Mark Woyongo, who organised a forum on the adoption of non-custodial sentencing policy,[44] and the former Chief Justice Sophia Akuffo[45] under whose regime the Non-Custodial Sentencing Draft Bill was produced in 2018.[46] Research has also proved that the general population displays favourable attitudes toward community sentencing, and it has been suggested that the religiosity of the majority of the populace may have a bearing on their attitudes toward community sentencing for adult nonviolent offenders.[47]

A little research into the laws of Ghana reveal that, at some point in time, our law framers did consider non- custodial punishments:
Section 2(5) of the Education Act, 2008 provides that
"*A parent who fails to comply with the appropriate action agreed on with the social welfare committee, commits an offence, and is liable on conviction by a District Court,*

(a) for a first offence, to a fine not exceeding five penalty units, and

(b) for a continuing offence, to a fine of one penalty unit in respect of each day during which the offence continues; or in lieu of the payment of the fine, to ***community service*** *as determined by the Court in consultation with the Social Welfare Committee.*"[48]

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[43] Hudson, J., & Galaway, B. (1990). "*Community Service: Toward Program Definition*". Federal Probation, 54, 8.
[44] "Minister Launches Forum on Non-custodial Sentencing". Ghana News Agency. 22 October 2014. Retrieved 1 March 2020.
[45] "*I Look Forward to Community Sentencing – Chief Justice*". Starrfmonline. 28 November 2018. Retrieved 24 February 2020. https://starrfm.com.gh/2018/11/i-look-forward-to-community- sentencing-chief-justice/.
[46] "Chief Justice Pushes for Non-Custodial Sentencing". Daily Guide Network. 11 October 2018. Retrieved 26 February 2020. https://dailyguidenetwork.com/chief-justice-pushes-for-non- custodial-sentencing/.
[47] Feikoab Parimah, Joseph Osafo, Kingsley Nyarko & Nkansah Anakwah (2017) "*Community Service for Misdemeanours in Accra: Preferences of Offenders, Victims, Judiciary, And Community Members*", Journal of Psychology in Africa, 27:5, 455-457.
[48] Education Act, 2008 (Act 778).

Simply put, the provision stipulates that a parent-defaulter will be liable on conviction by a District Court to community service as determined by the Court in consultation with the Social Welfare Committee.

In Form 1B under the Schedule to the Juvenile Justice Act, 2003, there is a section where a juvenile has the option to perform between 10 to 30 hours of **community service** at an indicated place as a condition for a police caution for committing an offence under section 12 (7) of the Act.[49]

Section 74 (1) of the Insolvency Act, 2006 stipulates that, "A person who does an act in contravention of a duty imposed on that person as a debtor or as the representative of a deceased debtor by or under this Act commits an offence and is liable on summary conviction to a fine of not less than two hundred penalty units or to a term of imprisonment of not less than three years or to **community service**."[50] The Act further interprets 'community service' as "community service as determined by the Court in consultation with the Minister responsible for Social Welfare"[51], the same interpretation given under Definitions in section 46 of the Interpretation Act, 2009 (Act 792).

Apart from revealing the intentions of the law framers to introduce community service into Ghana's justice system, it also provides the information that the execution of the sentence is the responsibility of the courts with the help of the Ministry for Social Welfare, which is now the Department of Social Welfare and Development, a Government statutory agency under the Ministry of Gender, Children and Social Protection.[52] The Department has the mandate of integrating the disadvantaged, the vulnerable, persons with disabilities and the excluded into mainstream society.[53] It already provides correctional measures and remands reformation for juvenile offenders.[54] With

[49] Juvenile Justice Act, 2003 (Act 653).
[50] Insolvency Act, 2006 (Act 708).
[51] Section 77 of Insolvency Act, 2006 (Act 708).
[52] The Department of Welfare, Ministry of Gender, Children and Social Protection. Retrieved from http://mogcsp.gov.gh/index.php/department-of-social-welfare/
[53] *Ibid.*
[54] *Ibid.*

proper guidance and the right training, the Department can easily take charge of the management of offenders under community sentence.

CONCLUSION

We must face the truth: our prisons have long ceased to be institutions for reformation. Ghana's sentencing policy must be dynamic and respond to the socio-economic demands of our peculiar society. So, although the writers have not been privileged enough to view the Non- Custodial Sentencing Draft Bill yet, they are definitely in support of its review and subsequent passage.

In their 2011 report to the President of the Republic of Ghana, the Constitution Review Commission stated under their Recommendations for Legislative Changes that the Criminal and Other Offences (Procedure) Act, 1960 be amended to institute the option of communal service for categories of offences. It also reiterated its recommendation that the penal legislative framework be reviewed and streamlined to incorporate well-studied and defined sentencing guidelines and procedures, so as to ensure uniformity in sentencing, as well as to favour the progressive prescription of non-custodial sentences, especially for minor offences.

The time for including Community Sentences in Ghana's criminal justice system is now. Let us stop stifling our nation's productivity by detaining the working class of our economy: the skillful, hardworking, innovative youth, who are misguided and caught up by the antithesis of an unjust social order. There is a way to punish their wrong, reform their minds and behaviour, and explore their productivity, all at once. In judging and sentencing the non-conformists of our society, we must always remember, "***for every crime, there is a past but for every criminal, a future***."

AN EPISTLE TO WOODMAN: DOES THE FEE SIMPLE EXIST IN GHANA?

Kwame Adusei & Frederick Agaaya Adongo*

ABSTRACT

The question as regards the existence of the fee simple in Ghana is one of great legal significance, as there are opposing views regarding same. This piece, brief as it shall be, seeks to consign to the archives of history any seeming controversy as regards the existence or otherwise of the fee simple interest in land in Ghana. In consequence thereof, the paper argues that the fee simple interest exists in Ghana and can be created in family lands and lands owned by individuals. This is supported by the fact that the common law, of which the fee simple is a part, is included as one of the sources of Ghanaian law as well as the fact that the fee simple interest is recognized as a registrable interest in land in Ghana.

TENURES AND ESTATES

One of the greatest difficulties encountered by students of immovable property law comes from the English habit of splitting what may generally be called ownership into its component parts and making each of them an abstract entity[1].

These concepts answer two important questions which are germane to our discourse. The doctrine of tenure answers the question as to the terms upon which land is held. The concept of estates, on the other hand, answers the

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[1] Lawson and Rubben, *The Law of Property* (3rd ed) p 90.

question as to how long land may be held and the bundle of rights exercisable by the holder.

Tenures

The doctrine of tenure is of little practical importance today but it must be briefly mentioned, to facilitate a better appreciation of our discourse. The word itself means 'holding'[2]. Tenure signifies the relationship between the land and the tenant. In England, every acre of land in the country was held by the King.[3] What this implies, as Pollock and Maitland have said, is that the person whom we may naturally call the owner, the person who has the right to use and 'abuse' the land, cultivate it or leave it uncultivated, to keep all others off it, does not own the land but merely holds it as a tenant of the king either immediately or mediately.[4]

Historically, after the Norman Conquest, King William I, regarded the whole of England as his by conquest. In exercise of his powers, he granted land to his followers and confirmed same as overlord. Of course, the lands were not given for nothing; the people rendered services worthy of same (tenures in chivalry, socage and spiritual tenures).

Today, the law of tenure will not be of much assistance in solving contemporary problems of land holding. However, the student of immovable property law needs to be aware of the notion for at least two reasons. First of all, the Crown still holds some land as sovereign, an entitlement which is at the root of English property law. Secondly, something very similar to the old notion of tenure operates nowadays in the law of leases, where the words 'tenancy', 'landlord' and 'tenant' are part of landholding system.[5]

[2] *Tenere* in latin,*tenir* in French.
[3] Cheshire and Burn's *Modern Law of Real Property* (16th ed) p 13.
[4] Pollock and Maitland, *History of English Law*, 1895 (2nd ed) vol i p 237.
[5] Roger Smith, *Property Law Cases and Materials* (3rd ed).

Estates

Whatever the tenure, the land might be held for different periods. The estate indicates an interest in land for some particular duration. If the Crown is said to be the only owner of land, the question that arises is what bundle of rights do the immediate occupiers of the land possess? Though the Crown is said to be the owner of the land in England, one piece of land can have several apparent 'owners', in law, merely tenants but each having his own separate estate or interest in the same parcel of land.

By way of illustration, the position of Blackacre may be that A is entitled to the land for life, B to a life interest remainder (only exercisable after A's death) and C to the fee simple in remainder. At the same time, D may own a lease for 99 years, subject to a sub-lease in favour of E for 21 years and the land may be subject to a mortgage in favour of F, a profit `a prendre in favour of G, easements such as rights of way in favour of H, J and K, and so on indefinitely.[6] This is to buttress the point that there are several packages or bundle of rights exercisable over land, the principal distinguishing feature being the extent or duration of the tenant's 'ownership', whether perpetual, or for life, or for a fixed period of time etc.

It is also worthy of note that whereas some of these interests exist as legal rights, others exist as equitable interests. Estates are divided into two main classes, namely, Freeholds and Leaseholds. For the purposes of the present paper, the freehold estates will be examined.

Freehold Estates

The nature of the estate determines the length of time for which the land can be enjoyed. Traditionally at common law, there existed three kinds of freehold estates. These were the fee simple, fee tail and life interest.[7] A common feature of all estates of freehold was that the duration of the estate, though limited,

[6]Megarry& Wade, *The Law of Real Property* (8th ed).
[7] See *Ibid,* for a detailed discussion on the fee tail and life interest.

was uncertain. Nobody could tell when death could occur of a particular person and all his future heirs, or of a person and his descendants nor was it certain that the duration would be perpetual.

The Law of Property Act 1925 (LPA)[8] has abolished the fee tail in England. It must be stated, however, that the LPA has no effect in Ghana since it is neither a statute of general application nor an existing law within the meaning of Article 11 of the 1992 Constitution of Ghana. It suffices to say here that whether or not these common law freehold estates, particularly the fee simple, are of any practical effect in Ghana is a matter of some serious debate.

It is the stance of the present writers that the fee simple estate exists in Ghana and we proceed to give reasons for this assertion.

WHAT IS THE FEE SIMPLE?

The fee simple is the highest interest in land at common law. A tenant in fee simple enjoys all the advantages of absolute ownership. The estate shares the basic characteristics of indefinite duration and potential perpetuity. The word *fee* denotes that the estate is inheritable, that is to say, that it would endure until the person entitled to it for *the time being* – dies without successors. The adjective '*simple*' imputes that the inheritance is unrestricted to a particular class of heirs, so that it is inheritable by the heirs general.[9] Traditionally, the fee simple could exist as absolute or qualified.

The fee simple absolute in possession is almost the same as the ultimate right to the land. The estate is of indefinite duration and potentially perpetual. Accordingly, Preston says that the epithet '*absolute*' is used to describe an estate extended to any time given without any condition to defeat the estate in the meantime and that the term has the same significance with the word pure, or

[8] Section 1(1) abolishes the fee tail interest in land as it categorically states that the only estates in land which are capable of subsisting or of being conveyed or created at law are an estate in fee simple absolute in possession and an estate for term of years absolute.
[9] *See,* Cheshire and Burn, *supra* note 3, at p 165.

simple, a word which expresses that the estate is not determinable by any event.[10]

On the other hand, a qualified interest is one which, though might be perpetual, may also be cut short. An example would be a grant 'to Andrew, on condition that he never smokes.' There are two forms of qualified fees: the conditional fee and the determinable fee. The essence of the conditional fee is that there are ties or strings attached to it by which the estate may be terminated. For instance, a grant of land to A on condition that he doesn't marry B; this is usually called the condition subsequent as distinct from the condition precedent relating to the beginning of the estate (an example is that X to be granted fee simple interest in land when he attains 21 years).

The determinable fee on the other hand, will automatically determine on the occurrence of some specified event (which may never occur). If the event is bound to happen at a particular time, then the estate created is not a determinable fee because an essential characteristic of every determinable fee is that it is of indefinite duration. For example, a grant to X, so 'long as the Independence Square still stands' creates a determinable fee simple because it may continue forever and it is not certain that the independence square will collapse at a specific time. But if the specified state of affairs come about, the land reverts to the grantor. The grantor's interest here is the possibility of reversion.

Hence, should the possibility of reversion become impossible, the possibility of reversionary interest is destroyed and the fee simple becomes absolute.

A tenant in fee simple has extensive property rights in the subject-matter of his interest. This is in accordance with the common law principle fashionably coined in the maxim; *Cuius est solum, eius est usque ad coelum et ad inferos.*[11] Thus,

[10] *Preston on Estates,* vol. i. pp. 125-6.

[11] "A colourful phrase often upon the lips of lawyers since it was first coined by Accursius in Bologna in the 13th century", Justice Griffiths, in *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479.

the owner enjoys the right to everything in, on and above his land.[12] For that matter, the owner has the right to maintain an action in torts for trespass to the land and the right to be compensated for acquisition of the land by the state that may have exercised its power of eminent domain. The owner also maintains the right to alienate part or all of his interest in the land.

OWNERSHIP REGIME OF LAND UNDER GHANAIAN LAW

The Ghana legal system is pluralistic in nature.[13] In effect, land rights in Ghana are governed by constitutional and statutory provisions, customary law rules and principles and the received English common law.[14] According to Ollenu, the types of land ownerships known to customary law are the Allodial/paramount title, the sub-paramount title, usufructuary (customary freehold), tenancies, licenses and pledges.[15]

As Bentsi-Enchill postulates, the allodial title is the fullest cluster of rights over the land, characterised by indefinite or unlimited duration, usage or unrestricted point of disposition. It is the absolute, original interest in land held of no one. It serves as the standard by which any other interest in land is defined in terms of ways by which it falls short of plenary use and disposition.[16]

The usufructuary interest is subordinate to the Allodial title. It is that interest held, as of right, by a member of a landholding community having the allodial title or created in favour of a stranger.[17]

The question has been asked as to whether or not the fee simple as a freehold interest existing at common law is an interest that can be created out of land in Ghana. Some judicial decisions on the matter will be briefly discussed,

[12] *Pountney v. Clayton* (1883) 11 QBD 820 at 838. *Kelsen v. Imperial Tobacco* (1957) 2 QB *334.*
[13] PokuAdusei, *Towards a Transsystemic Study of the Ghana Legal System (Global Journal of Comparative Law, Volume 6, Issue 1 2017)*
[14] Article 11, 1992 Constitution of Ghana.
[15] Ollenu, *Principles of Customary Land Law in Ghana* (2nd ed, Sweet & Maxwell 1962)
[16] Bentsi-Enchill, *Ghana Land Law*(Sweet & Maxwell, 1964), pp 3-6
[17] Kwame Gyan, *Cases and Materials on Customary Land Law*

followed by Professor Woodman's view on the matter.

The case of *Total Oil Products Ltd v. Obeng & Manu*[18] is one in which the 2nd defendant, subject of Old Tafo in the Akim Abuakwa state, having the usufructuary interest in Tafo stool land, purportedly made a transfer by deed of conveyance to the 1st defendant. The habendum clause in the indenture stated that the grant was made to the 1st defendant in fee simple. The 1st defendant had subsequently drawn an indenture also purporting to transfer the land to the plaintiff-company in fee simple. The High Court held, per Ollenu J (as he then was),"that the submission that a fee simple title in the land is vested in the stool, and that the use of the words fee simple is essential in a conveyance of land by the holder of the usufructuary title is misconceived" and that "*there is no fee simple in customary land tenure*"[19](our emphasis).

We agree with Ollenu that the fee simple as a common law estate is alien to customary land law and that a subject of a stool having the usufructuary interest at customary law cannot transfer a title he does not have. Relying on the Supreme Court's decision in *Addai v. Bonsu II*[20], the Court further held that all the effect that a conveyance which purports to convey the fee simple *in land in Ghana* has is to pass the highest estate or interest vested in the transferor (our emphasis).

With due deference to the learned Ollenu J, this statement seems to be too broad and unwarranted, considering the facts of the case. As a matter of fact, the extract from *Addai v. Bonsu II*[21] quoted by Ollenu[22], when read carefully, does not support the holding of the High Court. The extract simply shows that the Supreme Court only held that a person having the customary freehold (usufruct) can only transfer that title and not the fee simple. An important

[18] [1962] 1 GLR 228.
[19] [p.232] of [1962] 1 GLR 228
[20] [1961] G.L.R. 273.
[21] *Ibid*
[22] [p.232] of [1962] 1 GLR 228

thing to note from Ollenu's judgment is where he says[23] that "the effect that a conveyance which purports to convey the fee simple in land in Ghana has is to pass the highest estate or interest vested in the transferor…" From this holding, we take cognizance of the fact that should the Courts accept the fee simple as a registrable interest in land in Ghana, its status would most likely be the equivalent of the usufructuary interest (customary freehold).

Interestingly, the Supreme Court seemed to be suggesting in *British Bata Shoe Co. Ltd v. Roura and Forgas Ltd*[24] that the fee simple exists in Ghana. The parties to the conveyance were Lebanese and the legal issue was whether the deed of conveyance had the effect of transferring the fee simple to the transferees according to the law of conveyancing in force in Ghana at the material time. The Court found that as non-Ghanaians who had embodied their transaction in formal conveyance in English form, the proper law was English law under which the land could effectively pass in fee simple.

Of much importance to our present discourse is where Adumua-Bossman J.S.C. held to the effect that even as between indigenous persons, where they have adopted the English method of sale, they are bound by principles of English law under which there can be a transfer of the fee simple in land.[25] This decision is more progressive and in line with the pluralistic nature of our legal system as it takes notice of English common law principles as having effect in Ghana.

THE PROPRIETY OF WOODMAN'S VIEW

In his article[26], Professor Woodman (of blessed memory) begins with a brief analysis of the case of *Nana Issiw & Ors. v. Nana Wiabu IV & Anor*.[27] Both parties

[23] Ibid
[24] [1964] GLR 190.
[25] [p.201] of [1964] GLR 190
[26] Gordon Woodman, 'Land Law Controversies: Does the Fee Simple Exist? What is Tribute?' [1971] VOL. VIII NO. 2 UGLJ 148—52.
[27] (1970) CC. 108.

in this case claimed ownership to a parcel of land. Upon the evidence before him, the trial judge entered judgment for the defendants as having only possessory right to the land but refused to make a declaration of title on the ground that the defendants had not satisfactorily proved that they were the owners of the land in fee simple.

In an appeal by the plaintiffs, the Court of Appeal varied the ruling of the court below and held that the defendants/respondents had title to the land in dispute. In its reasoning, the court said: "It is trite learning that Ghana customary land law knows of no estate in fee simple, as understood in English land law".

According to the learned author, this is a correct statement of the law since the fee simple is an interest developed in English law, and there is no reason for expecting the customary law of Ghana to include an identical interest, although it might include a similar interest. To this extent, the author raises no questions about the judgment.

However, the Court went on to cite with approval the judgment of Jackson J. in the *Kokomlemle Consolidated Cases*[28] to further hold that the fee simple does not exist in Ghana. According to Prof. Woodman, this made the ruling of the court to be unnecessarily "expressed in wider terms" because the decision by Jackson J that the fee simple does not exist in Ghana is a more general statement which "overlooks the obvious fact that the law of Ghana does not consist exclusively of customary law."

He emphasized that for nearly a century now it has been possible for the parties to a transaction to agree to be bound by common law which is also part of the laws of Ghana and when they do so, it is allowed for the fee simple to be created by deed of conveyance. Prof. Woodman then suggested three possibilities of the fee simple existing in Ghana. These are as follows;

[28]*Golightly v. Ashrifi* (1951) D.C. (Land) '48-'51, 301 at pp. 327-328

1. Land compulsorily acquired by the government: in this case he posits that all the pre-existing interests in the land before the acquisition become extinguished after the acquisition. The government then becomes the overall owner of the land (allodial owner) and can grant fee simple in the land.

2. A stool land (where the stool has the allodial title):in that case the stool acting through its appropriate representatives may exercise its right of alienation as the allodial owner, and upon agreeing to be bound by the common law, make a grant of the fee simple out of the stool land to a stool subject or a stranger.

3. Where a person holds the customary usufructuary interest in any land, he exercises almost the same rights as the fee simple because both are potentially perpetual and of indefinite duration. Thus, the usufructuary holder can transfer all his interest to another person by way of creating fee simple.

In 1971 when Prof. Woodman's article was published in the UGLJ[29], these assertions he made might have probably been unimpeachable. With the greatest respect to the learned Professor, it is our humble opinion that within the period amounting to about five decades, Ghanaian law has developed significantly and so, whereas some of his assertions will hold sway today, some part of the article will seem untenable. We shall proceed to give reasons for our position.

To begin with, we agree with the learned author that compulsory acquisition of land extinguishes the rights of the pre-acquisition owner.[30] We also agree that the State steps into the shoes of the allodial owner of the land. In fact, the Supreme Court has held that the effect of compulsory acquisition is to make a complete transfer of allodial title from the pre-acquisition land owner to the State and that allodial title cannot simultaneously vest in the State and pre-acquisition owner.[31]

[29] University of Ghana Law Journal.
[30] *MemunaMoudy v. Antwi* [2003-2004] 2 SCGLR 967.
[31] *NiiNorteyOmaboe III v. Attorney-General &Lands Commission* [2005-2006] SCGLR 579.

However, we hold some apparent doubts as far as concerns his assertion that the State, as the allodial owner of such land, can make a grant of same in fee simple. Before the promulgation of the 1992 constitution, the basic law governing the state's power of eminent domain was the State Lands Act, 1962 (Act 125). This was the existing law at the date on which Prof. Woodman's article was written. Under Act 125, the President was given the power, if he considered it to be in the public interest, to compulsorily acquire land by publishing an Executive Instrument. Regrettably, the Act did not define the scope of purposes which could qualify as being in the public interest; neither did it require the state to specify the particular public interest purpose for which the land was being required.[32]

However, under the 1992 Constitution, Article 20 imposes some strict pre-conditions on compulsory acquisition with regard to the purpose and justification for the acquisition. Article 20(1) requires a clear justification to be made for compulsory acquisition by the state, by stipulating that land shall only be compulsorily acquired if it is necessary in the interest of defence, public safety, public order, public health, town and country planning or if its use will promote the public interest.[33]

Thus, the state is required to specify the necessity for the acquisition and purpose for the proposed acquisition as a *sine qua non* for the validity of acquisitions and under Article 20(2) & (3), provide reasonable justification for any hardship caused to a person having an interest in the said land.[34] With regard to the usage of such land, Article 20(5) is quite emphatic that the land acquired in the public interest or for a specific public purpose shall only be used for that purpose alone.[35]

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[32] C. Dowuona-Hammond, 'Enforcing the Constitutional Framework on Compulsory Acquisition in Ghana: Looking Backward, Forward or Maintaining the Status Quo?' (2016) VOL. 29 UGLJ 71 at p 75.

[33] *Ibid,* at p. 76.

[34] *Ibid,* at p. 77.

[35] See the following cases in which the supreme Court has interpreted Article 20 and made pronouncements on the public interest requirements therein; *Nii Kpobi Tettey Tsuru III v.*

In the event that the state puts the land to a use otherwise than in the public interest, Article 20(6) of the constitution clothes the pre-acquisition owners with the right of pre-emption upon repayment of any compensation received.[36] It is also noteworthy that compulsorily acquired lands form part of public lands managed by the Lands Commission on behalf of the government of Ghana.[37]

The incidents of the fee simple, as have been discussed above, include its potential perpetuity and yet indefinite duration as well as the rights of the interest holder to put the land to any (legal) use and make grants to other persons to do same. Bearing in mind the brief exposition of the legal regime on compulsory acquisition, these proprietary rights of a fee simple holder seem to be irreconcilable with the public purpose/interest requirements in Article 20.

It would be a herculean task for the government to justify that a grant of fee simple out of compulsorily acquired land to any individual is in the interest of defence, public safety, public order, public health, town and country planning or that such grant of land is for the promotion of the public interest as required under Article 20(1) to validate the acquisition. For this reason, the Draft Lands Bill, 2016 puts some restrictions on the extent of interest that may be transferred by the state in acquired lands: the Republic shall not grant a freehold interest or a perpetual lease of public land to a person other than a public university and such allocation grants rights of user only and does not confer on the beneficiary institution the right to create or transfer an interest in the land.[38]

Attorney-General [2010] SCGLR 904; *Nii Nikoi Olai Amontia v. Managing Director Ghana Telecom* [2006] G.M.L.R. 69.

[36] *Nii Tetteh Opremreh II v. Attorney-General* (Unreported Ruling of High Court, dated 20th April, 1999, Suit No. 671/93) *See* also, C. Dowuona-Hammond, *supra*, note 32 at p. 79.

[37] Articles 257(1) & (2) and 258(1) of the 1992 Constitution.

[38] S.229, Draft Lands Bill. *See* also, C. Dowuona-Hammond, *supra*, note 32 at p. 99.

We also take into due consideration Article 295(1) which defines public interest to include any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana.

In our considered view, a grant of fee simple out of compulsorily acquired land which would entitle the grantee to exercise the accompanying rights, does not in any way confer a right or advantage which would enure to the benefit generally of the whole of the people of Ghana. On the contrary, such grant would rather bring unjustifiable hardship to the pre-acquisition owners who may successfully invoke their right of pre-emption under Article 20(6) to recover those lands subject to the repayment of the money received as compensation.

The authors are not unaware that the apex court has held that "the definition of "public interest" in article 295(1) implied that the meaning of public interest was not restricted to the scope indicated in the definition; hence, public interest might exist even if the interest was only of a section of the populace"[39]. However, the following dictum is instructive;

"Once the use to which the land is to be put is not restricted to any personal or individual interest, but one to which the general public will have a benefit or the benefit of the project will inure to the entire country either directly or indirectly, the public interest purpose will be deemed to have been adequately catered for."[40]

Hence, it is the firm position of the authors that the State cannot exercise its power of eminent domain to the benefit of, say a particular family or an individual in fee simple, to the detriment of the pre-acquisition owners, as same would be tantamount to unjustifiably 'robbing Peter to pay Paul'.

Further, it appears to us that Prof. Woodman's suggestion that the fee simple

[39]Republic v. Yebbi and Avalifo [1999-2000] 2 GLR 50

[40] Per Dotse JSC in *NiiKpobiTetteyTsuru III v. Attorney-General* [2010] SCGLR 904 cited in the judgment of Brobbey JSC in *Ablakwa And Another Vrs. The Attorney General and Another* (J1 / 4 / 2009) [2012] GHASC 32 (22 May 2012)

can be granted by a stool (allodial title holder) out of any stool land in Ghana is untenable when examined in light of our current Ghanaian legal dispensation, particularly Article 267(5) of the 1992 Constitution.[41] The effect of Article 267(5) is to put a ban on the creation of *freehold interest howsoever described* in stool lands (our emphasis), subject only to the provisions of the constitution.[42] It is our position that the fee simple as a freehold estate at common law perfectly fits the description '*freehold interest howsoever described*' as found in Article 267(5). It follows, therefore, that just like any other freehold interest, the fee simple cannot be created in stool lands in Ghana.

To this extent, Prof. Woodman's assertion that stools as the allodial owners of land may choose to make a conveyance under common law and grant fee simple in stool land would be untenable in modern Ghana.

OUR POSITION ON THE EXISTENCE OF THE FEE SIMPLE

Having challenged Woodman's position on the existence of the fee simple in Ghana, the question becomes whether or not the fee simple exists. It is our view and full conviction that the fee simple exists today, as a registrable interest in land in Ghana. We are fortified in this view by the reasons we proceed to give herein.

It is worthy to note that under the 1992 Constitution[43], the laws of Ghana comprise also of the common law. By the common law of Ghana is meant *the rules of law generally known as the common law,* the rules generally known as the doctrines of equity and the rules of customary law[44] (our emphasis). The point must be made clear that all the freehold estates (including fee simple) are

[41] Article 267(5) provides; '*Subject to the provisions of this Constitution, no interest in, or right over, any stool land in Ghana shall be created which vests in any person or body of persons a freehold interest howsoever described.*'

[42] For a detailed discussion on the effect of this provision, *see,*Mr. Kwame Gyan Esq, 'Article 267(5) of the 1992 Constitution and the Death of the Freehold Interest in Stool Land in Ghana.'

[43] Article 11(1)(e)

[44]1992 Constitution, Article 11(2)

creatures of the common law. Essentially, the inclusion of the common law as part of the sources of Ghanaian law necessitates the application of common law estates, of which the fee simple is a part, in Ghana.

Apart altogether from the argument on the basis of the sources of Ghanaian law as enunciated in the constitution, some pieces of legislation impliedly or expressly recognize the application of the fee simple in Ghana. Notably, *Section 19* of the Land Title Registration Law 1986 (PNDCL 152), which deals with interests in land that can be registered in Ghana, lists the registrable interests as follows;
19(1)(a) allodial interest at customary law
19(1)(b) customary law freehold [45]
19(1)(c*) freehold interest according to the rules generally known as common law* (our emphasis).

The focal point herein is *section 19(1)(c)*. It expressly admits that the common law freehold interests (including *fee simple*) are registrable interests in land under Ghanaian law.

Having brought to the fore the authorities, on the basis of which a fee simple interest in land can be registered in Ghana, it is worth considering the categories of lands out of which an interest in fee simple can be created.

On that footing, it is trite learning that a family can hold the allodial title to land in Ghana.[46] As the holder of the paramount title to land, a family may create a freehold interest, by way of a fee simple, to another person. Proceeding therefrom, we must take affirmative cognizance of the decision of the High Court in *Republic v. Regional Lands Officer, Ho; Ex parte Kludze*[47], in which it was held that the restriction or prohibition on the creation of freehold interest in stool land, as found in *Article 267(5)* does not apply to family lands.

[45] This has to do with the usufructuary interest of a subject of a stool in stool land or member of a family in family land.
[46] *Ameoda v. Pordier* [1967] GLR 479
[47] [1997-98] 1 GLR 1028

In that case, the applicant, a member of the Amega Edze family of Gbi-Kpeme, Hohoe was given a gift of a portion of the family's land and the family executed the relevant deed to evidence the transaction. However, when the applicant presented his document to the respondent, the regional lands officer, for registration he refused to register it on the ground that in line with a circular letter issued by the executive secretary of the Lands Commission, the applicant's document could not be registered as a freehold but as a leasehold. The said letter stipulated that since under article 36(8) of the Constitution, 1992 family lands had been grouped with public and stool lands and recognised in the economic objective of state policy as land held in fiduciary capacity by their managers, the State had a role in the certification, revenue collection and monitoring of such grants and therefore all categories of family lands be processed for concurrence.

Aggrieved by the respondent's decision, the applicant brought an application before the High Court, Hohoe for an order of mandamus to compel the respondent to register his document as a freehold. In support of his application, he contended, inter alia, that *Article 267(5)* of the Constitution, 1992 which prohibited the creation of freehold interests in stool lands did not apply to family lands since family lands were not stool lands.

The court held that the definition of stool land in article 295(1) of the Constitution, 1992 did not cover family land, noting that the word "family" did not appear in the definition of stool land. Accordingly, the court expressed the opinion that the limitation on the grant of freehold interest in stool lands provided in article 267(5) of the Constitution, 1992 did not apply and could not be extended to grants in family lands. In the circumstances, the court concluded that the executive secretary's circular was not only misconceived in the light of the plain language of article 295(1) of the Constitution, 1992 but also subversive of the constitutional rights of the individual. In this connection thereof, a very strong argument can be made (and indeed we assert) that in Ghana the fee simple can be created in family lands.

Then again, there has been a suggestion of the possibility of the allodial title being vested in an individual[48]. On the strength of this proposition, we submit that it is possible for an individual who holds an allodial title to land to create a fee simple interest in the land that vests in another person.

Bearing all the above in mind, we must note that an allodial title holder's right to dispose of land in fee simple is not without limitation. It is unlawful in our current Ghanaian legal dispensation for an interest in, or right over, any land in Ghana to be created which vests in a person who is not a citizen of Ghana a freehold interest in any land in Ghana[49]. We are well aware that if a person has the capacity to create a fee simple interest in land, such interest can vest in a stranger (which is wide enough to include a non-Ghanaian). As such, the constitutional barricade in article 266(1) limits the power of an allodial interest holder to create a fee simple interest which vests in a non-citizen. Thus, inasmuch as the family or individual who holds the allodial title to land can dispose of same in fee simple, he cannot transfer any freehold interest, including fee simple interest, to a non-Ghanaian.

CONCLUSION

The crux of our argument, as can be gleaned from the fore-going analysis, is that the fee simple interest in land can actually be created in Ghana. Nonetheless, there are some categories of lands out of which the fee simple interest can be created. These are family lands and lands to which the paramount title vests in an individual. Be that as it may, no fee simple interest can be created which vests in a person who is not a citizen of Ghana.

[48] *Nyasemhwe v. Afibiyesan* [1977] 1 GLR 27
[49] Article 266(1)

ADVERSE POSSESSION OF LAND: A PERUSAL OF THE DOCTRINE AS APPLICABLE IN GHANA

Moses Ekow Andoh [1]

INTRODUCTION AND BRIEF HISTORY

Introduction

Adverse possession is a doctrine of law by which a party acquires title to land he has possessed for a set period of time. A trespasser in continuous possession of land acquires title to that land upon sufficient proof of the elements of adverse possession. This essay attempts an appraisal of the doctrine and points out concerns with its application.

Josiah-Aryeh states that "the doctrine operates in two ways (a) to bar the owner's right to recover property adversely held for a specified period and (b) to vest the adverse owner or disseisor with a perfect title as though the property had been conveyed to him by deed"[2] It is a doctrine backed heavily by Section 10 of the Limitation Decree 1972 (NRCD 54) sub-titled "Recovery of Land". The law operates to bar an action for recovery of land by the previous title holder (hereinafter referred to as owner).[3] The title of the owner is extinguished leaving him with no capacity to bring such an action against the trespasser.[4] Section 10 of NRCD 54 further implies that any landed property or immovable property can be adversely possessed.

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[2] N. A. Josiah-Aryeh, *Law of Landlord and Tenant in Ghana*. 2nd Edition (Icon Publishing Limited, Accra, Ghana, 2015) at 299.

[3] Section 10(1) of Limitation Act, 1972. (NRCD 54).

[4] *Ibid*. Section 10(6).

A Brief History of the Doctrine

Adverse possession was introduced into the laws of Ghana from English law.[5] Ballantine explores the history of this doctrine in English law by the concept of seisin from times when statutes of limitation barred the use of previous possession as evidence of title to the more recent statutes which bar the commencement of action to recover land[6]. The provisions of the Limitation Act, 1972 (NRCD 54) are *in pari materia* with that of England and English rulings are highly persuasive to Ghanaian courts.[7]

Woodman clarifies that before 1973 when NRCD 54 commenced, the 12-year limitation of action was inapplicable to matters regulated by customary law[8]. Although its applicability was suggested by virtue of Statutes of General Application introduced with the Supreme Court Ordinances of 1874 and 1876[9], the courts in the early 20th century settled to refuse this position[10]. Thus, in **Addo v. Wusu (1940),** 200 years of possession did not affect title[11].

Ollenu J (as he then was) in **Ohimen v. Adjei (1957)**[12] stated the unavailability of prescriptive right in the customary law. He was rather open to apply equity to refuse recovery of land after it is developed. As such, Kom highlights the courts' denial of recovery of land based on their equitable

[5] Gordon R. Woodman, *Customary Land Law In The Ghanaian Courts* (Ghana Universities Press, Accra, 1996); N. A. Josiah-Aryeh, *The Property Law of Ghana.* 2nd Edition. (Icon Publishing Limited, Accra, Ghana, 2015).

[6] Henry W. Ballantine, "*Title By Adverse Possession*" (1918) H.L.R. 32. P135-159.

[7] By the doctrine of *Stare Decisis*; Date-Bah JSC in GIHOC Refrigeration Household Products Ltd. v. Hanna Assi (2005) SC GLR 458 relied on English authorities to establish a principle concerning adverse possession in Ghana.

[8] *Supra* at 5. Also stated in Enoch Kom, "*Limitation of Action to Recover Land*" [1968] UGLJ 1. P13-75.

[9] Atta v. Sam (1882) Sar FCL 151; Accuful v. Martey (1882) Sar FCL 156 cited on page 413.

[10] Also stated by Anin, J (as he then was) in Biney v. Biney [1974] 1 GLR 318 at 334.

[11] (1940) 6 W.A.C.A. 24; Other cases include Dadzie v. Kojo (1940) 6 W.A.C.A. 139; Kuma v. Kuma (1938) 5 W.A.C.A. 4 (P.C.); Akese v. Ababio (1935) 2 W.A.C.A. 264; Abinah v. Kennedy (1921) F.C. '20-21' 21.

[12] Ohimen v. Adjei (1957) 2 WALR 275 at p. 279.

jurisdiction.[13]

In 1973[14] section 30 (3) of NRCD 54 extended limitation of actions for lapse of time to matters regulated by customary law. Consequently, adverse possession became applicable in Ghana by statute.

ELEMENTS OF ADVERSE POSSESSION

In proof of adverse possession, Josiah-Aryeh states that the claimant must give evidence of "open, continuous and exclusive possession of land via a hostile entry"[15]

Open Possession of Unoccupied Land

For openness, the acts of possession must be notoriously visible so that the owner and the whole world would be notified. Section 10(4) of NRCD 54 provides that only a formal entry is sufficient to prove possession.[16] In **Armar Boi v. Adjei (2014)**, Adinyira JSC states that "Adverse possession must be open, visible and unchallenged so that it gives notice to the legal or paper owner that someone is asserting a claim adverse to his".[17] This case is also authority for the proposition that illegality in the entry or development of the land does not limit the right conferred by Section 10 of NRCD 54 since the lack of a building permit before the development of the land in dispute was found not to affect the rights of the adverse possessor under the Decree.

Furthermore, in **Nana Kofi Antwi v. Kobina Abbey & 2 Ors (2009)**, Ansah JSC states that openness includes "fencing the property, posting signposts, planting crops, building or raising animals in a manner that a diligent owner could be expected to know about them."[18] Thus, Josiah-Aryeh maintains that it is the permanent, substantial and visible acts that amount to

[13] Kom, *supra at 8* cites the equitable jurisdiction of the courts under statutes – Courts Ordinance, Cap 4; Courts Act, 1960, Section 66(3)(b); and Interpretation Act 1960, section 17.

[14] Section 36 of NRCD 54 provided that the Act commences on January 7, 1973.

[15] *Supra* at 2. p. 300.

[16] Section 10(4) of NRCD 54; Memorandum to the Limitation Act, 1972, (NRCD 54).

[17] Armar Nmai Boi & 2 Ors v. Adjetey Adjei & 12 Ors. (19/03/2014) CA No. J4/8/2013.

[18] Nana Kofi Antwi v. Kobina Abbey & 2 Ors (28/10/2009) CA No J4/10/2009. p. 6.

possession.[19]

Possession must be Continuous

As regards continuity of possession, there should be no hiatus in the occupation or possession of the said land by the adverse possessor. Section 10(3) of NRCD 54 limits an action for recovery where the land has ceased to be in possession. The right of action accrues when the land is under trespass and this right expires after persisting for 12 years continuous.

Possession must be Exclusive

Exclusive possession implies sole possession and is extended to the exercise of ownership rights contrary to the rights of the owner. Blackstone's indicates that (adverse) possession must be inconsistent with, threaten and conflict the ownership of the true owner.[20] For non-licensees, such acts of possession may suggest a blatant challenge to the owner's title but a licensee could challenge the owner's right by acting ultra-vires his rights. In **Kuma v. Kuma (1938)**, it is stated that customary grants conferred possessory title on grantees provided or so long as grantees recognize ownership of the grantor.[21] In **Hanna Assi v. AG & 3 Ors (2016)**, Gold Coast Motors by selling the land to the 5th defendant had challenged the ownership of the plaintiff; their grantor[22].

Possession must be to the Knowledge of the Owner

On the awareness of the owner, the owner "must know not only the facts but also the consequences".[23] Furthermore, in grants, the owner's actual knowledge of such overt acts is needed whereas this knowledge is presumed where no grant exists. So, the plaintiff's awareness of the possession and

[19] *Supra* at 2.
[20] Roger Sexton. *Blackstone's LLB Learning Texts. Land Law.* (Blackstone Press Limited, London, 1996) p.269-284 at 270. *Supra* at 17.
[21] *Supra* at 11.
[22] *Supra* at 29. Also, in Odonkor v. Botchway [1991] *Supra at 21.*
[23] Kom, *supra at 8* cites Danckwerts J in Re Howlett.

development of the land in **Jean Hanna Assi v. AG & 3 Ors (2016)**[24] counted against the owner. The trespasser is however under no obligation to inform or draw the attention of the owner and can establish against a person who doesn't know that he is the owner[25].

Although not stressed on in the cases, Josiah-Aryeh[26] adds that these elements must be simultaneous and concurrent.

HOW CONSENT AFFECTS ADVERSE POSSESSION

In principle, the consent of the owner to the possession of the trespasser defeats adverse possession. This consent plays out in leases and other forms of transfer that permit occupation or possession by the adverse possessor. As Josiah-Aryeh puts it, possession should be hostile (without the consent of the owner).[27] This accounts for the adversarial nature.

Kom[28] examines this principle and finds as follows;

i. An alien can establish adverse possession against a stool, family or personally acquired land since entry is not by consent.
ii. A tenant cannot establish adverse possession for that land during the tenancy but can adversely possess other lands.
iii. A squatter can establish adverse possession where he claims title by transfer from an alleged absolute owner if the transaction is valid in form and substance according to customary law and was by his mistake as to identity. But this claim cannot stand where the acquisition is from a limited owner.
iv. Pledgees and vestees cannot establish adverse possession as their entry is by implied consent and not wrongful or adverse.

[24] Jean Hanna Assi v. AG & 3 Ors (9/11/2016) CA No. J4/17/2016.
[25] Philips & MacKenzie, "*Textbook on Land Law*" 11th Edition (Oxford University Press, London) cites Topplan Estates Ltd. v. Townley [2004] EWCA Civ 1369 at para 85 and Gray v. Gray respectively.
[26] *Supra* at 2.
[27] *Supra* at 2.
[28] *Supra* at 8.

v. Claims under unlawful dispositions (by limited owners, heads of families, occupants of stools, or caretakers, etc.) are void-ab-initio so such purchasers cannot establish adverse possession.

For a licensee, possession after revocation or nullification of the license is a good proof of adverse possession. Such a licensee becomes a trespasser, like a squatter, who can acquire title by adverse possession in due time. So in **Mensah v. Blow [1967]** the fact of a license prevailed over continuous possession and refusal or non-demand of customary tributes from licensees.[29] In **GIHOC v. Assi (2006)** as well**,** Date-Bah JSC found that the plaintiffs were on the disputed land by an indefinite grant of the defendant so adverse possession was not established[30]. Professor Ocran JSC also stated in that case that "an occupant of land under license is not a trespasser, and the occupant cannot be a licensee of the rightful owner and simultaneously assert adverse possession against the owner"[31]. Attention can also be paid to Section 12(3) and (4) of NRCD 54 which allows a mortgagor's title to be extinguished by 12 years' acquiescence.

WHEN ADVERSE POSSESSION STARTS

Then comes the issue of time. The law on adverse possession demands proof of the duration of possession to establish at what point in time the owner is barred and his title extinguished by Section 10(1) and (6). Usually, the time starts when a right of action accrues to the owner by trespass and possession; revocation, nullification or determination of consent;[32] or when occupant exercises ownership rights[33]. The 12 year period then starts.

Acknowledgment of Title by the Trespasser

Edginton v. Clark [1963] suggests acknowledgement of the title of the

[29] Mensah v. Blow [1967] GLR 424 CA. Affirmed by Taylor JSC in Saaka v. Dahali [1984-86] 2 GLR 774.
[30] *Supra* at 7.
[31] *Ibid*. p. 488.
[32] Hughes v. Griffin (1969) 1 WLR. 23.
[33] *Supra* at 21.

owner at any point in time restarts time of adverse possession[34]. But acknowledgement of the title of the owner after 12 years is of no effect[35]; the owner's title is already extinguished and no amount of recognition can resurrect it. Furthermore, time in statutes of limitation runs against the owner even if the adverse possessor is unknown[36].

Beneficiaries of Estate

Nevertheless, provision is made for beneficiaries of estates. Time commences against beneficiaries when a vesting assent is issued to them and they become properly seised.[37] This principle was approved and applied in **Adu Kofi Djin v. Seidu Baako (2006)** by Aninakwah JSC.[38] His Lordship also cited Halsbury on Accrual of Course of Action after Death (4th Edition, Volume 28, paragraph 625) for the principle that upon death testate, cause of action accrues immediately and executor could be barred after 12 years' inaction. Upon death intestate, time starts when Letters of Administration is granted the administrator (as trustee) and to beneficiaries upon issuance of the vesting assent.

INTENTION AS AN ELEMENT IN ADVERSE POSSESSION

English courts require proof of an intention to dispossess the owner on entry by the adverse possessor because the law cannot impute an intention to a person where all actions prove to the contrary.[39] For Blackstone's, the possessor must "take control of the land with the intention of excluding everyone else from the land".[40] This intention must be evident in his overt

[34] Edginton v. Clark [1963] 3 All ER 468. Based on proof of *animus mannendi*.
[35] Colchester Borough v. Smith [1992] 2 All ER 561.
[36] R. B. Policies at Lloyd's v. Butler [1980] 1 KB 76. Approved and applied in Essoun II v. Yemo & Ors (1982-83).
[37] Section 104 of the Administration of Estates Act, 1961 (Act 63) as applied by Benin J. in Prah v. Ampah [1992] 1 GLR 34.
[38] Adu Kofi Djin v. Seidu Musa Baako (15/11/2006) CA No. J4/3/2006.
[39] Lord Greene MR in Booker v. Palmer [1942] 1 All ER 674.
[40] Blackstone's (*Supra at 23*) cites Bucks C.C. v. Moran [1989] 2 All ER 225.

acts.[41] The formula becomes open possession + *animus possidendi*. This is evident in **Powell v. McFarlane (1977)**[42] but in **Littledale v. Liverpool College (1900)**[43] the court clarified this requirement to be *an intention to possess*. If not required, possession by mistake would be sufficient.[44]

Furthermore, if the basis of the limitation of action is prescription (abandonment) then the law requires proof of *animus desserandi* by the owner so that the adverse possessor can by his *animus occupandi* and *animus possidendi* acquire an absolute title to that piece of land. The English courts considered this proposition in **Williams Brothers Ltd v. Raftery [1957]** and on finding that the plaintiffs had an intention to use the undeveloped land, ruled against the adverse possessor.[45] Nevertheless, the House of Lords disregarded the lack of this requirement in **J. A. Pye (Oxford) Ltd. v. Graham [2003].**[46]

LANDS UNAFFECTED BY ADVERSE POSSESSION

Compulsorily Acquired Lands

Not all lands can be adversely possessed. In considering the possibility of adverse possession of state lands, Date-Bah JSC in **Memuna Aboudy v. Antwi [2003 – 2004]** found that adverse possession against government compulsorily acquired land results in a tacit or implied license where the adverse possessor becomes a licensee of the government.[47] Based on public policy concerns that state lands would be under threat and the lack of *animus possidendi* of the occupants, it was found that until the tacit or implied license is revoked by the government, a cause of action does not accrue against the licensees.

[41] Prudential Assurance Co. Ltd. V. Waterloo Real Estate Inc. [1999] 2 EGLR 85.
[42] Powell v. McFarlane (1977) 38 P&CR 452.
[43] Littledale v. Liverpool College (1900) 1 Ch 19.
[44] Wiliams v. Putt (1871) L.R. 12 Eq. 149.
[45] Williams Brothers Ltd. Raftery [1957] 3 All ER 593; Also in Wallis' Cayton Bay Holiday Camp v. Shell-Mex [1974] 3 All ER 575.
[46] J. A. Pye (Oxford) Ltd. v. Graham [2003] 1 ac 419
[47] Memuna Aboudy v. Antwi [2003 – 2004] 2 SCGLR 967.

Res Extra Commercium

Kom discusses the impossibility of adversely possessing lands which are *res extra commercium* by wrongful entry or claim through a third person.[48] These lands are not occupied in observance of customary reverence but in its unoccupied state, it is regarded as being in use. Such lands include cemeteries, sacred groves, places of local fetishes and the surrounding unoccupied land.

Registered Land

Registered land can be adversely possessed. Section 18 of the Land Title Registration Act, 1986 (PNDCL 152) is on the conclusiveness of the land title register. Subsection 1 provides that registration is conclusive on the title to the land. Subsection 2 brings exceptions. It makes conclusiveness subject to other provisions of that Act and to the acquisition of the title by customary law and by the Limitation Act, 1972 (NRCD 54). Title by any of these exceptions is superior to registration. Being backed by NRCD 54 an adverse possessor's title is superior. The owner is transformed into a trustee of/for the adverse possessor.[49]

Subsection 3 of NRCD 84 allows the trespasser to apply to amend the register to reflect the change in ownership. Subsection 4 in regard for natural justice directs the land registrar to notify the owner and allow him to make representation to dispute the application. Section 46 (1) (f) and (g) of PNDCL 152 also make the interests of an adverse possessor an overriding interest over the registered owner. By these provisions, the law affirms the title of the adverse possessor over registered land.

WHICH TITLE IS ACQUIRED BY THE ADVERSE POSSESSOR?

Though Ollenu JA (as he then was) posited that an adverse possessor acquires only a possessory title in the land he possesses,[50] Date-Bah JSC, in contrast, professes that the squatter gains an original title; a fee simple also known as

[48] *Supra at 8*.
[49] Section 18(2) of PNDCL 152.
[50] Ollenu JA cited in Woodman *Supra* at 5 at p. 434.

the freehold.[51] His Lordship further states that "*the title is not transferred from the previous owner to the adverse possessor, but rather the squatter or adverse possessor gains a new title that takes the place of the rights of the original owner. This is the effect of Sections 10(1) and (6) of NRCD 54 else there would be the risk of "ownerless lands" resulting from a contrary interpretation of Section 10(6)*".

Being a product of ownership by seisin, the adverse possessor obtains a title equivalent to the extinguished title of the owner or the person with the right to immediate possession by necessary implication of the law. Consequently, adverse possession against a freehold title holder results in the acquisition of a freehold title and of a leasehold title where adverse possession is against a leasehold titleholder. This principle is dependent on the land tenure system of that state and is reflected in the holding in **Klu v. Darko & Konadu Apraku (2009)**[52] where the Supreme Court held that the plaintiff exercised adverse possession against the Nungua Stool.

Blackstone's posits the adverse possessor's title is not affected by the doctrine of notice.[53] The adverse possessor "begins a new chain of title".[54] These ideas are summed up by Ballantine where he writes; "… *the title is independent, not derivative, and "relates back" to the inception of the adverse possession".*[55] The title of an adverse possessor could also be view as a defective title, voidable only at the instance of the rightful owner before the expiration of the 12 years. It matures into a valid title with incidents exercisable by the trespasser. This notion suggests an idea of title nisi and title absolute; the former persisting until the latter matures at 12 years.

Lessees and Tenants

Lessees acquire the right to immediate possession or occupancy so an adverse possession against a lessee results in the equivalent title exercisable against any

[51] Blackstone's; Josiah-Aryeh; GIHOC v. Assi *(Supra at 7)*; Armah Boi v. Adjei (2014) CA No J4/8/2013.
[52] Klu v Darko & Konadu Apraku (25/11/2009) SC CA No. J4/15/2007.
[53] *Supra* at 23. Because it is not acquired by transfer.
[54] *Supra* at 2 at 301.
[55] *Supra* at 6 at 142.

other trespasser except the true owner after the lease. Blackstone's explains that adverse possession against a tenant creates a defective title to the land and in certain circumstances, the adverse possessor could be ejected by the landlord.[56] It is illustrated in **Fairweather v. St Marylebone Property Co. (1962)** that "in termination by agreement or expiration of the tenancy, the landlord gains an immediate right to claim possession of the land from the adverse possessor."[57] but this right expires after 12 years. It is therefore arguable whether the basis for a special action on the case for the loss of reversionary interest could be extended to allow landlords to recover land from the adverse possessor against their tenants.[58]

Furthermore, where a tenant encroaches neighbouring land and adversely possesses it, it is presumed that the tenant extended the locus of the lease and the encroached land reverts to the landlord unless the tenant proves that he intended to treat the encroached land different from the leased land[59].

ADVERSE POSSESSION AS A SWORD OR A SHIELD

Adverse possession in its original pristine form was used as a defence to actions for recovery of land. By the limitation of action, the adverse possessor only made a conditional appearance and raised a preliminary objection to the incompetence of the action.

Its use as a sword was contended in **GIHOC Refrigeration v. Hanna Assi (2006)**[60] where Date-Bah JSC per curiam found that such a right exists. By virtue of Sections 10(1) and 10(6) the law confers a title on the adverse possessor which is enforceable by action. He concluded, "In my considered view, therefore, the possessory title of an adverse possessor can be used as a

[56] *Supra* at 23.
[57] *Ibid*.
[58] The writer has reservations on this idea since this action is rather available in trespass to chattel but he considers whether this action can be brought in an action for the recovery of land.
[59] Blackstone's cites Smirk v. Lyndale Development Ltd [1975] 1 All ER 690.
[60] *Supra* at 7.

sword, and not only as a shield".[61] Relying on this finding, the plaintiff in **Klu v. Darko & Konadu Apraku (2009)** enforced his new adverse title[62]. Recently, the Supreme Court of India has found same in **Ravinder Kaur Grewal v. Manjit Kaur Aran (2019).**[63]

BRIEF CRITIQUE OF THE DOCTRINE

It is undoubted that upon scrutiny, adverse possession is a coherent theory contrary to popular disapproval based on its apparent harshness in its application. Banking on a policy of diligence, adverse possession rewards the party that shows a more pressing need for the land by acts of possession and occupation. For Blackstone's, "land is a scarce commodity and people … should not allow land to lie derelict".[64] As such, adverse possession "by destroying stale claims ensures that the person who (together with his predecessors in title) has been in control of unregistered (or registered) land for a lengthy period is indeed the owner".[65]

This notion resonates in Ballantine's point that "the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing"[66] Woodman[67] rather considered scarcity of land due to rapid population growth. By adverse possession, the law permits the party which is in use of the land to continue undisturbed whereas the nonchalant loses his property.

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[61] *Ibid* at 471.
[62] *Supra* at 51.
[63] "Leading Supreme Court Judgment on Use of Title Acquired by Adverse Possession as Sword" *The Law Web* (August 7, 2019), online: The Law Web <https://www.lawweb.in/2019/08/whether-person-who-has-acquired-right.html?m=1> last visited January 27, 2010.
[64] *Supra* at 17 at 283.
[65] *Ibid*
[66] *Supra* at 6 at 135.
[67] *Supra* at 5.

Adverse Possession and the Right to Create a Freehold Title

Article 267(5) of the 1992 Constitution of Ghana bars the creation of any interest that vests a freehold title in any person subject to the provisions of the Constitution. Considering that an adverse possessor acquires a fee simple title (freehold) by operation of law, is the acquisition of freehold title in stool land by adverse possession barred? I think so. The object of Article 267(5) is to keep the allodial title where it hitherto lies and to the extent that freehold title can be acquired by adverse possession, such adverse possession can be rendered void[68] for contrariness to the Constitution. The holding in **Klu v. Apraku [2009]** can be criticized on this argument as adverse possession was exercised against stool lands.

Adverse Possession and Right to Property

Another concern is its juxtaposition to a person's legal right to property. The right to property is an entrenched fundamental constitutional right.[69] Recognized limits to this right include its subjection to "the rights and freedoms of others and for the public interest",[70] and limitations in accordance with law necessary for public health, morals, fighting crime, etc.[71] None of the limitations expressly puts a time limit on the enjoyment of one's property so it appears once a person is seised with immovable property, his right to property should protect this ownership for the duration agreed in the conveyance. Yet, the law supports a trespasser to dispossess this constitutionally protected owner.

This curtailment of a person's property rights may be justified by considering the nature of ownership of land in our land tenure system. Land is a communal property and a person can acquire an interest in rem.[72] Absolute ownership lies with the members of the community most of which are unborn and it is

[68] By virtue of Article 1(2) of the 1992 Constitution.
[69] Article 18, 36(7) & 290(1)(d) of the 1992 Constitution of Ghana.
[70] *Ibid.* Article 12 (2).
[71] *Ibid.* Article 18 (2).
[72] Article 36(8) of the 1992 Constitution; A. K. P. Kludze, The Ownerless Lands of Ghana 11 U. Ghana L.J. 123 (1974).

vested in stools, skins or family stools, not for the benefit of a particular person but all who show a present need for it. A person thus cannot be allowed to hold on to land without putting it to use while another needs such land.

Adverse Possession and Illegality

The time-honoured maxim '***ex turpi causa***' is also considered. The question is whether or not the courts by affirming and approving adverse possession is assisting a foul hand. The second is whether or not equity is assisting an unclean hand. By the maxim *ex turpi causa*, courts recuse themselves from considering matters based on an illegality. Trespass is illegal so courts should not assist a trespasser to acquire title. Adverse possession cannot be justified even with necessity. Necessity breaks all laws but Lord Denning recognizes that this defence is unavailable for squatters.[73] He cites Lord Hale who found such acts felonious. The law does not even require good faith of the adverse possessor.

However, a possible explanation is that actions for torts are barred after 6 years of non-action[74] thus the trespass ceases to be actionable at law. By staying in unchallenged possession for another six years, the 'trespasser' acquires title by occupation. Accordingly, Date-Bah JSC cites Halsbury's Laws of England (4th Edition, Vol 28) where it is stated that "adverse possessor's title is gained by the fact of possession and resting on the infirmity of the right of others to eject him".[75]

Adverse Possession and Retrospectivity of Law

Adverse possession based on a statute of limitation also raises concerns about the retrospectivity of the instrument.[76] NRCD 54 commenced on 7th January 1973. It could have equivocal implications. First, does it mean actions to recover land are barred after 12 years from 1973? Or does it mean that such actions are barred if on 7th January 1973 12 years had elapsed since the right of action accrued to the plaintiff? The latter appears retrospective as it seeks to

[73] Lord Denning, "*The Closing Chapter*" 1983, (Butterworths, London).
[74] Section 4(1)(a) of NRCD 54.
[75] *Supra at 7* at 471.
[76] Article 107(b) of the 1992 Constitution.

bar actions even before the Decree commenced. This anomaly was instrumental in the decision in **Essoun II v. Yemo & Ors (1982-83)** since it was held that the 12-year limitation had accrued before the Act commenced.[77]

This concern is rather out of date because as it stands, after 1985, the instrument could be applied without any risk of retrospectivity. The first proposition prevails comfortably.

CONCERNS WITH THE APPLICATION OF THE DOCTRINE

Legal and judicial blessing of adverse possession, in all honesty, is harsh towards the owner. In the interest of justice, these suggestions could be considered.

A Stricter System of Proof

The Requirement of Intention

First, the law could require a stricter system of proof of adverse possession. Like the English courts, proof of *animus possidendi* of the adverse possessor and *animus desserandi* of the owner can be required. NRCD 54 is literal on the conclusiveness of possession for 12 years but these intentions must be required. The time this intention is formed and illustrated (by the challenge of the owner's right) would mark the start of adverse possession. The lack of these elements affords possession by mistake or of unabandoned land to amount to adverse possession contrary to the basis of the doctrine.

The Requirement of Continuous Possession

The requirement of continuous possession could also be clarified by interpretation to include unchallenged and undisturbed possession. As it stands, a trespasser whose possession has been under constant unsuccessful challenge (perhaps due to procedural fatality, or incapability to fund litigation) can still prove adverse possession. The Supreme Court's dictum in **Nartey v. Mechanical Llyod Assembling Plant [1987-88]**[78] that such possession

[77] *Supra at 37.*

[78] Nartey v. Mechanical Lloyd Assembling Plant [1987-88] 2 GLR 314.

must be long, peaceful and undisturbed must be strictly applied. The sufficiency of only continuous possession allows adverse possessors a time-wasting strategy to stall negotiations and challenges to their possession until 12 years is exhausted. Then their claim of adverse possession matures.

The Requirement of Exercise of Ownership Right

The current proof of adverse possession requires the trespasser to exercise the rights of the owner without the consent of the owner but to the knowledge and awareness of the owner. The problem with this requirement is that there are several rights of the owner; transfer, occupation and development, etc. The law is silent on which of or how many of these rights when exercised amounts to adverse possession. Is it mere possession? I doubt. Transfer of the land? Maybe, but in recent times, land is conveyed by paperwork in secret without informing the owner. In my view, there ought to be a clear and strict requirement of the right(s) the trespasser must exercise to amount to adverse possession since "absence of clarity is destructive of the rule of law".[79]

Compensation for the Owner

Another argument is for a system of compensation for the extinguished owner. A person who loses his property, one as expensive, scarce and valuable as land by operation of law, could be awarded some compensation paid by the adverse possessor. The reasoning is supported by section 1(2) of the Land Development (Protection of Purchasers) Act 1960 which allows compensation where the purchaser in mistake of fact acquires land from a wrong owner. This could compensate for the owner's loss as against the unjust enrichment of the adverse possessor. Considering the facts of each case, owners could be equitably compensated to avoid delivering 'Good Law Bad Justice'[80]

[79] Per Lord Diplock in Merkur Island Shipping Corporation v. Laughton [1983] 2 WLR 778 at 790.

[80] *Supra* at 76. As Lord Denning terms such ironic situations.

CONCLUSION

Adverse possession is a doctrine which shows the ability of the law to reward a diligent trespasser title to the land he occupies at the loss of the nonchalant owner. By so doing, the law determines all pre-existing interests and starts a new trend of title.

The adverse possessor acquires a title equivalent to the person dispossessed and this title upon maturity has equivalent incidents. But this title cannot be acquired if the entry, possession or occupation of the land was by the consent (transfer, lease, etc.) of the owner.

The doctrine is largely criticized for its apparent harshness towards the owner. Nonetheless, the courts have not addressed the justification for the doctrine so as to put to rest the concerns people have. Hitherto, the challenge has not arisen for the courts to justify this function of the law. But when it so arises, I hope, in the interest of justice for the owners, the suggestions and concerns raised in this essay are considered judiciously. The viability of this doctrine in the face of the constitutional provision (Article 267(5)) and other legal doctrines can be examined. When adverse possession withstands these tests, it is submitted humbly, that the application should be based on a stricter onus of proof as suggested in the concerns.

IDENTIFYING THE VIRTUAL INFRINGER: GHANA'S COPYRIGHT LAW AND ITS PURPOSE IN THE DIGITAL WORLD

Emmanuel Bugyei[1]

INTRODUCTION

Intellectual property, the branch of law that focuses on the protection of the creations of one's mind, must, just as any other branch of law evolve to address the demands of any epoch. The law of Copyright emerged at a time when there was a need to protect the publications of various individuals. Thus, the need to grant and protect the economic and moral rights inherent in an author as a result of a work emanating from him emerged. Copyright law ensured that these economic and moral rights were safeguarded.

The law of copyright may be said to focus on works solely from a time when printing presses were in vogue. However, the world as a result of the advent of the internet and globalization, has moved away from such a time. In recent times, copyright has taken a central role in the global economy. Some writers have espoused that posting a comment or a snapshot online or even creating a digital start-up that is based on copyrightable contents such as graphic design, texts, images or music can make a person an author for copyright purposes.[2]

This article seeks examine Ghana's copyright law focusing on its development, the protectable works and the scope of its protection against acts of infringement. Lastly, this article will address the question whether or not

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[2] Thierry Calame, Lenz & Staehelin & Massimo Sterpi '*Copyright Litigation*' (Sweet & Maxwell International Series 2015)

Ghana's current Copyright Law is suited to protect against infringement of copyright materials in a world that deems copyright law to be technologically challenged as it is only suitable for a paper-oriented society.

THE ORIGIN AND NATURE OF COPYRIGHT

It is suggested that the law of copyright came about in the 1700's with the passing of the infamous legislation known as the Statute of Anne in 1709.[3] This law whose enactment was said to have been called for and championed by booksellers in London did not, it would seem, give them the security they initially intimated. The Statute of Anne, the world's first complete copyright law, gave authors the sole right to print their works provided they continued to produce books. This assertion is clearly brought to the fore by the Act's long title as what was once a *Bill for the Encouragement of Learning and for Securing the Property of Copies of Books* became an *Act for the Encouragement of Learning by Vesting the Copies of printed Books in the Authors or Purchasers of such Copies*.[4]

Copyright is a creation of statute. The protection, that is afforded to the works of any individual must thus emanate from an Act of Parliament which may be coupled with a Legislative Instrument duly passed. There is no copyright law protection given at common law.[5]

The question as to whether or not there existed a perpetual right naturally vested in an author at common law was a matter of great debate for a time. This debate was finally concluded by the House of Lords in the case of *Donaldson v. Becket*,[6] where on the 13th of June 1769, the copyright in poems entitled Summer, Autumn, Winter, Britannia, a Poem sacred to the Memory of Sir Isaac Newton, a Hymn on the Succession of the Seasons, and an Essay on Descriptive Poetry written by one Mr. Thomson (deceased), along with the

[3] Guidelines on Copyright and Academic Research, The British Academy, 2006 [online source]
[4] Ronan Deazley, The Myth of Copyright at Common Law, 62(1) C.L.J. 106, (2003)
[5] Donaldson v. Beckett (1774) II Brown 129, (HL)
[6] (1774) II Brown 129, (HL)

sole right of printing, publishing, and vending these poems, were sold at an auction by the executors of one Andrew Millar who had purchased the copyright in the poems from the deceased. At the sale, the respondents, purchased the copyright to these poems for £505. After the purchase of the copyright of the said poems, the appellants subsequently published and sold several thousand copies of the poems in a volume titled The Seasons by James Thomson; Edinburgh; printed by A. Donaldson, 1768: and thereby made considerable profit to the great loss and prejudice of the respondents.

The primary issue was whether or not at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might the said author bring an action against any person who printed, published, and sold the same without his consent? The judges of the House of Lords differing in their opinion delivered their opinions with five judges in favor of the perpetuity or common law right; and the remaining six against the existence of any common law right in copyright. Thus, bringing the debate of whether copyright existed at common law to an end with a response in the negative.

The law of copyright protects the expression of ideas rather than ideas in and of themselves.[7] Its protection can only be invoked once an individual, progresses, from the "idea stage" and expresses his or her idea in a fixed and tangible form.

The protection granted by Copyright law seeks to promote two competing interests. These are; the private interests of an author of a work and the right of the general public to enjoy and have access to the work of the author. Copyright law endeavors to strike a balance between protecting the economic rights of owners of copyright and the need to encourage the free exchange and dissemination of ideas which is vital for the development and progress of any society.[8] This goes to show that copyright law is not solely fixated on authors

[7] CCH Canadian Ltd. v Law Society of Upper Canada [2004] 1 S.C.R. 339, at para. 8
[8] Pearson Education Ltd. v Adzei [2001] 2 SCGLR 864 (SC)

but also includes users of copyright material and content, by recognizing a sociological need to protect such works whose distribution goes to ensure a copyright material user's enjoyment and use of a work.

DEVELOPMENT OF GHANA'S COPYRIGHT LAW

Ghana's laws were largely influenced by the Laws of Great Britain and our law on copyright after the attainment of independence is no exception. On attaining independence, Ghana is said to have inherited a copyright system based on the British Copyright Act, 1911. This use of the British law was reflected in Ghana's Copyright Ordinance of 1914 (Cap. 126) with its enabling Copyright Regulation of 1918. The Ordinance applied the British Copyright Act of 1911 within the colony of the Gold Coast (now Ghana).[9] The Ordinance predominantly covered literary, dramatic, musical and artistic works. The law made it an offence to sell, make for sale, hire, exhibit or distribute copyright-infringing works in the then colony.

Under the Ordinance, no express mention was made of public exceptions or free uses, but the British Act from which the Ordinance derived its authority permitted 'fair dealing' with any work for the purpose of private study, research, criticism, review or newspaper summary.[10] Under the Ordinance it was a criminal offence to make copies of protected works with the use of industrial printing machines.[11] The term of protection, in tandem with the British Copyright Act, was for the life of the author plus 50 years after the author's death.

In 1961, the Ordinance and its subsidiary legislation were replaced with the Copyright Act 85 of 1961 and the Copyright (Fee) Regulation of 1969 (Legislative Instrument 174). Act 85 and its respective Legislative Instrument,

[9] Poku Adusei et al., "Ghana: Access to Knowledge in Africa- The Role of Copyright" in C. Armstrong et al eds., Access to Knowledge in Africa: The Role of Copyright (UCT Press,2010) Chapter 3

[10] Ibid.

[11] Copyright Ordinance 1914, s 3(1).

L.I 174 became the first post-independence pieces of copyright legislation in Ghana. This new Act included more material as protectable subject-matter under copyright. These additions were cinematograph films, gramophone recordings and broadcasts.[12]

Under this Act, works were protected only where sufficient effort had been employed to give the work an original character.[13] The Copyright Act 85 of 1961 contained relatively shorter terms of protection. In the case of published literary works, copyright protection lasted only until the end of the year in which the author died or 25 years (instead of 50 years under the earlier Ordinance) after the end of the year in which the work was first published, whichever was later in time.[14]

In the case of *C.F.A.O v Archibold,* the court held that " it is basic and fundamental to the subsistence of copyright in any form of literary composition, musical or otherwise that there is a composition in writing to which the right relates or is there to appurtenant."[15] This clearly meant that it was necessary to point to the existence of some basic essential requirement of a manuscript or paper on which one inscribed or wrote out a composition. Thus in giving effect to the provisions of Act 85, the courts alluded to the fact that under the said Act, it is implied that the expression of intellectual ideas in literary composition or form, as a matter of necessity, must have the expression derive its validity from the circumstances that it is committed to, or is made or written out on a manuscript or paper.[16]

This incessant need for writing as the *sine qua non* for protection for works such as musical works was problematic, as it clearly offset the interests of illiterate Ghanaian composers. The requirement of writing, was subsequently done away with by the Copyright Law of 1985. The Copyright law of 1985 (PNDCL

[12] Copyright Act, 1961 (Act 85), s 1(1).
[13] Copyright Act, 1961 (Act 85), s 1(2).
[14] Copyright Act,1961 (Act 85), s 14.
[15] [1964] GLR 718 (SC)
[16] C.F.A.O v Archibold [1964] GLR 718 (SC)

110), was passed by the Provisional National Defence Council, to replace the old law of 1961. Protection for works was extended to cover foreign made works under this new law.[17] This was done in compliance with the international Berne Convention for the Protection of Literary and Artistic Works.

The 1985 law extended the terms of protection for copyright works. The general duration of protection for most works became the life of the author plus 50 years. In the case of other kinds of works owned by a body corporate, copyright protection lasted for 50 years from the date on which the work was made public.

This 1985 law (PNDCL 110) also changed the strict requirement of writing that existed under the 1961 Act and adopted a more flexible requirement of fixation.[18] This law also included as protectable subject-matter of copyright works in forms such as sound recordings, choreographic work, derivative work and programme-carrying signals.[19] These inclusions were evidently novel. Section 6(2) of the Copyright law of 1985 (PNDCL 110), in addition to the already existing economic rights held by authors also included moral rights. Moral right allowed authors of any work to claim authorship of the work. Further, it granted an author the sole right of altering his or her creation whenever he or she wished and also allowed an author to seek relief in the event of any mutilation or distortion of his or her work where such a distortion was damaging to the author's honor or reputation.[20]

The foremost copyright legislation in Ghana is the Copyright Act, 2005 (Act 690). This Act, replaced the Copyright Law, 1985 (PNDCL110). It came into force on the 17th of May, 2005. Under this law, the works eligible for copyright protection include; literary work, artistic work, musical work, sound recording, audio-visual work, choreographic work, derivative work and

[17] Copyright law of 1985 (PNDCL 110), s 4.
[18] Supra note 8
[19] Copyright law,1985(PNDCL 110), s 2(1)
[20] Copyright law 1985(PNDCL 110), s 6(2)

computer software or programmes.

This Act, in terms of the duration of protection given to authors, goes a step further than that provided generally under international copyright standards. Under international law (notably The Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 commonly known as TRIPS Agreement) protection does not exceed the lifetime of the author plus 50 years after his or her death[21], Act 690 grants copyright protection for the life of the author plus 70 years after his or her death.[22] The provisions under this Act which exceed the general standard term of protection are examples of what are referred as TRIPS-plus provisions.

SOURCES OF COPYRIGHT LAW IN GHANA

In accordance with the 1992 Constitution of Ghana which espouses our nation's aspiration to adhere to the principles, aims and ideals of the various international organizations of which Ghana is a member of,[23] our law makers fashioned our primary copyright law which is the Copyright Act, 2005 (Act 690) to mirror the standard of protection established at the international level. There is a myriad of laws pertaining to copyright. These include national copyright legislation and international copyright law sources. Note that the list provided below must not be thought of as final and exhaustive as law has the remarkable character of changing and evolving to meet the requirements of the times. The sources of Ghana's Copyright Law are;

- Copyright Act, 2005(Act 690)
- Copyright Regulation 2010 L.I 1962
- Berne Convention for the Protection of Literary and Artistic Works 1886 (most recent revision, Paris 1971)

[21] The Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, Article 12.
[22] Copyrights Act, 2005 (Act 690), s 12.
[23] 1992 Constitution of Ghana, Article 40.

- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ("the Rome Convention")
- Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPS)
- Universal Copyright Convention 1952 (most recent revision, Paris 1974)
- WIPO Copyright Treaty, 1996
- WIPO Performances and Phonograms Treaty, 1996
- Case law on Copyright matters
- Textbooks on the subject of Copyright by highly acclaimed authors

THE INTRODUCTION OF THE INTERNET AND THE CHALLENGES POSED TO THE LAW OF COPYRIGHT

The emergence of the internet, connected the world in more ways than what the makers of this communication tool primarily envisioned. The internet has become a storehouse for the mass of information and knowledge of the world. Through it, people can have access to any material particularly the works of any author, with just the click of a button. In the rendition of the facts in *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers,* Binnie J. gave an apt and concise description of the nature of the internet as well as how it operates. He described the internet as

> "*a huge communications facility which consists of a worldwide network of computer networks deployed to communicate information. A "content provider" uploads his or her data, usually in the form of a website, to a host server. The content is then forwarded to a destination computer (the end user). End users and content providers can connect to the Internet with a modem under contract with an Internet Service Provider. An Internet transmission is generally made in response to a request sent over the Internet from the end user (referred to as a "pull"). The host server provider transmits content (usually in accordance*

with its contractual obligation to the content provider)."[24]

The internet, distorted the law of copyright's ultimate objective which is to strike the right balance between protecting the intangible proprietary rights of the individual creator on the one hand and the public interest in maintaining freedom of information, communication and expression on the other.[25] This distortion evidently tipped the scales in favor of the interest of the public. The law of copyright came under siege as result of the introduction of the internet as protection of the rights of authors, copyright litigation as well as imputation of liability in matters of infringement became increasingly difficult. Issues of conflict of law arose given the territorial nature of copyright law. An author whose copyright had been infringed on could not apply his local copyright laws to seek redress in another jurisdiction since the principle of geographical application of copyright law is the core foundation of copyright regimes in every country.[26] This ultimately fed into the issue of litigation as questions of what is the proper law to be applied arose; was it the law of the author's domicile or the law of the place where the infringement occurred?

The latter question was an extremely peculiar and difficult one especially where traditional copyright concepts and principles were designed to deal with infringement being one of physical reproduction and communication without an author's consent and not that of the digital world where infringement was the abstract reproduction of the work of an author and the place of infringement a virtual world. The issue of imposition of liability as well as identifying a copyright infringer in a virtual world is also a very challenging question as it is presumed that in a virtual world an internet user is everywhere

[24] Per Binnie J, Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers [2004] S.C.R 427 (SC)

[25] Cheng Lim Saw, Linking on the Internet and Copyright Liability: a clarion call for doctrinal clarity and legal certainty, IIC 536-564, (2018)

[26] Poku Adusei, '*Issues Arising in Litigation in the Field of Copyright and Related Rights in Ghana And Beyond*' (May 3-5 2007)
< https://commercialcourt.org.gh/index.php/training-materials?download=10:issues-arising-in-litigation-in-the-field-of-copyright-and-related-rights > accessed 05 February, 2021

and nowhere at the same time and that Internet Service Providers (ISPs) are only providers of a platform of information and are not directly involved in copyright infringement.

COPYRIGHT INFRINGEMENT AND THE COPYRIGHT ACT 2005, (ACT 690)

Copyright infringement is the bane of all creators of copyrightable subject matter. In my humble opinion, copyright infringement is a scourge that discourages authors from publishing their work especially where there are inadequacies in the framework of Copyright law designed to provide them with protection of their works.

An infringement is simply a breach of copyright law. It is the doing, performance, reproduction or adaptation of the original work of an author. An original work is the expression of an idea through an exercise of skill and judgment.[27] Infringement occurs without the consent of the rights holder. Infringement consists of the unauthorized taking of the originality in an author's work.[28] The Copyright Act, 2005 (Act 690) and Copyright Regulations, 2010 L.I 1962 stipulates the rights conferred to the right holder. The Copyright Act, 2005 (Act 690) does not explicitly define the term 'copyright infringement'. However, it provides a list of actions that could constitute and be deemed to fall under the domain of copyright infringement.

It is worthy to note that it is no defense in a matter of infringement to say that one lacked knowledge that a work was copyright protected. Acts of infringement under Act 690, include the reproduction of the work in any manner or form, the translation, adaptation, arrangement or any other transformation of the work, the public performance, broadcasting and communication of the work to the public, the distribution to the public of originals or copies of the work by way of first sales or other first transfer of

[27] CCH Canadian Ltd. v. Law Society of Upper Canada [2004] S.C.R. 339 at para. 16
[28] Cinar Corporation v. Robinson [2013] 3 S.C.R. at para. 24

ownership, and the commercial rental to the public of originals or copies of the work which are known in the Act as the economic rights of a copyright holder.[29] The claiming of authorship in a work by an individual who is not the actual author as well as the distortion or mutilation of a work in a way prejudicial to the person of its creator are acts that infringe on the moral rights[30] of the copyright holder. The Act also provides that the doing of an act contrary to the rights of a performer under sections 28, 30 and 31 as well as the rights of broadcasting organizations under sections 33 and 34 constitutes an infringement of copyright or related right.[31]

IDENTIFYING THE VIRTUAL INFRINGER UNDER ACT 690

Upon the exposition of the forms of infringements above, and a careful reading of the Copyright Act, 2005 (Act 690) it becomes evident that the above Act cannot deal with issues of infringement that occur on the internet as the Act and its regulations give no provision to tackle such an issue. In my opinion, the Act's application and efficiency is limited to a paper-oriented society or one where a work and where it is stored can be physically identified. In the virtual world of the internet, which makes it difficult to tie an infringer to one place and where the works of authors exist not in a tangible form, the Copyright Act, 2005 (Act 690) simply cannot keep up with the vicissitudes and resultant challenges of digitization.

Other pieces of legislation and case law have however come to the aid of Ghana's Copyright Act in response to its apparent limitations.

A. The Electronic Transactions Act, 2008 (Act 772): In reference to the liability that can be imputed on Internet Service Providers (ISPs) and Intermediaries considering their actions that may amount to direct participation in acts of infringement the Act gives a number of provisions in response. The two entities cannot be liable for copyright infringement where

[29] Copyright Act, 2005 (Act 690), s 5.
[30] Copyright Act, 2005 (Act 690), s 6.
[31] Copyright Act 2005, (Act 690), s 41.

they act only as "mere conduits".[32] Section 90 of Act 772 provides that (1) An intermediary or service provider is not liable for providing access to or for operating facilities for information systems or transmitting, routing or storage of electronic records through an information system under its control, as long as the intermediary or service provider

(a) does not initiate the transmission,

(b) does not select the addressee,

(c) performs the functions in an automatic, technical manner without selection of the electronic record, and

(d) does not modify the electronic record contained in the transmission.

Any act contrary to the above would make an intermediary or service provider a direct or indirect participator in copyright infringement and as such liability can be imputed on them.

With regard to matters of hosting which could lead to an internet service provider or an intermediary infringing on an author's copyright, Act 772 states that:

> 'An intermediary or service provider who provides a service that consists of the storage of electronic records provided to a user of the service, is not liable for damages arising from information stored at the request of the recipient of the service, as long as the service provider
>
> (a) does not have actual knowledge that the information or an activity relating to the information is infringing the rights of a third party,
>
> (b) is not aware of facts or circumstances from which the infringing activity or the infringing nature of the information is apparent or can be reasonably inferred, and
>
> (c) upon receipt of a take-down notification under this Act, takes action expeditiously to remove or to disable access to the

[32]Electronic Transactions Act, 2008 (Act 772), s 90.

information'.[33]

The Act also makes provisions for illegal or unlawful matter that is electronically published to be removed from the internet by the use of a "take-down notification".[34] Thus, by implication a creator of a work has the right to request for his work to be removed by a service provider which must be complied with.

B. Foreign Case Law: With foreign case law, which are of persuasive effect to the courts of Ghana, a number of cases have dealt with the issue of copyright infringement through the use of the internet. One such case of notable mention is the case of *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers.*[35] This case was an appeal that raised questions as to who should compensate musical composers and artists for their Canadian copyright in music downloaded in Canada from a foreign country via the internet. The respondents, a collective body which administers in Canada the copyright in music of Canadian members and foreign members, sought to collect royalties from Internet Service Providers (ISPs) located in Canada arguing that the ISPs infringed the copyright owner's exclusive statutory right to communicate their work to the public and to authorize such communication. The appellants (the ISPs) on the other hand argued that, they neither 'communicate' nor authorize anyone to communicate musical works because they acted merely as conduits and as such, they did not regulate the content of the internet communication which they transmit.

The Canadian Supreme Court held that real and substantial connection to Canada is sufficient to support the application of Canada's Copyright Act to international internet transmissions [copyright infringement via the internet] that will accord with international comity and be consistent with the objectives of order and fairness. The court stated that in terms of the internet, relevant connecting factors would include the *situs* of the content provider, the host

[33] Electronic Transactions Act, 2008 (Act 772), s 92(1)
[34] Electronic Transactions Act, 2008 (Act 772), s 94
[35] [2004] 2 S.C.R 427

server, the intermediaries and the end user. The court also was of the view that the weight to be given to any of the factors mentioned above will vary with the circumstances and the nature of the dispute that arises with regard to copyright infringement.

Territorial implications of granting orders against internet service providers or internet search engines limit the grant of equitable remedies against any person and to tackle them seems to be an over reach by any court. The Canadian Supreme Court in the case of *Google Inc. v Equustek Solutions Inc* dealt with this issue in relation to the grant of injunctions by simply stating that problems of this nature occur online and globally. The internet has no borders- its natural habitat is global. The only way to ensure that an interlocutory injunction attains its objective is to have it apply where an entity like Google operates-globally.[36]

The Electronic Transactions Act, 2008 (Act 772) and persuasive case law allow for consideration of matters of infringement with regard to internet copyright infringement but they are not the authoritative statutory statements of a Ghanaian Copyright Act.

CONCLUSION

In reverence to the words of Chief Justice McLachlin who stated that "The capacity of the Internet to disseminate works of the arts and intellect is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of the creator of the works."[37] We cannot deny the usefulness and effectiveness of the internet as a tool for communication and dissemination. However, a balance of the rights of creators of copyrightable works and the users of these works is the goal of Copyright Law. Thus, creators must get what is due them for their brilliance and they must be protected where their intangible rights in

[36] Google Inc. v Equustek Solutions Inc. [2017] 1 R.C.S 825 at para. 41

[37] Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers [2004] S.C.R 427

a work are trampled upon. Current copyright legislation in Ghana needs to be revised to include provisions that identify infringers and infringement by the use of the internet as well as provide for appropriate remedies where these internet infringement actions occur.

As a last note of caution, the need for a statutory definition of copyright infringement is advised against. A definition for an ever-evolving facet of the Law would only prove to be limiting and unsuitable for Copyright protection in Ghana as technology also transmogrifies with each new age.

SPORTS LAW? OR SPORTS AND THE LAW?

Godslove Emmanuel Bogobley[1]

INTRODUCTION

Wole Soyinka in On Africa describes football as a "global pastime of mass hysteria". This observation is very true, not only for football, but for other sports disciplines as well.

However, the sports industry has in the last decade been rocked by one scandal after another. These scandals have been mainly concerned with two diverse yet connected aspects of sports: sports administration and sports rules.

In the realm of sports administration, several officials have been charged with corruption-related offences. For instance, in 2018, Kwesi Nyantakyi, former President of the Ghana Football Association, was implicated in the infamous exposé by investigative journalist Anas Aremeyaw Anas in which he was filmed taking bribes. Mr. Nyantakyi was subsequently removed from office and banned from all football-related activities. Ghanaian football suffered greatly from this incident and is still recovering.

On the other side of the spectrum, there have been issues regarding the application of rules relating to anti-doping and hormone treatment, as in the cases of Maria Sharapova and Castor Semenya.

These problems have raised questions about what body of laws regulate these sports disciplines that are so important in the lives of many. This article is an

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attempt to contribute to the debate regarding the existence of a body of "sports law" by examining the various positions on the topic and concluding whether or not there is indeed a separate area of law called "sports law".

DOES "SPORTS LAW" EXIST? – THE DEBATE

There are three general positions on this debate:

A. Sports law is not an independent area of law, but comprises various other areas of law:

This is the traditional view. Proponents of this view claim that there is nothing like "sports law". They claim instead that "sports law" in reality is just the application of other areas of law to issues arising from sports.[2] According to them, "sports law" is just law applied to sports and does not involve a unique body of principles that is different from traditional legal principles.[3] Thus, it cannot be said that there is a separate area of law known as "sports law".

At first glance, there appears to be some truth in this position. A prima facie examination of some of the various legal issues arising from sports would suggest that these issues indeed can be resolved using other areas of law. The enforceability of player contracts for instance, may be resolved using the law of contract. The acquisition of work permits may border on employment law. Disputes regarding sponsorship and advertisement may have their remedy in intellectual property. There may even be issues regarding battery on the field of play, remedy for which may be available in torts. Thus, it would appear that "sports law" is indeed a misnomer, and is just a combination of the other areas of law.

However, the present author disagrees with this traditional view. First of all, the mere fact that several areas of law are relevant to a particular discipline does not negate the existence of a separate field of law with respect to that discipline. The

[2] Simon Gardiner, *Sports Law,* 71 (1998).
[3] Michael J. Cozzillio & Mark S. Levinstein, *Sports Law Cases And Materials*, 5 (1997).

traditional view fails here because it ignores one important yet simple legal fact: very few (if any) substantive areas of law fit into separate watertight compartments. Overlaps between different areas of law is a common occurrence in law, as has been observed by several writers.[4] The following cases illustrate this point further.

In the case of *Fisher v. Bell*[5], the defendant was accused of offering to sell a flick knife, which was a criminal offence. In determining whether Bell was guilty or not, the court made use of the principles of contract law. Bell was not found guilty because he just put the flick knife on display in his shop, which did not constitute an "offer" in the law of contract. In *Donoghue v Stevenson*[6], the plaintiff discovered a rotten snail in a bottle of beer that the plaintiff's friend bought from the defendant. She therefore brought an action in torts. In determining the claim, the court considered contract principles and recognized that conduct that constituted breach of contract towards one party could also constitute a tort against another party. The court then held that even though no contract had been formed between the plaintiff and the defendant, the plaintiff's claim would still succeed. Thus, overlaps occur not only in sport- related disputes, but in other areas as well.

Furthermore, the traditional view fails to take into consideration the fact that even though there are several issues that can be resolved in other areas of law, there are several others that require the application of principles peculiar to sports. An example is the incidence of doping. Doping, simply put, refers to the taking in of banned performance-enhancing substances by athletes. While taking in drugs to enhance performance might not be seen as a problem in an area of law such as employment law, it is considered highly unethical in sports. In fact, a lot of anti-doping regulations have been passed, with quite a number of athletes being tried and subsequently banned, either temporarily or permanently, for violating

[4] AWB Simpson, *Invitation To Law* (1st ed. 1988).
[5] [1961] 1 QB 394.
[6] [1932] All ER Rep 1.

these regulations.[7] Thus, there has been the elevation of certain ethics to the standard of enforceable rules, which is a development unique to the world of sports.

The traditional view also ignores the phenomenon of sport-specific legislations being passed in several jurisdictions to help in the regulation of professional sports. These legislations provide for and mandate the application of rules and principles unique to different sports disciplines. An example of such legislation is the Sports Act 2016.[8] Section 29(1)(c) of the Act provides that the Minister may by legislative instrument make regulations to prescribe for compliance by national sports associations to, *inter alia,* the statutes and regulations of the respective international federations or organizations.

B. Sports law may develop into an independent area of law:

This view is described by Davis[9] as the moderate position, i.e. this view does not agree with the traditional view that "sports law" is just an amalgamation of other areas of law but is also undecided as to whether there is such an independent body of law.

Proponents of this view argue that there are indeed laws and legal issues that are increasingly specific to sports. According to them, there is enough evidence to suggest that there is a growing "sports-only" body of law. They argue that there are many areas where specialized analysis has been required to solve legal issues, and that such analysis does not apply in any other field apart from sport. Thus, the traditional view cannot not stand.

However, adherents to the moderate position also argue that sports law is still undergoing a "transformative process"[10] They believe that the increase in sport-

[7] Pechstein v. International Skating Union CAS 2009/A/1912 & 1913.
[8] Act 934.
[9] Timothy Davis, *What Is Sports Law*, 11 MARQ. SPORTS L. REV. 211 (2001).
[10] Carter, W. Burlette. *Introduction: What Makes a Field a Field,* VA.J. SPORTS & L. 1 (1999): 235.

specific rules and regulations will eventually create an independent body of law. However, to call it "sports law" would be far-fetched. The moderates prefer the term "sports and the law" as a more befitting description of the phenomenon, since the field has not fully developed yet.

In the present author's opinion, the main weakness with this approach to the debate is that, it would very difficult to pinpoint when exactly sports law can be said to have fully developed into an independent area of law. How many more legislations have to be passed for the independent area to be recognized? How many more judicial decisions?

This view is even more problematic in modern times, with the increasingly sophisticated and more elaborate rules put in place for the regulation of professional sports both domestically and on the international plane.

Looking at the advanced level of development of sports today, one cannot help but ask how much more the regulation of sports should develop before the moderates finally accept that sports law indeed exists.

C. There is a separate area of law known as "Sports law":

This is a fairly modern view. Proponents argue that there is indeed an independent area of law known as sports law, and that such a field is more than just the amalgamation of other areas of law. There are a number of arguments put forward in support of this position.

First, adherents to this position agree with holders of the moderate view on the point that there is evidence of an emerging field of law, but go on to assert that such a field has indeed been formed.

They also argue that the refusal to regard sports law as an area of law on its own is an indication that such people do not take sports seriously.[11] According to them, the intellectual unseriousness attached to sports stems from the fact that sports is

[11] Robert Siekmann, *Introduction To International And European Sports Law* (2011).

seen by traditional academics as having more of a social nature than a business nature. In more traditional areas of law such as contract law, transactions done in a social setting are generally not legally enforceable. However, advocates for sports law argue that this unseriousness is misplaced, especially in light of the huge number of economic transactions that go on in the world of sports. Thus, sports law is as business as it is social and should be treated like other "business-natured", or traditional, areas of law.

The present author agrees with this position, for reasons that will be explained imminently.

ASSESSING WHETHER OR NOT THERE IS "SPORTS LAW"

Davis himself lists eleven factors for determining whether sports law is an independent area of law. He however does not reach a concrete conclusion as to whether the criteria have been satisfied, or even whether the criteria listed are conclusive enough.

Nevertheless, it is the author's humble submission that the criteria, though they might not be conclusive, are as comprehensive a list as any, and that in the times following Davis's article, the criteria listed have been satisfied as will be shown below.

According to Davis, the factors that need to be considered are[12]:

1. unique application by courts of law from other disciplines to a specific context;

2. factual peculiarities within a specific context that produce problems, requiring specialized analysis;

3. issues involving the proposed discipline's subject matter must arise in multiple, existing, common law or statutory areas;

4. within the proposed discipline, the elements of its subject matter must connect, interact or interrelate;

[12] Davis, *Supra*.

5. decisions within the proposed discipline conflict with decisions in other areas of the law and decisions regarding a matter within the proposed discipline impact another matter within the discipline;

6. the proposed discipline must significantly affect the nation's (or the world's) business, economy, culture or society;

7. the development of interventionist legislation to regulate specific relationships;

8. publication of legal casebooks that focus on the proposed discipline;

9. development of law journals and other publications specifically devoted to publishing writings that fall within the parameters of the proposed field;

10. acceptance of the proposed field by law schools; and

11. recognition by legal associations, such as bar associations, of the proposed field as a separately identifiable substantive area of the law.

Regarding points 1 and 2, which are the unique application of principles by courts, and the use of specialized analysis, sports (in particular, football) have seen several issues arising that are peculiar to the area of sports and therefore have required specialized application of legal principles as well as analysis.

Siekmann[13] notes that the European Court of Justice for instance has recognized certain exceptions to regular law which are necessary for the carrying out of sports competition in a correct and proper fashion. In the Bosman case,[14] the professional contract of Bosman, a footballer, had expired and he wanted to move to a new club, but his former club still demanded a transfer fee.

He claimed that this interfered with his right as an EU citizen to freedom of movement. In determining the matter, the Court recognized that there are only two periods during which footballers can switch clubs (known in football as the winter and summer transfer windows). This rule contradicts the freedom of

[13] Siekmann, *Supra*.
[14] C-415/93; ECR 1995 I-04921.

movement of workers within the European Union, but is necessary to ensure fair competition among the clubs, hence the Court's willingness to create this exception.

Another example can be seen from the attitude of the courts towards resolving disputes in sport. As a general rule, the courts do not intervene in sports disputes. This is as a result of the courts' acceptance that disputes in sport require specialized analysis and is a matter best settled by the governing body of the sport in question. In the words of Lord Denning MR, *"Justice can often be done in domestic tribunals by a good layman than a bad lawyer".*[15]

Still on points 1 and 2, disciplinary action in "contact" sports (sports involving a lot of bodily contact such as football, rugby and American football) is another indication of specialized analysis relevant only in the context of sports law. In deciding punishments for bad tackling, for instance, the disciplinary bodies take intent into consideration. However, "intent" in the context of sports is slightly different from intent in the ordinary legal context. In other areas such as torts and criminal law, a person who does an act knowing there is a high probability of causing an injury by that act may be deemed to have intended to cause the injury. In Ghanaian criminal law, for instance, this type of intent is seen in section 11(2) of the Criminal Offences Act[16], which states that "*A person who does an act voluntarily,* ***believing that it will probably cause or contribute to cause an event****, intends to cause that event, within the meaning of this Act, although that person does not do the act for the purpose of causing or of contributing to cause the event.*"

Disciplinary bodies in sports law, on the other hand, usually discard this type of intent because almost every tackle in "contact" sports involves a high probability of injury. In fact, the consequences of the tackle can even outweigh the matter of intent to injure the opponent in some instances.[17] This is another example of specialized analysis unique to the world of sports. Hence, it would appear that

[15] Enderby Town FC Ltd v. Football Association Ltd [1971] Ch 591.
[16] Act 29.
[17] Koen Lankhaar, *The Criminal Tackle in Football,* Leiden Law Blog (April 25, 2018). https://leidenlawblog.nl/articles/the-criminal-tackle-in-football

points 1 and 2 are satisfied.

Point 3, regarding the presence of similar issues in multiple common law or statutory areas, is easy to satisfy. Across the globe, especially in football, multiple disputes and disciplinary matters have arisen time and time again in various football associations in different jurisdictions regarding, *inter alia,* the enforceability or otherwise of certain clauses in contracts, the breach of financial regulations and racism. In Italy and Portugal for instance, there have been cases concerning acts of racism directed at Mario Balotelli and Moussa Marega respectively[18]. Similar cases have also occurred in Scotland and England.[19]

Clubs from different countries have also been involved in disputes regarding their alleged breaches of financial regulations. For instance, Manchester City Football Club lost an appeal to the Court of Arbitration for Sport in 2019 to prevent an investigation by the Union of European Football Associations (UEFA) into a possible breach of Financial Fair Play rules. They were later banned by UEFA from competing in continental competitions. Earlier that year, a similar dispute also arose between Paris Saint Germain Football Club and UEFA, the football club winning this time.[20]

The next criterion to look at is the connection between elements of the subject matter. This is satisfied by the relationship between the bodies that regulate organized sport. In football, FIFA[21] is the world governing body. However, FIFA cooperates with other bodies such as CAF[22] and UEFA, as well as the various national football associations to ensure that the sport of football is properly

[18] Fernando Duarte, *Moussa Marega: Is football losing the fight against racism?* BBC (February 17, 2020) https://www.bbc.com/sport/football/51531083

[19] *Ibid.*

[20] Lawrence Otstlere, *PSG win appeal to shut down UEFA'S investigation into alleged FFP breach after Cas sides with club,* THE INDEPENDENT (March 19, 2019). https://www.independent.co.uk/sport/football/european/psg-ffp-appeal-uefa-paris-saint-germain-decision-upheld-cas- a8830166.html

[21] Federation Internationale De Football Associations.

[22] Confederation of African Football.

managed.

Same can be said for basketball. The sport of basketball worldwide is governed by FIBA[23] in conjunction with the national basketball associations as well as bodies such as the World Association of Basketball Coaches, the International Wheelchair Basketball Federation and the Deaf International Basketball Association.

The above illustrations demonstrate that the elements in the world of sports interact with each other, thus satisfying the 4th criterion put forward by Davis.

Point 5, which has to do with the impact of a decision on another matter within the same discipline, is illustrated by the following example. The increasingly global and business-like nature of football has raised concerns that the influx of foreign talented players might result in local players not getting the opportunity to play in their own country. To combat this, national football associations have come up with rules to limit the participation of said foreign players. The Spanish Football Federation, for instance, limits the number of non-EU players in a game at a time to 3, and also stipulates that a minimum of 4 homegrown players must feature in the matchday squad. This rule, prima facie, is employment discrimination based on nationality. Nevertheless, it is an accepted rule in football.

Points 6 and 7, regarding the social and economic impact of the proposed discipline, as well as the existence of legislation to regulate the discipline, have been satisfied. The 2018 FIFA World Cup, according to official figures from FIFA, was watched by more than 3.5 billion people. That is a more than significant impact on the world's society.

The economic impact of sports also cannot be underestimated. For instance, in 2019, Forbes estimated the revenue of the National Basketball Association (the basketball governing body in the United States) for the 2018/2019 season at 8

[23] Fédération Internationale de Basket.

billion dollars.[24] FIFA, in its 2018 Financial Report, was also estimated to have made about 5.4 million dollars from the 2018 FIFA World Cup alone[25], a competition that lasted for less than two months. These huge numbers underline the huge effect sport has on the world's economy.

Furthermore, many states, such as Ghana[26], have enacted Sports Acts to help promote and encourage the organization and development of sports within their jurisdictions.

Regarding points 8 to 11, which point to the academic and legal recognition or otherwise of the proposed discipline, some legal casebooks and academic research among others have been centered on various disciplines within sports law. The existence of separate associations to handle all sport-related matters, including legal ones, also lend credence to the assertion that these criteria have been satisfied.

FURTHER PROOF OF THE EXISTENCE OF SPORTS LAW

Aside the fulfilment of the criteria proposed by Davis, another argument for the existence of sports law is the invocation of the maxim *ubi societas, ibi jus*, which translates as "where there is society, there is law". This maxim implies that no society can operate successfully for any substantial period of time without a system of legal rules to balance competing interests in the society. In other words, law is both a social fact and a social necessity.

This maxim, in the author's humble opinion, is relevant in the context of the debate regarding the existence of "sports law". Professional football for instance,

[24] Forbes. *Forbes Releases 21st Annual NBA Team Valuations,* (February 6, 2019) https://www.forbes.com/sites/forbespr/2019/02/06/forbes- releases-21st-annual-nba-team-valuations/#21347b4611a7

[25] FIFA Financial Report 2018. https://resources.fifa.com/image/upload/xzshsoe2ayttyquuxhq0.pdf

[26] Sports Act, 2016 (Act 934).

has been in existence for over a century.[27] Professional boxing has been around from as early as the 1840s[28]; and basketball, from 1925.

In this context, the "society" refers to the professional sport organizations, and the "law" refers to their rules and regulations. It is therefore the current author's submission that in the absence of specialized rules (i.e. sports law), these professional sports would not be in existence for as long as they have been, for the simple reason that proper regulation of these sports would have been next to impossible.

It may however be argued that this is a rather simplistic way of determining whether sports law exists. Some might argue further that this test may prove that law exists in sports, but does not necessarily prove that the law in question is "sports law".

Nevertheless, there are two indications that the law in question is actually a separate body of law known as "sports law." These are:

1. The autonomy of sport governing bodies;
2. The recognition of the decisions of the Court of Arbitration for Sport (CAS) as a source of sports law.

Regarding the first point, most sport governing bodies have clauses within their statutes or constitutions that preclude the influence or interference of third parties in the management of their affairs. This rule of non- interference by third parties is stretched to forbid the submission of sport-related disputes to the courts.

For instance, article 53(1) of the CAF statutes provides that "*National associations, leagues, clubs or members of clubs* ***shall not be permitted to bring before a court***

[27] The Football Association, English football's governing body, was set up in 1863; FIFA was set up in 1904.
[28] The London Prize Ring Rules, the first set of rules for the regulation of professional boxing, were promulgated in 1835.

of law disputes with CAF or other Associations, clubs or members of clubs. *They shall submit any such disputes to an arbitrator appointed by mutual agreement and fully comply with his decisions*."

When such disputes are decided through arbitration, the law used is the regulations of the sport governing body in question, which is a form of sports law. Subject to certain exceptions, such as the breach of the rules of natural justice, the courts cannot step into such disputes.

This point was illustrated in the case of Daniel Rockson v. Ghana Football Association,[29] where the plaintiff alleged that certain provisions in the statutes of the association were contrary to the provisions of the 1992 Constitution and were therefore null and void. In dismissing the claim, the court, speaking through Adinyira JSC, said "*The Statutes of GFA is accordingly* ***not part of the Laws of Ghana but a private agreement or arrangement between members of a voluntary association to regulate the conduct of their affairs.*** *It is therefore our considered opinion that any challenge against any provision of its statutes must be made at another forum other than the Supreme Court.*" Thus, disputes in sports are handled by specialized forums which apply specialized rules known as sports law.

The Court of Arbitration for Sport (CAS), on the other hand, is an institution which is responsible for the resolution of legal disputes in the field of sport through arbitration or mediation. Since its inception in 1984, the CAS has helped shape international sports jurisprudence through the formulation of sports principles, described by some writers as *lex sportiva*[30].

The growing reputation of the CAS, recognized by many as the world's supreme court of sport[31] has made their decisions a very important source of sports law. This is due to the fact that the CAS has addressed a wide range of issues related to sports in their decisions, from doping disputes to challenges to the decisions of

[29] Writ J1/9/2009.
[30] Gilson, Eric T, *Exploring the Court of Arbitration for Sport,* LAW LIBR. J. 98 (2006): 504.
[31] McLaren, Richard H, Twenty-five years of the Court of Arbitration for Sport: a look in the rear-view mirror, *MARQ. SPORTS L. REV. 20* (2009): 305.

officials during competitions. It is also the final court of appeal for all the major sport governing bodies in the world.

In fact, it is argued by some writers that the decisions of the CAS have developed into the "common law" of sports law.[32] The CAS has developed a system of judicial precedent, where it applies its previous decisions to cases with similar facts. Their decisions are also widely used as persuasive authority in resolution of disputes and the making of new regulations by the sport governing bodies.

The status of CAS decisions as a source of law, coupled with the autonomy from external parties that is characteristic of most sport governing bodies, a necessary consequence of which is that these bodies apply their own regulations in the management of their affairs, makes it clear that the law applied in the "society" of sports is in fact a separate corpus of law called sports law.

CONCLUSION

Sports law in Ghana, and in many other African countries, is still not widely known. Many people, including some legal practitioners and law students, still view sports as a social activity that is governed by the traditional principles of law they are already familiar with.

However, as can be seen from the discussion in this article, there is an entire corpus of law known as sports law, which encompasses and goes beyond the traditional areas of law.

It is the hope of the author that this article is a fruitful effort to contribute to the discussion of sports law. Hopefully, this article will generate interest in the subject, especially in Ghana where sports-related issues are increasingly receiving attention.

[32] Lorenzo Casini, The Making of a Lex Sportiva By the Court of Arbitration for Sport, *GERMAN L.J. 12.5* (2011): 1317-1340.

THE LAW ON RAPE IN GHANA: A VIOLATION OF THE CONSTITUTION OF GHANA, 1992?

Daniel Ewusi Awuku*

ABSTRACT

The Constitution of Ghana, 1992 which seeks to protect the rights of all persons provides for equality before the law. Thus, any law supporting proscribed discrimination including gender discrimination is unconstitutional. Interestingly, the definition of rape pursuant to the Criminal Offences Act, 1960 (Act 29) is gender specific in ascribing culpability to both genders. While only women can be raped, men alone can be rapists. In effect, men cannot be victims and women can never be perpetrators. I reason that this definition, points to two presuppositions. First, a woman cannot have carnal knowledge with a man. Second, a man always consents to sex. I, however, contend that these two assumptions are flawed based on a holistic and critical examination of Act 29. Consequently, it is posited that the law on rape is inconsistent with the Constitution and I ultimately recommend that the law be made gender-neutral to ensure that men and women are capable of being victims and perpetrators respectively.

INTRODUCTION

The Constitution of Ghana, 1992 provides that, the rights and freedoms of persons shall be respected and upheld by all organs of government.[1] It also makes provision for protection of rights regardless of one's attributes inter alia, gender.[2] Article 17 (the equality clause) which is more poignant provides

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[1] Article 12(1) of the Constitution of Ghana, 1992

[2] Article 12(2) of the Constitution of Ghana, 1992

that first, all persons shall be equal before the law and second, a person shall not be discriminated against on grounds of gender among others.

Be that as it may, the law on rape as defined in the *Criminal Offences Act, 1960 (Act 29)* contradicts the principle of equality since a woman cannot be charged with the offence of rape. The consequence thereof is that a man can never be a victim of rape.

In this article, I seek to show that the two assumptions inherent in the definition, namely, a woman's inability to have carnal knowledge over a man and a man's inability to withhold consent during intercourse are flawed based on a broader analysis of other sexual offences under *Act 29*. Thus, the law on rape violates the equality principle.

Finally, I suggest that the law be amended or declared unconstitutional to ensure gender neutrality in conformity with the Constitution. It is argued that this would go a long way to mitigate the problem of gender discrimination in the country.

THE EQUALITY CLAUSE AND GENDER DISCRIMINATION

The equality clause[3] which would form the basis of analysis for the ensuing paragraphs is reproduced below:

"(1) All persons shall be ***equal*** *before the law.*

(2) A person shall not be discriminated against on grounds of ***gender****, race, colour, ethnic origin, religion, creed or social or economic status*

(3) For the purposes of this article, ***"discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by*** *race, place of origin, political opinions, colour,* ***gender****, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description*." (emphasis is mine).

[3] Article 17 of the Constitution of Ghana, 1992

This shows that people of different genders are equal before the law and deserve the same treatment. In essence, any law that seeks to accord separate rewards or mete out unequal punishments for the same achievements and offences respectively, is inconsistent with the highest law of the land. I dare say that the provisions against discrimination were inspired by case laws such as *Akrofi v Akrofi*[4] where the court held that: *"A custom which discriminates against a person solely on the basis of* ***sex*** *has outlived its usefulness and is not in conformity with public policy; if customs are to survive they must change with the times."* (emphasis is mine):

It is my position that the custom that sees men as the sole perpetrators of rape and women as the only victims is discriminatory, has outlived its usefulness and should not be expressed in public policy as is currently the case.

The question of discrimination against sexes being distinct from gender discrimination may arise. However, it is submitted that the two may be used interchangeably. The mere fact that the word "sex" does not even appear once in the Constitution, shows that its meaning is largely encapsulated in the word "gender". This is further evidenced in the *University of Ghana Act, 2010*[5] where for instance, the Council shall:

"ensure the creation of an environment of equal opportunity for members of the University without regard to ethnicity, ***sex****, race, religious belief…"* (emphasis is mine)

The above-cited provision may have been inserted to be in conformity with not only the equality clause, but also *Article 35* which reads:

"(5) The State shall actively promote the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, ***gender*** *or religion…"*

(6) Towards the achievement of the objectives stated in clause (5) of this article, the State shall take appropriate measures to -

(b) ***achieve reasonable regional and gender balance in recruitment and appointment to public offices****;* (emphasis is mine):

The question that remains is whether gender discrimination constitutes

[4][1965] GLR 13-17

[5] Section 12c of the University of Ghana Act, 2010 (Act 806)

unlawful discrimination. In the case of *Nartey v Garti*[6], the Supreme Court held, as per *Dr. Date-Bah JSC* as follows:

"…the provision in article 17(1) was, in effect, freedom from unlawful discrimination. Article 17(2) made it clear that not all discrimination was unlawful. It proscribed discrimination based on certain grounds. The implication was that discrimination based on other grounds might not be unlawful, depending on whether the Supreme Court could distil from article 17(1) other grounds of illegitimate discrimination, not expressly specified in article 17(2)."

The above-quoted holding shows that gender discrimination is unlawful since gender is part of the grounds set out in the *Article 17(2) of the Constitution*, *1992*. Hence, any law that discriminates based on gender should be rendered unconstitutional. Thus, the essential question is whether or not *Section 98 of Act 29* is inconsistent with the Constitution and this would be addressed presently.

THE DEFINITION OF RAPE AND THE PUNISHMENT THEREFOR

Section 98 of *Act 29*, defines rape as:

"*the* ***carnal knowledge of a female*** *of not less that sixteen years* ***without her consent.***" (emphasis is mine)

In *Gligah & Atiso v The Republic*[7], the Supreme Court set out the following ingredients inherent in the offence of rape:

> *"1. That someone has had carnal knowledge of the victim…*
> *2. That, the someone is the accused person….*
> *3. That the victim (PW1) was carnally known against her wish…."*

The salient elements of rape as listed above, point to two main sub-issues that are noteworthy in answering the question of whether *Section 98* of *Act 29,* is inconsistent with the Constitution of Ghana, 1992. They are:

- Whether or not a female can have carnal knowledge of a male of sixteen years or above.

[6] [2010] SCGLR 748
[7] [2010] SCGLR 870

- Whether or not a female can have carnal knowledge of a male of sixteen years or above without his consent.

WHETHER OR NOT A FEMALE CAN HAVE CARNAL KNOWLEDGE OF A MALE OF SIXTEEN YEARS OR ABOVE?

The learned *Dotse JSC,* in defining carnal knowledge in *Gligah & Atiso v The Republic*, wrote the following:

"Carnal knowledge is ***the penetration of a woman's vagina by a man's penis****. It does not really matter how deep or however little the penis went into the vagina. So long as there was some penetration beyond what is known as brush work, penetration would be deemed to have occurred and carnal knowledge taken to have been completed."* (emphasis is mine)

This definition not only shows the union of the sexual act but also gives two alternatives for the occurrence of rape. First, if a man penetrates a woman against her wish and second, which is more germane to this article, if a woman makes a man penetrate her against his wish. The definition in *Section 98* of *Act 29* does not take into consideration the latter occurrence and is thus discriminatory, since it ostensibly assumes that carnal knowledge is an act that can only be done by a male and that a male cannot be forced to have sexual intercourse with a female against his wish. However, that notion seems to contradict another part of *Act 29* [8] where carnal knowledge is shown to be a two-way affair in terms of the actions of both male and female. This is captured succinctly as follows:

"(1) ***A male of not less than sixteen years of age who has carnal knowledge of a female*** *whom he knows is his grand-daughter, daughter, sister, mother or grandmother commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than three years and not more than twenty-five years.*

(2) ***A female of not less than sixteen years of age who has carnal knowledge of a male*** *whom she knows is her grand-son, son, brother, father or grandfather, commits a criminal offence and is liable on conviction to a term of*

[8] Section 105 of the Criminal Offences Act, 1960 (Act 29)

imprisonment of not less than three years and not more than twenty-five years …" (emphasis is mine)

The law on incest not only tells us that males can have carnal knowledge of females but also shows that females can do same. In both instances, the offences are met with the same punishment. Indeed, one can clearly state that the law on incest is in sync with the Constitution while that of rape is tantamount to gender discrimination. It would seem, nonetheless, that a woman who has carnal knowledge over a man can only be guilty of indecent assault which is only a misdemeanour as shown in the same Act[9] where it states:

"(1) A person who indecently assaults another person commits a misdemeanour and is liable on conviction to a term of imprisonment of not less than six months.

(2) A person commits the criminal offence of indecent assault if, without the consent of the other person that person

(a) forcibly makes a sexual bodily contact with the other person, or

(b) sexually violates the body of the other person, in a manner not amounting to carnal knowledge or unnatural carnal knowledge…"

This is problematic primarily because it assumes that a woman cannot have carnal knowledge over a man, an idea that has already been debunked. Furthermore, it goes contrary to *Articles 12* and *17* of the 1992 Constitution since it seems to suggest that men and women are not equal before the law. If they were, the punishments meted out for the same acts would not be different as is the present case.

The *Criminal and Other Offences (Procedure) Act, 1960, (Act 30)* provides that:

(4) Where a criminal offence which is not an offence mentioned in subsection (5), is declared by an enactment to be a misdemeanour and the punishment for that offence is not specified, a person convicted of that offence is liable to a term of imprisonment not exceeding three years."[10]

[9] Section 103 of the Criminal Offences Act, 1960 (Act 29)

[10] Section 296 of the Criminal Procedure and Other Offences Act, 1960, (Act 30)

On the other hand, the *Criminal Offences Act, 1960 (Act 29)* lays down the following:

"A person who commits rape commits a first degree felony and is liable on conviction to a term of imprisonment of not less than five years and not more than twenty-five years."[11]

In effect, a woman and man who engage in the same act, at most, suffer penalties of 3 years and 25 years respectively. This certainly goes against the spirit and the letter of the equality principle in the Constitution. Evidently, this is gender discrimination since it is possible for a female to have carnal knowledge of a male of sixteen years or above.

WHETHER OR NOT A FEMALE CAN HAVE CARNAL KNOWLEDGE OF A MALE OF SIXTEEN YEARS OR ABOVE WITHOUT HIS CONSENT

The second sub-issue to be canvassed is that of consent. It might seem that by virtue of the physical strength of men, it is unlikely that a man would be forced to penetrate a woman. Nevertheless, this theory is disproven when one engages in a critical analysis of the meaning of "consent" in *Act 29* [12] which provides that:

"In construing a provision of this Act where it is required for a criminal act or criminal intent that an act should be done or intended to be done without a person's consent, or where it is required for a matter of justification or exemption that an act should be done with a person's consent,

(a) a consent is void if the person giving the consent is under twelve years of age, or in the case of an act involving a sexual offence, sixteen years, or is, by reason of insanity or of immaturity, or of any other permanent or temporary incapability whether from intoxication or any other cause, unable to understand the nature or consequences of the act to which the consent is given;

[11] Section 97 of the Criminal Offences Act, 1960, (Act 29)
[12] Section 14 of the Criminal Offences Act, 1960 (Act 29)

(b) a consent is void if it is obtained by means of deceit or of duress…

(e) a consent does not have effect if it is given by reason of a fundamental mistake of fact…

Illustrations

1. A induces a person in a state of incapacity from idiocy or intoxication, or a child under twelve years of age to consent to the hair of that person being cut off by A. The consent is void.

2. A by pretending to have the consent of a child's father, or under pretence of medical treatment, or by threats of imprisonment, induces a child to consent to sexual intercourse. The consent is void **…**

5. A induces a woman to consent to having carnal knowledge of her by personating her husband. Her consent is void (emphasis is mine)

A study of the provisions relating to consent are hardly gender-specific in nature. As a matter of fact, the reverse is true for the only gender-specific reference with regard to *Illustration (5)* because a woman can also induce a man into consenting to engage in carnal knowledge by personating his wife. After all, the law on incest, in terms of the wording, with respect to consent shows clearly that a woman can have carnal knowledge of a man without his consent.

Section 105 of *Act 29*, reveals the veracity of the above assertion:

"(3) A male of not less than sixteen years of age who ***permits*** *a female whom he knows is his grandmother, mother, sister or daughter to* ***have carnal knowledge of him with his consent,*** *commits a criminal offence and is liable on conviction to a term of imprisonment of not less than three years and not more than twenty-five years.*

(4) A female of not less than sixteen years of age who ***permits*** *a male whom she knows is her grandfather, father, brother or son* ***to have carnal knowledge of her with her consent****, commits a criminal offence and is liable on conviction to a term of imprisonment of not less than three years and not more than twenty-five years…"* (emphasis is mine)

It is humbly submitted that there would have been no need for the *"permits"* and *"consent"* elements to be added if the lack thereof was non-existent. Nonetheless, I seek to examine *Section 14 (a)* of *Act 29* in relation to consent

and carnal knowledge of men. It is self-evident, first of all, that a female can have carnal knowledge of a male below the age of consent as seen in the incest laws of a mother's ability to have carnal knowledge over her son. The same principle applies to a woman having sexual intercourse with a severely mentally-ill man, thereby making his consent void. Indeed, with regard to the latter, the law[13] states:

"A person who has ***carnal knowledge or has unnatural carnal knowledge of an idiot, imbecile or a mental patient*** *in or under the care of a mental hospital whether* ***with or without the consent of that other person****, in circumstance which prove that the accused knew at the time of the commission of the criminal offence that the other person has a mental incapacity commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than five or and not more than twenty-five years.."* (emphasis is mine)

Certainly, the above-quoted section shows that a woman can forcibly have sex with a man who is mentally ill since that man can be a victim of the act of carnal knowledge. That notwithstanding, I seek to zone-in on the second part of *Section 14(a)* which refers to *"any other permanent or temporary incapability whether from intoxication or any other cause, unable to understand the nature or consequences of the act to which he consents."* In this regard, I shall refer to the work of the learned British author, Siobhan Weare where she makes the case that:

"Alcohol and/or drugs played a significant role in many men's forced-to-penetrate experiences…. The limited research conducted into compelled penetration highlights the frequency with which intoxication of the victim as a result of alcohol or drugs is used as part of aggressive strategies by female perpetrators."[14]

The above-cited work of a female legal scholar which is geared towards ensuring the eradication of gender discrimination in order to achieve equality

[13] Section 102 of the Criminal Offences Act, 1960 (Act 29)

[14] Siobhan Weare *Oh You're a Guy, How Could You Be Raped By A Woman, That Makes No Sense': Towards A Case For Legally Recognising And Labelling 'Forced-To-Penetrate' Cases As Rape,* 14 IJLC. 117 (2018)

is clearly in line with the Constitution of Ghana.

With regard to *Section 14(b)* and the idea that, "*a consent is void if it is obtained by means of deceit or of duress,"* Weare's work is once again instructive. She writes:
"… coercion or verbal pressure is consistently highlighted as being the most common aggressive strategy used by women who force men to penetrate them.
Analysing the experiences of male forced-to-penetrate victims highlights how coercion takes multiple forms. At its most extreme, the coercion for these men included threats by the female perpetrator to kill herself… Blackmail was also reported by several male victims…"[15]

In the analysis of the extreme situations, Weare cites cases involving men being *"physically restrained"* by women while others suffer from the *"use of weapons"* by women, all in the bid to force the men to penetrate them. This clearly shows that a man can be forced to have sexual intercourse with a woman by means of deceit or duress.

Consent and Stimulation of the Sex organs

It may be contended that a man cannot be sexually stimulated or aroused to the extent of having an erection required for penetration if he did not desire it in the first place. This notion is also sufficiently rebutted by Weare in the same article where she states the following:
"*Research on male sexual arousal has highlighted that men can experience erections 'in various emotional states such as fear and anger . . . and [thus it] is not necessarily indicative of pleasure or consent' …Consequently, in their experiences, men reported feeling 'betrayed' by their bodies…*
Whilst the issue of body betrayal has been recognised in relation to female rape victims, it has typically been in the context of their bodies experiencing sexual pleasure or orgasms during nonconsensual sexual intercourse. This has also been documented as happening to male forced-to-penetrate victims who have reported ejaculation as being particularly traumatic for them…"[16]

[15] *Id* at 116
[16] *Id* at 125

Based on the arguments above, it must be said that a female can have carnal knowledge of a male of sixteen years or above without his consent. For that matter, females can be criminally liable for rape.

THE LAW ON MARITAL RAPE

According to Morhe et al[17], in Ghana, 18.5% and 40% of males and females respectively have been raped by their spouses. This is indicative of the fact that marital rape transcends gender-specific boundaries in terms of victims and perpetrators. The scholars also state that:

"forced marital intercourse is domestic violence and cannot be justified on the basis that parties are married or in a domestic relationship where consent to marital intercourse is given."

The authors made this assertion based on two legal developments – the repeal of *Section 42 (g)* of the *Criminal Offences Act, 1960 (Act 29)* and the passage of the *Domestic Violence Act, 2007 (Act 732)* Per the latter law[18] domestic violence includes:

"(ii) sexual abuse, namely the forceful engagement of another ***person*** *in a sexual contact which includes sexual conduct that abuses, humiliates or degrades the other person or otherwise violates another person's sexual integrity …"* (emphasis is mine)

The use of the word *"person"* rather than female presupposes that both males and females can be victims of sexual abuse and by extension forced sexual intercourse which is ipso facto rape. It is no wonder, therefore that the law has no specific reference to gender when it provides as follows:

"The use of violence in the domestic setting is not justified on the basis of consent."[19]

It is worthy of note that according to the law a domestic relationship means:

"… a family relationship, a relationship akin to a family relationship or a relationship

[17] Rene A.S. Morhe et al *Criminalizing Marital Rape under Ghanaian Law* Paper Proceedings Of Second International Conference On Advances In Women's Studies 100 (2015)

[18] Section 2(b) of the Domestic Violence Act, 2007 (Act 732)

[19] Section 4 of the Domestic Violence Act, 2007 (Act 732)

in a domestic situation that exists or has existed between a complainant and a respondent and includes a relationship where the complainant: (a) Is or has been married to the respondent"[20]

Thus, it is crystal clear, from the letter of the statute, that a gender-neutral approach is taken with respect to sexual abuse among married couples. But what about the spirit? This can be determined by reference to legislative history. On 23rd November, 2006, Mrs. Juliana Azumah-Mensah (NDC MP––Ho East), in supporting the Domestic Violence Bill, said the following:

"Mr. Speaker, thank you for this opportunity to register my wholehearted support for the Bill on the floor, the Domestic Violence Bill. Indeed, it is a great day for mankind… Mr. Speaker, it is not only for womankind, it is for everybody because the Bill encompasses everybody and it is gender neutral. I believe I said for mankind because anybody who abhors violence in this House will vote for the passage of this Bill into law."[21]

The assertion that the criminality of marital rape was fixed in the law can be seen in the following words of Mr. John Ndebugre:

"… If you look at page 16 of the Report, you will see that there is a proposal that we include this so-called "marital rape", outlawing the marital rape in it and it reads as follows: 'That the use of violence in the domestic setting is not justified on the basis of consent.' So that has been taken care of."[22]

It is quite lucid that the lawmakers, based on a gender-neutral approach, intended to make non-consensual sexual intercourse in the marital setting illegal.

Over a decade ago, the *Laws of Ghana (Revised Edition) Volume 3 page 111-1731 [Issue 1],* pursuant to the *Laws of Ghana (Revised Edition) Act, 1998 (Act 562)* which gave The Statute Law Revision Commissioner (SLRC) powers to rewrite, in plain English, all the laws, to let the language be in line with current

[20] Section 2(1) of the Domestic Violence Act, 2007 (Act 732)
[21] See Hansard of 23rd November, 2006
[22] See Hansard of 24th November, 2006

usage and in conformity with the Constitution, repealed *Section 42 (g)* of the *Criminal Offences Act, 1960 (Act 29)* which hitherto read:

"42. The use of force against a person may be justified on the ground of his consent, but; (g) a person may revoke any consent which he has given to the use of force against him, and his consent when so revoked shall have no effect for justifying force; save that the consent given by a husband or wife at marriage, cannot be revoked until the parties are divorced or separated by a judgment or decree of a competent court."

to read as follows:

"42. The use of force against a person may be justified on the ground of consent, but, (g) a person may revoke a consent which that party has given to the use of force against that person, and the consent when so revoked shall not have effect or justify force."

In *Martin Kpebu v The Attorney General*[23], the Supreme Court as per *Akamba JSC* held that:

"… the Commissioner performed his mandate according to the powers granted him. The resultant product, same being the seven volumes of the Laws of Ghana (Revised Edition) having been approved and adopted by Parliament are now the product or handiworks of Parliament, to all intents and purposes."

The re-written provision (which is also gender-neutral) which criminalized marital rape, sought to eradicate a gender-neutral problem. This is the case since the obsolete law pointed to *the consent given by a husband or wife at marriage* and not just the wife which in essence means that the husband can be forced by his wife to act against his will. Indeed, the same thinking can be found in the *Matrimonial Causes Act, 1971 (Act 367)*[24] which says (the emphasis is mine):

"(3) The Court shall not grant a decree of nullity in a case falling within paragraph (b), (c) or (d) of subsection (2) unless it is satisfied that…

…(c) ***marital intercourse with the consent of the petitioner*** *has not taken place since the petitioner discovered the existence of the facts making the marriage voidable."*

[23] WRIT NO. J1/8/2015

[24] Section 13(3) c of the Matrimonial Causes Act, 1971 (Act 367)

From the above, it is crystal clear that a woman can have intercourse with her husband without his consent. This is because the word, "petitioner" does not only refer to a female but … (the emphasis is mine):
*"A **person** may present a petition to the Court for a decree of nullity for annulling the marriage on the ground that it is by law void or voidable."*[25]

If we can infer from the above-quoted statutes that marital rape involves instances in which both men and women can act as victims as well as perpetrators, then it follows that rape in the general sense must also be regarded as a gender-neutral crime. In essence, if the two issues of carnal knowledge and consent as broadly explained are applied to both genders in the case of marital rape then the same measure should be used in rape outside marriage.

THE LAW ON DEFILEMENT

The explanations given above on the two salient issues of carnal knowledge and consent are key to an understanding of why the law on defilement is constitutional and the reason the law on rape is not. The law[26] provides:
*"(1) For the purposes of this Act, defilement is the **natural or unnatural carnal knowledge** of a child under sixteen years of age.*

*(2) **A person** who naturally or unnaturally carnally knows **a child** under sixteen years of age, **whether with or without the consent of the child**, commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years."* (the emphasis is mine)

In critiquing this law in line with the ingredients of rape, I posit that there are 3 elements – a perpetrator, a victim and an act. Unlike the rape law, both the perpetrator and the victim in defilement can be either male or female. That brings us to the third element which is the act comprising the two issues of

[25] Section 13(1) of the Matrimonial Causes Act, 1971 (Act 367)
[26] Section 101 of the Criminal Offences Act, 1960 (Act 29)

carnal knowledge and consent. First, it suggests that a female can be a perpetrator of defilement since a male can be a victim of carnal knowledge and second, it shows that a female can have sex with a male without his consent since his consent is void as shown in *Section 14 (a) of Act 29*. If a male child of 15 years can be carnally known against his wish by a female, a 16-year-old male can also be a victim of same, since carnal knowledge with respect to incest, as shown, is a two-way affair regardless of age.

Carnal knowledge in the legal sense[27] is expressed thus:
"Where, on the trial of a person for a criminal offence punishable under this Act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge is complete on proof of the least degree of penetration."

It is posited that the definition of carnal knowledge as held in *Gligah & Atiso v The Republic* and juxtaposed with this submission shows that a woman can cause a man to penetrate her vagina without his consent. This means that the woman can also be guilty of rape or forced natural carnal knowledge.

THE LAW ON UNNATURAL CARNAL KNOWLEDGE

The law[28] reads:
"(1) ***A person*** *who has unnatural carnal knowledge*
(a) ***of another person*** *of not less than sixteen years of age* ***without the consent of that other person*** *commits a first degree felony and is liable on conviction to a term of imprisonment of not less than five years and not more than twenty-five years; or*
(b) of another person of not less than sixteen years of age with the consent of that other person commits a misdemeanour; or
(c) of an animal commits a misdemeanour.
(2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or, with an animal." (emphasis is mine)

[27] Section 99 of the Criminal Offences Act, 1960 (Act 29)
[28] Section 104 of the Criminal Offences Act, 1960 (Act 29

The term, 'unnatural carnal knowledge' includes:
"…sex other than heterosexual sexual intercourse, as well as heterosexual sex that involves organs other than the penis and vagina such as anal sex."[29]

In a word, unnatural carnal knowledge is sodomy which denotatively comprises both anal and oral penetrative sex as well as bestiality. The question as to whether a woman can be guilty of this crime is answered in *Section 104 (1)* since the perpetrators and victims are gender-neutral. The use of the word *"person"* clearly shows that a male can be a victim of unnatural carnal knowledge. In fact, if a woman can force a man to penetrate her vagina, she can force him to penetrate her anus or mouth and nothing physically prevents her from performing any sexual act on an animal.

CONCLUSION

In a newspaper publication[30], the writer penned down the following words:
"Gender inequality and discrimination have taken a surprisingly new dimension in Ghana, with Ghanaian men reportedly facing more discrimination than women."

The article went on to make reference to a United Nations Economic Commission for Africa (UNECA) report titled, African Social Development Index: Measuring Human Exclusion for Structural Transformation - West Africa Report which says, on page 38, as follows:
"*… the African Social Development Index results show that the exclusion of women is slightly lower than the exclusion of men (see figure 4.5.3). This could be associated with the relatively low level of poverty among women, compared with men, and affirmative policy interventions (Institute of Statistical, Social and Economic Research, 2015; African Development Bank et al., 2016).*"
The above finding goes against the presumption that women are always the

[29] Elizabeth Archampong & John Baidoo *The Treatment of Consent in Sexual Assault Law in Ghana,* EQUALITY EFFECT 16 (2011)
[30] Ghanaian Men Suffer Gender Discrimination – Report, 22 August, 2017, www.dailyguidenetwork.com (Accessed 16th January, 2019)

victims of a patriarchal tyranny especially when, according to the report, they are relatively less poor than men who rather face discrimination with respect to policy initiatives. The narrative that this discrimination does not extend to gender-based violence was refuted by the then Minister for Gender, Children and Social Protection, Otiko Afisa Djaba who, in commemorating the International Men's Day made the following remarks:

"Even though men have enormous power in our society, there are still some who are vulnerable, marginalized and unable to achieve their full potential…
Another challenge for our men, increasingly there are reported cases of violence against men and because of our culture, these men are suffering in silence."[31]

Indeed, it is the culture that has influenced the discriminatory law which is keeping men from reporting rape cases.

In this article, I sought to show, based on a holistic examination of the *Criminal Offences Act, 1960 (Act 29)* that the definition of rape as stated in *Section 98* culminates in gender discrimination and is inconsistent with *Articles 12* and *17* of the *1992 Constitution* since it is based on the false premises that first, only a man can have carnal knowledge over a woman and second a woman cannot have carnal knowledge over a man without his consent.

Finally, I recommend that the parliament of Ghana amend the law to read as follows: "*Rape is the* ***carnal knowledge of a person*** *of not less that sixteen years* ***without his or her consent.***"

In the alternative, the matter may be tested in the Supreme Court for a declaration that *Section 98 of the Criminal Offences Act, 1960 (Act 29)* is unconstitutional. This would help greatly in ensuring that the problem of gender discrimination is curbed.

[31] See Hansard of 16th November, 2017.

GHANA'S LAWS (TRADE AND INVESTMENT LAWS) AND TRADING ACTIVITIES OF NATIONALS OF ECOWAS IN GHANA: AN ANALYSIS IN THE CONTEXT OF GHANA'S INTERNATIONAL LAW OBLIGATION

M. S. Atiiga[32]

ABSTRACT

Ghana is a sovereign state located in the Western part of Africa. The Republic of Ghana is a thriving democracy in Africa and has successfully practiced democratic governance without any disruption since 1992. The country has adhered to the principles of rule of law in the conduct of elections, a key indicator of democratic governance world over. Ghana has as part of its democratic governance and respect of the rights, liberties of persons in its territory, enshrined in the 1992 constitution, respect for fundamental human rights and freedoms. It has always improved its human rights record in all the human rights global ranking indices since 1992. The country is a young producer of oil and endowed with valuable natural resources such as cocoa, gold, timber, mineral resources etc. The economy of Ghana is one of the biggest in the sub region.

Ghana is member of the comity of nations, the African Union, the Economic Community of West African States and a state party to a number of major Treaties and protocols in relation to trade and investment. The Treaties establishing all the above international and regional organizations have as part of their objectives, liberalizing and opening up markets to States parties all over the world, governed and regulated by International law. The ECOWAS Protocol of 1979 regarding free movement of persons, residence and

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establishment was ratified as well. Ghana is a signatory and has ratified the African Continental Free Trade Area Agreement, an Africa Union Initiative aims at liberalizing, opening up the various markets into a single continental market area for all State parties.

The Constitution of Ghana provides for the ideals that should define its relation with other States. The Ghana Investment Promotion Centre Act, Act 865 is the primary legislation which provides for and regulates trade and investment activities of both nationals and non-nationals. The Minerals and Mining Act, 2006 (Act 703,) as amended by the Act, 900 of 2015, The Free Zones Board Act, The Petroleum Exploration Act and the Forestry Commission Act are some sector specific investment legislation in Ghana as well. Section 27 of the GIPC Act provides a list of activities reserved solely for nationals of Ghana.

This paper submits that section 27 of the Act is inconsistent with the ideals as espoused in the preamble, articles 36, 40 of the directive principles of state policy and article 73 of Ghana's Constitution. It is in conflict with Ghana's international law obligation and contradicts the underlying principles of 'National Treatment' and the 'Most Favoured Nation Principle' required of international Trade and Investment laws. The said section 27 is discriminatory and is a barrier to trading to many nationals of ECOWAS who are small holder traders/investors in the Ghanaian markets. The said section 27 is against a long standing custom in the sub-region where nationals of Ghana are allowed free entry and access to sister countries markets without restrictions of the nature as provided in section 27 of the Act.

1. INTRODUCTION

The constitution of Ghana[33] is the supreme law of Ghana and all laws must conform to it. The constitution provides the basic tenets/guidelines and general rules in the country's relation to other sovereigns States across the world. One of the areas of which the relations of Ghana and other States come

[33] The 1992 Constitution of Ghana.

into play is through trade and investment activities of nationals of others states in Ghana.

There have been a number of issues and questions raised about the legality of nationals of other countries especially those from the ECOWAS member states engaging in small business set ups, trading and investment in the Ghanaian markets. The Ghana Union of Traders Association and the Ghana Union of Electronics Traders Association have been up in arms against traders from other member countries especially Nigerians insisting the laws of Ghana forbids them from engaging in retail trading activities.

There have been various views and opinions expressed about what Ghana laws say about the trading activities/retail trading activities of nationals of ECOWAS member states but hardly had any scholarly, critical analysis and examination of the provisions of the Ghana Investment Promotion Centre Act, which is at the center of this controversy been done in the context of the tenets or ideals as provided in the 1992 Constitution that should guide the country's relationship with others and Ghana's international law obligation, relative to the retail trading activities of nationals of other Sovereign States in Ghana. The article looks further at what had been the actual State Practice of member States of ECOWAS in the sub-region on this subject of State to State relations and lastly, assesses the conduct of the State Ghana over the years concerning this all important and controversial matter.

This article proceeds on the matter in the following sub headings: what does the laws of Ghana say about its international relations to other States, what have the courts of Ghana said about the country's international relations, International treaties/agreements and Ghana's international obligations in relation to trade and investment, what has been the custom in respect of retailing activities of non -citizens in other ECOWAS States, Ghana's conduct on this controversy and whether or not State responsibility ensues, recommendations and concluding remarks.

2. THE LAWS OF GHANA AND GHANA INTERNATIONAL OBLIGATIONS.

The **preamble** to the constitution sets the guiding principle that should underpin Ghana's relation with Sovereign States across the world. The Constitution admonishes to the effect that, Ghana's relation with other States should be in the spirit of friendship and peace with all people of the world. **Article 40 of the** constitution under the **Directive Principles of State Policy**[34] provides that in the Country's dealings with other nations, the Government of Ghana shall:

a. Promote and protect the interest of Ghana
b. Seek the establishment of a just and equitable international economic and social order
c. Promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means
d. Adhere to the principles enshrined in or as the case may be, the aims and ideals of
    i. The charter of the United nations
    ii. The charter of the Organization of Africa Unity
    iii. The commonwealth
    iv. The treaty of the Economic Community of West African States and
    v. Any other Organization of which Ghana is a Member

On matters of trade and foreign investment in Ghana, article 36(4) provides to the effect that foreign investment should be encouraged in Ghana subject to the laws of Ghana. A reading of **Articles 34(1)[35] and 40** of the Constitution of Ghana suggests that **article 40** shall be the guide to Ghana and its Citizens in dealings with other Nations and their Nationals. Further, in the conduct of

[34] Chapter 6 of the Constitution of Ghana, 1992.

[35] The directive principles of state policy contained in this chapter shall guide all citizens, parliament, the president, the judiciary, the council of state, the cabinet, political parties and other bodies and persons in applying or interpreting this constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

its international affairs, **article 73** of the constitution states that 'the government of Ghana shall conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana '. It is submitted that, an ordinary and plain language reading of these provisions points to the fact that the constitution of Ghana recognizes the importance and respects international law in the conduct of its affairs at all times, on matters governed by international law, however with the interest of Ghana as its utmost priority.

The Constitution also provides in **article 75** to the effect that the president shall execute or caused to be executed any treaty/agreement/convention for and on behalf of Ghana. Such treaty agreements should be ratified by an Act of parliament or a resolution.

On matters of trading and investment activities of nationals of other States, the Constitution provides in **article 36 (4)** that 'foreign investment shall be encouraged within Ghana subject to any law for the time been in force regulating investment in Ghana'. Some persons including social commentators and some trade associations have read this provision to mean so long as there is a law passed with any provisions regulating trade and investment in Ghana, such a law must be complied with and enforced. This reasoning is problematic as the Constitution lays down parameters that all laws in the Ghana must comply with to be law properly so called and to be enforceable as law.

All laws must be looked at in the light of the policy objectives of Ghana as outlined in the Constitution and where any law passed or anything contained in it, is inconsistent with any provision of the constitution, such law is void and is of no effect in Ghana[36]. At the heart of the ideals that should define Ghana's relationship with other States is to promote peace and friendship with all States of the world and to ensure the welfare of Ghanaian citizens all around the world. It is expected all laws regulating trade and investment in Ghana should be guided by same.

[36] Article 1(2) of the constitution, 1992

We proceed to look at the Primary legislation/Law in Ghana for the promotion and regulation of trade and investment activities in Ghana, the **Ghana Investment Promotion Centre Act, 2013**[37] **and** other industry/sector specific laws in the light of the above mentioned ideals. At the center of the controversy between some section of Ghanaians and retail traders and investors of nationalities of other ECOWAS member states is **Section 27** of Act 865. The section has its caption as '**activities reserved for Ghanaians and Ghanaian owned enterprises'.** The section provides that;

(1) A person who is not a citizen or an enterprise which is not wholly owned by citizen shall not invest or participate in—

i. the sale of goods or provision of services in a market, petty trading or hawking or selling of goods in a stall at any place;
ii. the operation of taxi or car hire service in an enterprise that has a fleet of less than twenty-five vehicles;
iii. the operation of a beauty salon or a barber shop;
iv. the printing of recharge scratch cards for the use of subscribers of telecommunication services;
v. the production of exercise books and other basic stationery;
vi. the retail of finished pharmaceutical products;
vii. the production, supply and retail of sachet water; and
viii. all aspects of pool betting business and lotteries, except football pool

(2) The Minister in consultation with the Board may by legislative instrument amend the list of enterprises reserved for citizens and enterprises wholly owned by citizens.

A law that seeks to restricts the Ghanaian markets from non-nationals small holder trading and investment may likely have reciprocal measures in sister nations. Thus Section 27 of Act 865, contradicts all the principles and guide lines and directions admonished and envisaged under the **preamble** and **the directive principles of state policy** particularly **article 40 and article 73** of the constitution.

[37] Act: 865 of 2013

Denying low income nationals of ECOWAS member States will not foster unity and peace; it won't promote development, contravenes public international law and more importantly doesn't serve and protect the best interest of Ghana. This is because, were this to be the law in other States, it wouldn't serve the interest of Ghana Nationals retail trading in those States and by extension Ghana. Adopting a broader view of Ghana's interest to include the interest and welfare of Ghanaian Nationals living and trading in other ECOWAS member States is encouraged as the best approach to actually assessing the interest of Ghana in matters like the one at hand. Section 27 of the GIPC Act will not pass the constitutional test as provided in the articles 34,36,40,70 of the constitution of Ghana.

3. GHANA'S INTERNATIONAL LAW OBLIGATION

A country's international law obligation flows from the sources of international law. For purpose of this discussion, Ghana' international law obligation will be looked at under the two main sources of International Law namely Treaties (used interchangeably as Agreements, Conventions) and Customary practices of States.

3.1 Treaties

Article 38 (1) of the Statute of the International Court of Justice[38] (ICJ) enumerates the law to be applied by the ICJ when deciding cases within its jurisdiction. This is seen as the most authoritative statement/enumeration of the sources of international law. It provides: "The court whose function is to decide in accordance with international law such disputes as are submitted to it shall apply;

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states.
b. International custom as evidence of a general practice accepted as law.
c. General principles of law recognized by civilized nations. Etc.

[38] Statute of the ICJ

On Treaties as a source of international law, Okeke puts it succinctly as "an important way a State participates in international law is by being a member of an international body. For the purpose of this article, an international body comprises organizations or entities composed entirely or mainly of states and usually is established by Treaties, Charters, Covenants, or similar instruments, which serve as the body's Constituent Instrument"[39]. The constitutive Instruments contain the objectives, missions and core principles of the organizations of which all members must comply. Being a member of international organization comes with it, rights as well as responsibilities of member States and to Member States respectively.

It is a basic legal principle of international law that agreements are binding on the parties to the agreement. This is known in latin as *pacta sunt servanda*. The principle requires State parties to honour their Treaty obligations as stated in Article 26 of the Vienna Convention on the Law of Treaties[40] It follows impliedly that if a State is not a party to an agreement it is not bound by it as also captured by the latin maxim: *Pacta tertis nec prosunt, simply meaning* third parties are not bound by Agreements. OKeke continued to state that "Being a member of an international body requires that a state show commitment to realizing the organization's objectives. Generally, by joining an international body, a state accepts to be bound by the provisions of the charter establishing that body and to perform its obligations arising under the charter. An international body, by its nature as an association of states, is mainly regulated by the principles of international law."

One of the major challenges encountered by states arising from their membership of an international organization is reconciling their obligation under the organization, which is an international law obligation and their obligations under their domestic laws. This is an incidence of the interaction between international law and domestic law; Ghana is not left out in this

[39] Christian N. Okeke: 'The use of international law in the Domestic Courts of Ghana and Nigeria' 32 Ariz .J.Int,l and Commp.L.371 (2015) 389.
[40] Vienna Convention on the Law of Treaties, 1969.

challenge.

Ghana is a member of United Nations, a member of the African Union, a member of Economic Community of West African States. Ghana is a signatory to the Treaties/Charters establishing the above mentioned bodies[41]. Additional Protocol relevant to issues of trade and small holder investors of non-nationals is the 1979 Protocol on Free Movement of persons and goods of member states[42] of ECOWAS. The 1979 Protocol on the free movement of persons and goods in article 2 grants ECOWAS citizens the right of entry, residence and establishment of nationals of ECOWAS in any member States without any restrictions. The only requirement is a valid passport or any travelling document of the State of which that person is a citizen. The Treaties establishing the above mentioned organization has as part of its key objectives of building friendly relations among member states and the maintenance of international peace among others by adhering to the principles of Sovereign Equality and Interdependence of member states, Trade Liberalizations and Markets integration, promote the Economic wellbeing of nationals of Member States, respect for the rights and dignity of all persons in the territory of each State etc. Any act of a member in respect of trade and investment that doesn't promote the objectives and principles of these Treaties establishing the organization would be in breach of its obligation in international law.

Ghana is also a signatory to the Marrakesh Agreement[43] which eventually led to the establishment of the World Trade Organization. A body that oversees trade and investment matters across nations. The Agreement essentially adopted the General Agreement on Trade and Tariffs (GATT) Agreement supplemented by a number of agreements including Trade in Services (GATS), Sanitation and Phytosanitary measures, Trade Related aspects of Intellectual Property, Technical Barriers to Trade etc. A key principle of the GATT

[41] The United Nations Charter of 1945, The Constitutive Act of the African Union, 2000 and ECOWAS Revised Treaty of 1975.
[42] Protocol A/PI/5/79
[43] An Agreement signed by 123 member States in 1994 in Morrocco.

Agreement which member States are entreated to observe is the principle of non-discrimination. This principle looks at two main rules: there are

a. The Most Favoured Nation Rule
b. National Treatment rule.

The Most Favoured Nation Principle which is captured in article 1 of GATT is to the effect that any advantage offered in respect of anything to a member of World Trade Organization in respect of any product, such favor should be granted unconditionally and immediately to all other nations of World Trade Organization. It must be noted that this Principle relates to custom duties, charges on products and methods of calculating such duties and charges.

The second aspect of the principle of non-discrimination as contained in Article 1 of GATT is the National treatment Obligation/Principle which in simple terms prohibits Nations or member of World Trade Organizations from as a matter of policy and law discrimination between nationals and non-nationals in matters of trade and investment. The National Treatment Principle sees any measure that discriminates by way of its trade policy and laws against other nationals as discriminatory and discourages same. In the CANADA AUTO CASE[44], a measure is said to be de jure discrimination if it is clear from the reading of the text of the law that, regulation or policy that it discriminates, however, it is deemed to be de facto discrimination if it is not clear but on the review of all facts, it becomes clear that it discriminates in practice or in fact. That is to say that the discrimination can be as a matter of fact or law. However, there are exceptions to this principle of non-discrimination as provided for in in **articles xx and xxi of the GATT**. The exceptions range from stuff necessary for protecting public morals, protecting plant and animal life to measures for protecting the essential security interest of a State.

The Preamble, article 36 and article 40 of the Constitution of Ghana seemed to have been inspired by the principles and ideals of the

[44] Canada-Certain Measures Affecting the Automotive Industry-DS139,142

Charters/Treaties/Constitutive Acts establishing the United Nations, the African Union, the Economic Community of West African States, and the World Trade Organizations.

Section 27 of the GIPC Act however is discriminatory as a matter of law. This section is contrary to both the constitution in both its letter and spirit and Ghana's international law obligation as evidenced in the various treaties enumerated above.

The interaction between Ghana's internal laws and international law

Article 75 of the 1992 Constitution has been interpreted variously to mean Ghana is a dualist state. The supreme court of Ghana recently in the case of Margaret Banful and others v. Attorney General[45] held to the effect that an international agreement between Ghana and others States has no effect in Ghana unless it is ratified by an Act of Parliament or a resolution of Parliament by two thirds of all members of parliament. The cases of New Patriotic Party v. Attorney General, Amidu v. Kuffour And The Republic v. High Court (COMMERCIAL DIVISION), Accra, Ex Parte Attorney General (NML CAPITAL CASE AND REPUBLIC OF ARGENTINA)[46] has early on emphasized the dualist nature of Ghana's Constitution relative to International laws, including inter African enactments as not binding on Ghana until such laws have been adopted or ratified as part of the laws of Ghana.

The courts position essentially is that Ghana is not bound by a Treaty obligation by the mere fact that it is a State party to a Treaty until such a Treaty is accepted as law in Ghana by an Act of parliament or a resolution of parliament by votes of at least two thirds of the members of Parliament. It is true that is the interpretation given to article 75 of the constitution by the apex court of the republic, but do the decisions of the Supreme Court of Ghana meant Ghana is

[45] Unreported Supreme Case no. JI/7/2016

[46] {1997-98}1 GLR 78, {2001-2002}2 GLR 510 and Unreported case , 20th June 2013 Suit number-J5/10/2013 respectively.

blind to any international law obligation as long as the Agreement or Treaty from which such an obligation is arising from is ratified? Or that such an obligation exists in the international legal arena but that it will be disregarded because it is not known to our laws? And wouldn't any violation of any international obligation for the reason that it is not part of the laws of Ghana result in State Responsibility? In other words, will Ghana be absolved of state responsibility for a breach of international law for the reason that an obligation of international nature/law is not part of the laws of Ghana?

To answer the above questions SHAW[47] states that 'the general rule with regard to the position of municipal law within the international sphere is that a state which has broken a stipulation of international law cannot justify itself by referring to its domestic legal situation. It is no defense to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of its own municipal law. The reasons for this inability to put forward internal rules as an excuse to evade international responsibility are obvious. Any other situation would permit international law to be evaded by the simple method of domestic legislation' this view resonates with **article 27 of the Vienna Convention of The Law of Treaties** which provides also that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The international court has in many cases e.g. in **Cameroun v. Nigeria**[48] reiterated this position of international law. All that the principle enumerated above says is that Ghana cannot violate the ECOWAS protocol of 1979 or any other treat of which Ghana is a signatory or state party citing municipal law as the reason of non-compliance. Been a signatory is enough for international law obligation to accrue if the person appending the signature was competent to do so. Thus, the GIPC Act cannot be the basis for Ghana to violate its international law obligation as established by its membership to the above mentioned international organizations. Ghana cannot in simple terms restrict

[47] Malcolm N Shaw- International law, 6th edition, pages 133-135
[48] ICJ Reports, 2002, pp 3030, 430 ff.

trading activities of nationals of ECOWAS members' states on the basis that our laws provides so.

3.2 Custom

Custom is a source of international law as provided in article 38 of the Statute of the ICJ. Article 38.1(b) of the ICJ Statute refers to "international custom" as a source of international law, specifically emphasizing the two requirements of state practice and acceptance of the practice as obligatory or *opinio juris sive* necessitates (opinion juris for short). Shaw[49] states that the "essence of custom according to article 38 is that it should constitute evidence of general practice accepted as law. Thus, it is possible to detect basic elements in the make-up of a custom. There are materials facts, that is, actual behaviour of States, and the Psychological or subjective belief that such behaviour is law". Also, in the Libya/Malta case, the International court of Justice stated that customary law must be 'looked for primarily in the actual practice and *opinio juris* of States'[50]. All that the text books and the decisions of the International Court of Justice speaks to of custom is that what is the actual practice or behaviour of States in relation to small holder traders and investors in their markets and whether such behaviour is as a result of a belief of a legal obligation.

What has been the custom of member states of ECOWAS?

The States of Cote D Ivoire, Togo, Benin, Burkina Faso, Mali, Niger, Nigeria and Ghana have for many years allowed the Nationals of ECOWAS member States to settle and trade in their markets without restriction. In fact, this practice in these states is for building friendly relations and peaceful co-existence among each other. Each allows the nationals of the other to trade in their markets with the thinking that this gesture will be reciprocated in the other's territory and in fact it has been the case for decades.

This custom among the member States stated above explains why there is no

[49] Malcolm N Shaw-International Law, 6th edition, pages 72-93.
[50] ICJ Reports, 1985, pages 13, 29 and 81; ILR page. 239.

law of the nature of section 27 in the above named countries. **In Nigeria, The Nigerian Investment Promotion Commission Degree no. 15 (NIPC ACT**) as amended in 1998 is the primary legislation regulating investment in Nigeria. This law in Nigeria allows non-nationals full participation in the trading and investment activities of non-nationals in the Nigerian business environment without any form of restriction or discrimination of the form provided in section 27 of the GIPC Act of Ghana. EKWUEME[51] on the principal legislation regulating investment in Nigeria states that "Essentially, the NIPC Act opened up almost all sectors of the Nigerian Economy to foreign investors, including the oil and gas sectors. It also removed the conditions on the ownership of shares in Nigerian enterprises by foreigners imposed by previous investment laws in Nigeria. The business activities closed to foreign investors are a no go area for local investors". It is worthy of note that Nigeria has come far in terms of opening up and liberalizing their economy for foreign participation. The NIPC Act actually repealed the **Nigerian Enterprise Promotion degree of 1989** which contained a schedule of 40 business activities reserved for only Nigerians and foreigners were only allow participation on meeting certain restrictions provided.

In Ivory Coast, there is no restriction on any foreign investment except the basic admonishment of compliance with the country laws. The Investment Code, Law no. 2018-646. The Code provides a suitable legal environment for investment friendly norms and policies. It grants more rights and stipulates few obligations for foreign investors. In all the countries above, there was no evidence of any restrictions in the nature of section 27 of the GIPC Act of Ghana.

It is important to state that though Section 27 of the GIPC Act as a matter of law seeks to restrict non-citizen small holder traders/investors in the Ghanaian

[51] Khrushchev U K Ekwueme: Nigeria principal investment laws in the context of international law and practice, Journal of African law , 49,2(2005).

markets, the actual practice on the ground however is contrary to this section of the GIPC Act. The paper observed that since the passage of this law, no Government or any institution of government or state has acted discriminatorily against non- nationals in our markets. It has always been some trader groupings and some persons this paper will deemed miscreants, who have often in a tussle more or less with government, angrily attacked and lock up some shops belonging to mostly Nigerians. The Ghana police service, an institution mandated by law in Ghana to maintain law and order have always acted and provided protection for the affected persons to carry on their business without fear. The general posture of governments and the provision of protection by the Ghana police service to the affected persons is an indication, section 27 of the Act will not serve the interest of the State if enforced. The enforcement of this law will creates a fertile environment of possible reprisals from ECOWAS member states whose nationals are affected.

That aside such an environment will not lead to friendly relations among member states. The government have often not acted to calls by some trader groups that the said section be in enforced against non- nationals. This sits well with the constitutional guidelines that should underpin our international relation, and also resonates with the ideals and principles of major Charters/Treaties/Conventions establishing major world bodies of which Ghana is a member. Customarily therefore Ghana's action is line with what pertains in other ECOWAS member states despite having a law providing otherwise.

However, a number of concerns and doubts have been raised about the commitment of governments since the said law came into force in dealing with persons who harass, lock up shops belonging to non-nationals. The state in all these years has not prosecuted anyone for taking the law into their hands. This is viewed as been no commitment on the part of the State to punish its citizens who engage in wrongful acts in this case against non-nationals.

4. CONCLUSION AND POLICY RECOMMENDATION

The issue in question has attracted a lot of media discussions in both Ghana and Nigeria for quite some time now. The discussions have often been more of emotional and logical opinions than legal and in the interest of friendliness between the two States. One won't be wrong to state there have been threats of certain actions and reprisals between the two powers in the Sub region. Section 27 of GIPC Act is contrary to the ideals that the constitution of Ghana stipulates in Ghana's relation with other Nation States as well as the ideals, aims and objectives of United Nations Charter, the Africa Union Charter, the Treaty Establishing the Economic Community of West African States.

It is discriminatory and doesn't also conform to the principles of non-discrimination as required of all trade and investment regulatory laws across the globe as enjoined by the Marrakesh Agreement establishing the World Trade Organization. This law has the tendency to trigger similar laws and actions against nationals of Ghana especially the small holder traders/investors in the sub region. The consequences of having your nationals driven away from other states markets, the repercussions on the country international relations, the implication on security and peace across the sub region will not serve the best interest of the Republic of Ghana.

The government of Ghana in the short term should be firm in enforcing its laws on any person who takes the country's laws into his/her hands to harassing nationals of ECOWAS in our markets. In the long term, Ghana should take a critical look at the policy objectives behind section 27 of the GIPC Act vis-a-vis the interest of citizens of Ghana no matter where they are. Creating an enabling business environment with accessible and affordable credit schemes for the average Ghanaian to compete with all persons whether nationals or not and whether in Ghana or else is the only way to bring economic prosperity and relieve and not restrictions that have the tendency to worsen the plight of Ghanaians.

JUDICIAL EUTHANASIA: THE CASE OF *ELIKPLIM AGBEMAVA AND OTHERS V. ATTORNEY GENERAL* (MONTIE 3 PRESIDENTIAL PARDON CASE)

Moesha Teiko Amanor[1]

ABSTRACT

The 1992 Constitution gives wide powers to the President to abate convicted persons through the exercise of prerogative of mercy as captured under article 72. An apposite constitutional issue is apparent from the decision of the Supreme Court in the Montie 3 case which declared that the President has the power to exercise his prerogative of mercy to grant liberty to the convicted persons with or without the Attorney General's involvement in the proceedings. This article critically examines the general overview and origin of prerogative of mercy. It further discusses the facts, and key majority and minority decisions in the Montie 3 case. This discussion will be preceded by a detailed historical development of article 72 of the 1992 Constitution. It also highlights whether prerogative of mercy is an affront to the judiciary. Lastly, this article narrowly focuses on a strong case as to whether the President in granting pardon to the convicted persons in Montie 3 acted arbitrarily and capriciously since proceedings were initiated at the instance of the Supreme Court and not the Attorney General.

INTRODUCTION

Contempt of court is a well-known aspect of common law that is enforced in Ghana. Civil contempt and criminal contempt are the two basic types of contempt of court. Civil contempt usually focuses on disobedience of a

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court order while criminal contempt deals with the issue of scandalizing the court or interfering in the administration of justice of the court. Criminal contempt is what usually raises many questions as to whether the courts should restrain their considerable power. Contempt in facie curiae (contempt in court) does not call for much controversy as contempt ex facie curiae (contempt out of court) does.[2]

Article 126(2) which grants the court the power to commit for contempt provides that; 'The Superior Courts shall be Superior Courts of record and shall have the power to commit for contempt to themselves and all such powers as were vested in a court of record immediately before the coming into force of this constitution'.[3] This gives rise to the question as to whether the President through article 72 can grant pardon to convicted persons in proceedings initiated by the Superior Courts. Article 72 of the 1992 constitution which grants such enormous powers to the President provides that, 'the President may acting in consultation with the council of state exercise the prerogative of mercy or power of pardon to convicted persons'.

In the year 2001, President Kufuor commuted the sentences of many prisoners including public officials[4]. This attests to the fact that President John Dramani Mahama was not the first President in the history of Ghana to exercise such power of pardon. However, Elikplim and others v. Attorney General (Montie 3 case)[5] has vexed the minds of legal practitioners after the Supreme Court gave its decision.

This article addresses the issue of whether the President can exercise the

[2] Samuel Kofi Date-Bah, *Reflections on the Supreme Court* (Wildy, Simmonds and Hill Publishing, 2015) 215.
[3] Article 126(2) of 1992 Constitution.
[4] Agboka, Godwin Yaw-Kufuor's exercise of 'Prerogative of Mercy'-mobile.ghanaweb.com-27 May 2008.
[5] (2018) JELR 67382 (SC).

power given under Article 72 of the Constitution in situations where contempt proceedings have been initiated by the Superior Courts, rather than by the Attorney General.

PREROGATIVE OF MERCY: GENERAL OVERVIEW AND ORIGIN

In the British tradition, prerogative of mercy was known as the Royal Prerogative of Mercy. The British monarch had the power to grant pardon or withdraw or in some cases provide alternatives to death sentences or capital punishment. Blackstone defines the prerogative in his commentaries (1765-69) as: "that special pre-eminence which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies in its etymology (from prae and rogo) something that is required or demanded before, or in preference to, all others".[6]

Dicey however describes the prerogative as "the residue of discretionary or arbitrary authority, which the executive government can lawfully do without the authority of an Act of parliament".[7] Before the year 1688, in the English tradition, it was for the king to summon parliament and to prorogue it. The king could suspend parliament's sittings and dissolve it. Also, members of the king's council were appointed and dismissed at the king's pleasure.[8]

Pardons and Remission of Sentence

A pardon or the reduction of a sentence does not in itself make the conviction a nullity. Also, the right of pardon does not extend to civil

[6] Hilaire Barnett, *Constitutional and Administrative Law* (6th Edn, Routledge-Cavendish, Ch. 6) 115.
[7] *Ibid*.
[8] *Ibid*.

matters. In the case of Ex Parte Grossman[9] for instance, the court held that the President could issue a pardon to criminal contempt of court but not as to civil contempt. The prerogative of mercy has been regarded as unreviewable by the courts. Lord Diplock in the case of De Freitas v. Benny stated that "at common law, this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not subject of legal rights. It begins where legal rights end".[10] In England, the power of pardon is exercisable on the advice of the Secretary of State for the Home Department, who is accountable to parliament. Prerogative of mercy is not susceptible to judicial review. This was stated by Lord Roskill in the case of Council of Civil Service Union v. Minister for the Civil Service.[11]

In the United States, the President has the power to grant reprieves and pardon for offences against the United States except in cases of impeachment.[12] This power includes the ability to pardon or reduce sentences for convicted persons. Also, the President has the discretion to decide the form of pardon. In Biddle v. Perovich, the Supreme Court upheld the authority of the President to reduce a death sentence to life imprisonment.[13] However the US Supreme Court has clearly stated that the President may grant a pardon subject to conditions. In the case of Schick v. Reed for instance, the court upheld the President's commuting a death penalty on the condition that a person would never be eligible for parole.[14] The pardon power is limited to reducing a person's sentence. The President

[9] 267 U.S 87, 121-122(1925).
[10] 1976 at p 247.
[11] (1984) UKHL 9.
[12] Article II, s 2 of U.S Constitution.
[13] 274 U.S 480 (1927).
[14] 419 U.S 256 (1974).

cannot award any other compensation to an individual as part of the conditions attached to a pardon.[15]

In Ghana, former President Kufuor granted pardon to certain public officials; Mallam Issa, former Minister of Youth and Sports, Mr. Kwame Peprah and Victor Selormey who were jailed for causing financial loss to the state[16]. They were public officials who benefited from this constitutional provision and humanitarian gesture from President Kufuor. In 2005, during the 48th anniversary celebrations of Ghana's independence, the President freed about 130 prisoners. Also, Mr. Dan Abodakpi, former Minister of Trade and Industry and NDC MP for Keta who was serving a 10 year jail term for willfully causing financial loss to the state was granted pardon by the President.[17]

FACTS OF THE MONTIE 3 CASE

On the 29th of June, 2016, three people namely, Godwin Ako Gunn, Alistair Nelson and Salifu Maase alias Mugabe made certain statements on a talk show broadcast on an Accra radio station known as Montie FM 100.1 FM, which were believed to be contemptuous of the Supreme Court. On the 18th of July 2016, the Supreme Court sentenced them to four months imprisonment each and a fine of GH₵10,000 each.

Subsequent to the conviction and sentence, the convicts on the 1st of August 2016, wrote a petition to His Excellency, the President of the Republic of Ghana urging him to exercise the prerogative of mercy under Article 72 of the 1992 Constitution in their favour. This petition was forwarded to the

[15] Erwin Chemerinsky, Constitutional law-principles and policies at p 269.
[16] Agboka, Godwin Yaw-Kufuor's exercise of 'Prerogative of Mercy'-mobile.ghanaweb.com-27 May 2008.
[17] *Ibid*.

Council of State for its advice. By a letter dated 19th August, 2016, the Council of State advised that the President could exercise the prerogative of mercy. By way of a circular issued by the then Minister of Communications, on the 22nd of August 2016, the President announced that he had exercised the prerogative of mercy in favour of the three convicted persons by remitting part of the jail term.

The 1st plaintiff invoked the original jurisdiction of the court for the declaration that on a true and proper interpretation of articles 72 and 296 of the 1992 Constitution of the Republic of Ghana, the power of the President in consultation with the Council of State to grant pardon is discretionary; as such the President and the Council of State are by law required to exercise that discretionary power in a manner that is not arbitrary.

The 2nd plaintiff seeks the relief that a declaration should be made that upon a true and proper construction and /or interpretation of article 72 of the 1992 Constitution of the Republic of Ghana, the power of the President of the Republic of Ghana to exercise prerogative of mercy is limited to convictions for criminal offences and does not include convictions for contempt arising from the inherent jurisdiction of the court under article 126(2) of the 1992 Constitution and ones initiated by private persons.

The 3rd plaintiff sought for a declaration that upon a true and proper interpretation of articles 14(1) (a), (b), 19(11), (12), (21) and 126(2) of the 1992 Constitution, the power in the Superior Courts to commit and/or punish for contempt of court when exercised is not the same as a prosecution/trial for a criminal offence under the laws of Ghana.

In short, the plaintiffs invoked the original jurisdiction of the Supreme Court contending that the remission of sentence that was granted to the convicts who were sentenced to a term of imprisonment by the court based on its jurisdiction under article 126(2) of the 1992 Constitution for contempt is contrary to articles 72 and 296(c) of the 1992 Constitution. Also, it is a

violation of the principle of judicial independence and therefore void and of no legal effect.

Majority Decision of The Court

Benin JSC in his judgment indicated that the law had always criminalized contempt of court in the country and had given recognition to the innate power of the court to punish for contempt. The court also pointed out that there was no difference in terms of the effect of a conviction for contempt of court and a conviction for any criminal offence. The court went on to state that the argument that the President cannot grant remission to persons committed to prisons for contempt by the Superior Courts was untenable in the sense that it violated the principle of equality. The reason being that two persons who have both been convicted for contempt of court now face different consequences as a result of who instituted the action and in what manner before the law.

Hence criminal contempt was an offence and attracted criminal penalties as a misdemeanor whether it was charged under article 126(2) of the Constitution, 1992 or section 224 of Act 29; the consequences were the same.[18] In determining the issue as to whether the President acted arbitrarily in granting pardon to the convicted persons, the majority was clear that the President's power was not impeded and the propriety or otherwise of it could not be questioned.

The court rejected the plaintiffs' argument that the constitution (article 296(c)) required the President to make regulations to govern his power to grant pardon. According to the court, it was practically impossible for the President to make regulations to govern every scenario in which he was required to exercise discretion.

[18] Montie 3 case at p. 23.

Minority Decision of The Court

Anin-Yeboah JSC and Dotse JSC in their dissenting view agreed with the plaintiffs that "the President did not have the power under the constitution to grant pardon to the three convicts. According to the minority, there appears to be little or no problem with contempt 'in facie curiae' which means contempt committed in the face of the court. For instance where a person misconducts himself whilst the court is in session, there is little doubt that such a person needs to be penalized for contempt. This is the type of contempt dealt with in section 224 of Act 29.

However, this is not the type of contempt in contention here. There is the criminal contempt which is called contempt 'ex facie curiae' meaning contempt committed outside the court such as what is demonstrated in Montie 3. This aspect of contempt of court lies in scandalizing the court. What must be noted is that the offence of contempt of court committed through scandalizing the courts must be dealt with promptly such that the authority and dignity of the courts is not thrown away to dogs. In these days of media pluralism and free expression, a delicate scheme must be maintained in striking a balance between where free expression ends and where the courts have been scandalized. Otherwise we run the risk of endangering the security of the state and its independent constitutional bodies such as the judiciary".[19]

The minority went on to state that "having evaluated the case and in its proper historical context as well as its constitutional and statutory status, President Mahama acted unconstitutionally when he sought the advice of the Council of State and exercised the prerogative of mercy to the three convicted persons and granted them the Presidential pardon. In their considered view, the prerogative of mercy in Article 72 of the Constitution, 1992 does not cover and/or extend to persons who have been convicted for

[19] Montie 3 case at p 62 dealing further with criminal contempt committed ex facie curiae. See also the case of Republic v. Liberty Press Limited (1968) GLR 123 at 135.

contempt of court by the Superior Courts under article 126(2) of the 1992 Constitution. Again, the power extends to only Superior Courts and does not apply to lower courts. And hence the power to commit for contempt by the lower courts lies under section 224 of Act 29, where a person commits an offence which is known as contempt in facie curiae".[20]

Dotse JSC stated that the last vestige of semblance of authority is the judiciary. He went on to state that one way of losing this power is the relegation or subjugation of this power of contempt granted the judiciary by the framers of the constitution in article 126(2).[21] Also, once the framers of the constitution had taken our history as a nation into consideration and also noted with concern the deteriorating conditions prevailing in the country where there is apparent recklessness and no respect for law and order, there is the absolute need for some form of arbitrary power to sanitize excesses as happened in the Montie 3 without Executive Presidential intervention.

Hence, these powers should not be exercised recklessly. In Dotse JSC's conclusion, he stated that: "In as much as possible that it is desirable to have rules and or guidelines to aid in the application, scope and extent of these discretionary powers, their absence is not fatal either. According to him, the President's exercise of the power is unconstitutional; the lack of discretion does not arise because he followed the due process. It is in the exercise of grant of the pardon that the President erred in committing an unconstitutional conduct. Also, the exercise of the power of grant of remission of sentence in the Montie 3 case constituted an unjustified interference with the Judiciary and an affront to the constitution".

In Yeboah JSC's dissenting view, he stated that "It is indeed inherent in every Superior Court to convict for contempt of court. It stands to reason that this power of the Superior Courts should not be subjected to any interference from the President and other organs of state when it convicts any person for

[20] S.224 of Criminal Offences Act, 1960 (Act 29).
[21] Article 126(2) of 1992 Constitution.

contempt summarily under it. Accordingly if the Attorney General acting on behalf of the President, had initiated the proceedings, he would have had no objection to the pardon granted".

HISTORICAL DEVELOPMENT OF ARTICLE 72 OF THE 1992 CONSTITUTION

Most provisions in the 1992 constitution are sheltered in the webs of previous constitutions. Paragraph 3 of the report of the committee of experts which drafted the 1992 Constitution states that; 'The committee operated on the cardinal principle that we should not re-invent the wheel. Accordingly, wherever we found previous constitutional arrangements appropriate, we built on them. In this connection, with appropriate modifications, we relied substantially on some of the provisions of the 1969 and 1979 constitutions of Ghana to the extent that they are relevant to the general constitutional structure proposed in this report'.[22]

1957 Constitution

The **1957 constitution** was the first constitution in force after Ghana's independence. Under this constitution, executive power was vested in the Queen, to be exercised on her behalf by the Governor-General. However, this Constitution did not contain provisions stating specifically the power of pardon or the prerogative of mercy to be exercised by the Queen or the Governor-General.

1960 Constitution

After Ghana had gained republican status on 1st July, 1960, the next major step was to promulgate a new constitution. The constitution established a President in whom executive power was vested.

Article 48 provided for the President's powers of mercy. According to

[22] Paragraph 3 of the Report of Committee of Experts of 1992 Constitution.

Article 48(1), "the President shall have the power, in respect of any criminal offence-

(a) To grant a pardon to the offender, or

(b) To order a respite of the execution of any sentence passed on the offender, or

(c) To remit any sentence so passed or any penalty or forfeiture incurred by reason of the offence

(2) Where the President remits a sentence of death he may order the offender to be imprisoned until such a time as the President orders his release".

The 1960 Constitution marks the genesis of Article 72 of the 1992 Constitution.

1969 Constitution

The 1969 constitution was promulgated to set afresh the journey of democracy and constitutionalism after the military intervention and domineering rule under the 1960 constitution.

Article 50(1)[23] provides that "the President may, acting in consultation with the Council of State

(a) Grant to any person concerned in or convicted of any offence a pardon either free or subject in lawful conditions, or

(b) Grant to any person a respite, either indefinite or for a specified period, for the execution of any punishment imposed on that person for any offence; or

(c) Substitute a less severe form of punishment for any punishment imposed on any person for any offence; or

(d) Remit the whole or part of any punishment imposed on any person or of any penalty or forfeiture otherwise due to government on account of any offence.

(2) Where any person has been sentenced to death for any offence, written report of the case from the trial judge together with such other information derived from the record of the case or elsewhere as may be

[23] 1969 Constitution.

necessary shall be submitted to the President.

(3) For the avoidance of doubt it is hereby declared that any reference in this article to a conviction or the imposition of a punishment, penalty, sentence or forfeiture by a court martial".

1979 Constitution

Executive authority was vested in the President as stated by the previous constitutions.

Article 72 existed in the 1979 constitution[24] which stated that "(1) the President may, acting in consultation with the council of state,

Grant to a person convicted of an offence a pardon either free or subject to lawful conditions; or

(a) Grant to a person, either indefinite or for a specified period, for the execution of a punishment imposed on that person for an offence; or

(b) Substitute a less severe form of punishment for a punishment imposed on a person for an offence; or

(c) Remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to government on account of any offence.

(2) Where a person has been sentenced to death for an offence, a written report of the case from the trial judge together with such other information derived from the record of the case or elsewhere as may be necessary shall be submitted to the President.

(3) For the avoidance of doubt, it is hereby declared that a reference in this article to a conviction or the imposition of a punishment, penalty, sentence or forfeiture includes a conviction or the imposition of a punishment, penalty, sentence or forfeiture by a court-martial or other military tribunal".

[24] Article 59.

(4) The 1979 constitution is a build-up of previous constitutions. Consequently, it is observed that the provisions on prerogative of mercy in the 1969 Constitution are replicated in the 1979 Constitution.

The 1992 Constitution

Presidential pardon powers under the 1992 constitution is exclusively vested in the President as stated in the past constitutions. Article 72 provides for the exercise of prerogative of mercy under the 1992 constitution.

IS PREROGATIVE OF MERCY AN AFFRONT TO THE INDEPENDENCE OF THE JUDICIARY?

Article 127(2) of the 1992 Constitution states that neither the President nor parliament nor any person acting under the authority of the President or parliament nor any other person whatsoever shall interfere with judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions, and all organs and agencies of the state shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of courts, subject to this constitution.[25]

It is worth emphasizing that the judiciary as composed at present, in terms of article 125(1) of the 1992 Constitution, shall 'be independent and subject only to the constitution' and is solely vested with judicial power, which is to be exercised by it to the exclusion of all other persons or institutions'.[26]

According to Professor Fiadjoe, 'judicial independence means the provision of an efficient and effective legal service for the populace. We cannot begin

[25] Article 127 of 1992 Constitution- Independence of the Judiciary.
[26] Article 125(3) of the 1992 Constitution.

to lay any claim to that independence when the judiciary is unable to buy into modern management concepts and technology'.[27] Judicial independence is also defined as the insulation of judges and the judicial process from partisan, ideological etc. pressure to influence the outcomes of individual cases.[28]

Although the 1992 Constitution contains provisions safeguarding the independence of the judiciary and the exercise of judicial power, are there provisions in the same constitution that place the judiciary at the risk of political manipulation?

The framers of the 1992 constitution, conscious of the enormous powers and responsibilities that are to be clothed with the judiciary to ensure that the constitution operates in harmony, granted it the power of contempt in article 126(2). It is provided therein that 'the Superior Courts shall be Superior Courts of record and shall have the power to commit for contempt to themselves and all such powers as were vested in a court of record immediately before the coming into force of this constitution'.

Whether or not the President's grant of pardon to persons convicted by the Superior Courts constitutes an interference with the judicial powers of the Judiciary.

As noted supra, the types of contempt include civil and criminal contempt. It is normally the case that either the Attorney General or the court on its own motion can initiate criminal contempt proceedings. In the case of The Republic v Liberty Press & Others,[29] the Attorney General initiated contempt proceedings against the contemnors for scandalizing the courts. In

[27] Dr. S. Y Bimpong-Buta, *The Role of the Supreme Court in the Development of Constitutional Law in Ghana,* (LLD Thesis submitted to the University of South Africa) 44.
[28] Maxwell Opoku-Agyemang, *Constitutional Law and History of Ghana* (2009) Accra: Admax Publishing. at p 243.
[29] (1968) GLR123.

the words of Yeboah JSC in the Montie 3 case, "it must be pointed out that article 72 is not a new provision introduced into Ghana's constitution since independence and indeed granting of pardon to convicts have been done on regular basis in constitutional dispensations. However, article 124(3) of the 1992 Constitution has prohibited the President and Parliament from any interference in judicial decision in any manner or form".

Since independence, there have been situations where executive interventions have plagued Ghana's judiciary. When the 1960 Constitution was in force and subsequent to the passage of E.I 161[30] after the ruling in State v. Otchere[31], some Superior Court judges were dismissed under the powers vested in the President. The military intervention in 1966 also witnessed the dismissal of several Superior Court judges under the guise of retirement on 1st October, 1966.

The 1969 second Republican Constitution afforded protection of the judiciary from executive interference. Indeed after the military intervention in early 1972, the National Redemption Council sacked the Chief Justice and passed a decree to abolish the Supreme Court and judges who had been appointed to the Supreme Court under the 1969 constitution, were made to revert to their previous positions before their appointments. Under the same military regime, the Chief Justice was dismissed in 1977. The 1979 Constitution came into force to restore the independence of the judiciary but when it was overthrown in 1981, the judicial interference continued and on 3rd April, 1986, several Superior Court judges were dismissed also under the guise of retirement.[32]

The grant of pardon is a discretionary power that is vested in the President

[30] Special Criminal Division Instrument 1963.
[31] (1963) 2 GLR 463.
[32] Montie 3 case at p 73- Yeboah JSC.

and as such interferes with the proceedings of the judiciary in a subtle manner especially in the case of Montie 3 where with regards to criminal contempt, it was initiated by the Superior Courts and not the Attorney General. This in my respectful view constitutes an abuse of power since the Superior Courts have been clothed with the power to convict contemnors as a protective mechanism which the court is entitled to employ in the discharge of its duties. Hence if the power of pardon is to be exercised, that discretionary power should not be abused in a manner in which the independence of the judiciary will be obstructed.

In the respectful view of former Attorney General, Martin Amidu, "as for the argument that it will be an interference with the independence of the judiciary to grant any pardon, I will like the proponents of that doctrine to tell the whole world which exercise of the President's powers of pardon cannot be said to be an interference with judicial independence in the sense that it pardons convictions and/or sentences already imposed in the exercise of the court's judicial power. That is why it is a prerogative of mercy!"[33]

In furtherance of his argument, he stated that anybody acquainted with the judicial process should know that there have been instances in which courts themselves have invited the President to consider exercising his powers of mercy by pardoning the convicted. The Attorney General also stated that, it would be an insult to the integrity, professionalism and maturity of our judicial system to say that the court will be offended by any exercise of the powers of mercy by the President, simply because the conviction was for contempt of the court.

Looking at the analysis drawn by the former Attorney General, Martin Amidu who is currently acting as the Special Prosecutor of the Republic of

[33]Martin A.B.K. Amidu, Montie 3: Presidential pardon not an affront to Judiciary- www.ghnewsnow.com- August 17, 2016.

Ghana, he failed to acknowledge that no one is disputing the fact that the President has the power to exercise his prerogative of mercy in situations of contempt of court. The only constitutional issue is how this particular contempt of court was initiated and thus, from the analysis drawn supra, it can be noted without doubt that the President in my respectful view interfered in the exercise of final judicial power.

Whether or not the act of granting pardon by the President in Montie 3 case arbitrary and capricious.

Criminal proceedings are initiated at the instance of the Attorney General who under article 88(3) exercises exclusive powers. As mentioned supra, the Attorney General can also initiate contempt proceedings.

Sir I.H. Jacob, an authoritative jurist, in his article on 'The Inherent Jurisdiction of the Court', stated the position that, 'the power of the court to punish by summary process for contempt of court provides a protective umbrella under which the litigant parties may fairly proceed to the determination of the issues between them, free from bias and prejudice and free from any interference and obstruction of the process of the court'.

From the above extract, it can be deduced that the President or any organ of government cannot interfere in the proceedings of the Superior Courts when it convicts an individual for contempt summarily. In my respectful view, if the Attorney General had initiated the proceedings in the Montie 3 case, I would not have debunked the fact that the President has the right to exercise his power of prerogative of mercy captured under article 72. There have been a number of occasions where past Presidents of Ghana have granted pardon to convicts but the outrage about such pardons have not been much as compared to the Montie 3 case. This is due to the circumstances under which the pardon was granted. Thus, granting pardon to convicted persons initiated by the Superior Court in my view will constitute an

interference with judicial proceedings. Hence the President's power to grant pardon to contemnors should not be made to cover proceedings initiated by the Superior Court.

CONCLUSION

The judiciary since independence has faced many interferences in the discharge of its duties. In the Montie 3 case, the independence of the judiciary was once again attacked but in a very subtle manner quite differently from previous occurrences mentioned supra. Hence, the use of the phrase JUDICIAL EUTHANASIA, which refers to the painless and subtle attack on the independence of the judiciary.

Contempt of court as noted supra can either be initiated at the instance of the court or by the Attorney General. The Montie 3 case in contention here was initiated at the instance of the Superior Court. This is the main reason why there have been many contentions after the judgment. Notably, the President has the discretionary power to grant pardon to convicted persons. However, the Superior Court under article 126(2) has the inherent power to convict contemnors and such power should not be interfered with by any organ of government as stated in article 127(2) of the 1992 Constitution. The framers of the constitution in my respectful view did not intend to cause much outrage in the exercise of power by each organ but rather efficiency in the exercise of such powers.

Although article 129 of the 1992 Constitution indicates clearly that the Supreme Court shall be the final court of appeal and shall have such appellate and other jurisdictions as may be conferred upon it by the constitution or any other law, article 129(3) on the other hand provides that 'the Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all

other courts shall be bound to follow the decisions of the Supreme Court on questions of law'.

I would thus recommend that the decision in the Montie 3 case should be revisited in light of the fact that there was an abuse of power by the President. The Supreme Court can safely depart from its previous decision in the Montie 3 case based on the arguments advanced in this article

WHERE THE LAW OF IMMOVABLE PROPERTY MET JURISPRUDENCE: MEMUNA MOUDY V. ANTWI AND THE USE OF PUBLIC POLICY IN THE COURTS

Nana Kweku Apraku Agyepong[1]

ABSTRACT

Everybody loves the story of the victim, or at least a majority of us. This feature of humans, fueled the backlash that followed the decision in Memuna Moudy v Antwi. People believed that it was unfair for the court to deny people who had been on land for decades, the right to use the land by virtue of a compulsory acquisition that at the material time had not been useful. The court justified its decision with public policy, but this piece, which is a blend of the law of immovable property and jurisprudence, seeks to justify the use of public policy in that case and deal briefly with other important matters in the law of compulsory acquisition.

COMPULSORY ACQUISITION

Compulsory Acquisition (also known as the power of eminent domain) has been defined in Black's Law Dictionary[2] as "*the right of a state, through its regular organization to reassert whether temporary or not, its dominion over any portion of land on account of public good*". The power of compulsory acquisition has been used by the state as an exercise of its sovereignty to advance the public good. The

[1] Third year law student of the University of Ghana. Many thanks to Sir Professor Kofi Kumado and Mr. Herbert Krappa for the assistance and help in the writing of this article.

[2] Brian A. Garner (ed) *Black's Law Dictionary*, (Thomson West, 8th Edn, 2004) 562.

term can be traced to the writings of the seventeenth century scholar, Hugo Grotius[3] who noted in his book that;

"… The property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property".

This concept has not been alien to our land tenure system. In colonial times, the government enacted the Public Lands Ordinance, 1918 (Cap 134) which was used to acquire land for this same *public use*. This was demonstrated in the case of ***Re Ayima***[4] where the Colonial Government used the power conferred by the Ordinance to acquire a tract of land at Somanya from the Krobos for the establishment of the Mount Mary Training College.

Post-independence however, the State Lands Act[5] has been used by successive governments, to acquire land for what is stipulated in section 1 of the said Act, as *public interest*.[6] A process, posited in sections 1 and 2 of the Act, ought to be followed for a valid acquisition. Failure to follow this process has seen the courts, invalidating the acquisition. The case of ***Rockson v Agadzi***[7] clearly shows this position of the law. In that case, Ollenu J, as he then was, held that in order to divest the plaintiff of his property and vest it in the President, there must be evidence of a due publication of the Executive Instrument (E.I.) used

[3] De Jure Belli et Pacis, 1625.
[4] [1960] GLR 80-84.
[5] Act 125, 1965.
[6] Section 1, supra note 5.
[7] 1979 GLR 106.

in acquiring the land, in the manner laid down in section 2 of Act 125. Apart from evidence which established that a copy of the acquiring E.I was affixed at a point on the land, other evidence adduced clearly showed that there was no service of the Executive Instrument on the plaintiff personally either as owner of the land or as the person in occupation. This, therefore invalidated the acquisition, as the steps, outlined in Act 125 were not adhered to.

However, the crux of this article is the nature of adverse possession, the interest it creates after the compulsory acquisition has been made and the role of public policy in determining the interest of parties on the land. It is necessary then, to look at the essence of adverse possession after the land is compulsorily acquired.

WHAT IS ADVERSE POSSESSION?

As stated earlier, there is the need for a special type of possession to invoke the Limitation Act, 1972 (NRCD 54). This was demonstrated in the case of ***Djin v Musah Baako***[8]. In this case, the plaintiff brought an action against the defendants for a declaration to a piece of land lying situate at Sabon Zongo at Laterbiorkorshie. He claimed that the defendants had lost title to the land because they had been barred. In 1984, the plaintiff put sand and stone on the land and was warned by letter by the defendant family. The plaintiff then did nothing on the land till 1999 when the action was commenced at the High Court. It must be noted however that the plaintiff gave part of the land out to mechanics to work on. It was held[9] that the act of the defendant warning the plaintiff through the letter was enough to prevent the accrual of rights in the land. On the issue of whether the rights had accrued in the land for the mechanics, Atugubah JSC, in quoting Omrod L.J. in ***Wallis Holiday Camp***

[8] (2008-2009) 1 S.C.G.L.R. pg 686.
[9] Per Aninakwah and Atugubah JJSC.

v Shell and BP Ltd[10] stated that;

"courts are reluctant to allow the encroacher to acquire a good title to land against the true owner and have interpreted the word possession in this context narrowly".

He also cited ***Buckinghamshire County Council v Moran***[11] (headnote 2) which also provided;

"*there was no special rule of law that an owner of land who intended to use it for a particular purpose at some future date could lose title by adverse possession to a squatter,* ***whose actions did not substantially interfere with the owner's plans for the future use of the land. Where a claimant could demonstrate factual possession and an intention to exclude the world at large, including the paper owner, he could establish adverse possession, whether or not he was aware of the owner's planned use of the property***"

There also exists the case of ***Memuna Amoudy v Yaw Antwi***[12] which also spoke to the issue of this adverse possession and would be discussed in detail subsequently.

From the reading of the cases it can be concluded that the entry to the property must be of such nature that amounts to an affront to the right of the original owner. The one seeking to claim adverse possession must show that his actions or inactions ***"…substantially interfere with the owner's plans for the future use of the land"*** and that the claimant must "…***demonstrate factual possession and an intention exclude the world at large, including the paper owner***".

[10] [1974] 3 All ER 575; [1974] 3 WLR 387.
[11] [1990] Ch. 623.
[12] [24/11/04] CA NO. J4/6/2004 and (2003-2004) 2 S.C.G.L.R. 967.

CAN THERE BE ADVERSE POSSESSION AFTER COMPULSORY ACQUISITION - A CASE FOR PUBLIC POLICY?

As discussed in the preceding paragraphs, when land is compulsorily acquired, the rights of the pre-acquisition owners are extinguished. For the purpose of this article, greater attention ought to be given to the justification of such position of the law. The attempt at such justification as was made in the case of ***Memuna Moudy v Antwi***[13]. The facts of the case are as follows. The plaintiffs had claimed title to a piece of land which their father had occupied for 50 years. The land in 1933 had been compulsorily acquired for the purpose of building a cemetery. The plaintiffs' father tried to make a claim for compensation in 1951 but was refused. The defendant approached the plaintiffs for a lease and they gave him a 50-year lease subject to the condition that he would build a two-bedroom house for them. The defendant failed to build the house, because upon investigation at the lands registry, he had discovered that the plaintiffs did not own the land in question. He asked them to perfect their title. The plaintiffs sued for declaration of title and damages for trespass as well as forfeiture of the lease as a result of the denial of title of the defendant. On appeal to the Supreme Court, the suit was dismissed. We shall now proceed to discuss the issue of compulsory acquisition and the rights of "*intruders*" juxtaposed with the need to apply public policy, by looking at what Professor Modibo Ocran JSC held in this case.

Professor Modibo Ocran JSC was of the view that for public policy reasons, it is important to prevent claimants from gaining title to acquired property because of the possibility of expansion of government projects. This position taken by him though may had been influenced by public policy reasons, contained an important assertion which hinged on the possibility for an adverse possession to be made, though it would be rare.

[13] Supra, note 12.

The tenor of all their judgements was to the effect that in principle it may be possible for these people to claim their rights in land that has already been compulsorily acquired. However, we must note the general consensus of the court when it came to the issue of granting these rights to the land holders. In practice, as was noted by the court, it will be near impossible for one to successfully assert these adverse rights against the state. The reason for this apparent impossibility was outlined by Professor Modibo Ocran JSC in his judgement and it shall be discussed subsequently.

From the judgment of the court in the case, it is evident that there needs to be to a form of possession that is more than just an entry on the land. It is important for one to have the land in possession that mounts a rival claim to that of the state such that, that possession has in form, a liking of legal personality to the adverse claimer. But we cannot conclusively determine what the form of possession is. As at now we can just leave it to the court to determine on a case-by-case basis, what really amounts to adverse possession.

The crux of their judgement again, was the defense of the state based on public policy. Professor Modibo Ocran JSC made it all too clear when he noted that the rationale for denying the plaintiff's title to land was with the intent of preventing any stumbling block in the way of government expansion of such projects in the future.

We shall then look to what public policy is, and analyze why such position taken by the court though may seem unfair to the eye, is justified for the greater good.

PUBLIC POLICY AND THE LAW

It is no secret that courts across the world have increasingly taken cognizance of public policy when determining the merits of the case and not just looking

at the law. In fact, in the case of ***R v Wilson***[14] the court even considered public policy when determining the culpability or otherwise of a man who tattooed the letters 'W' and 'A' on the buttocks of his wife.

Ghanaian courts have been no different. In the case of ***Quaye v Koiwah Investment Co. Ltd***[15], Justice Marful-Sau, referring to the case of ***Barrow v. Bankside Agency Ltd***[16], made a strong case for public policy as he defended the rule of res judicata with it. Furthermore, in the celebrated judgement of the ***31st December Case***[17], Amua-Sekyi JSC stated that;

In my view, even though Parliament has the right to legislate, this right is not without a limit, and the right to enact a law that 4 June and 31 December should be declared public holidays cannot be left to linger in the realm of public policy.

This statement represents the forces with which judges, many a time, have to grapple with, when making a decision. It represents the rift between the law itself and public policy and which of the two should be given the seat at the high table when pronouncing judgements. In the ***Memuna Moudy***[18] case, the court seemed to tilt to the favour of public policy as against the letter of the law. But can the court be blamed?

The decision of the court may have been necessitated by predominant practices on the ground and the problems they pose to societal life and order. According to Professor Kotey JSC,[19] the rapid growth in the urban population coupled with inadequate resources for housing provision and bad planning has led to a shortage of housing in the urban areas. This has created the ubiquitous thirst

[14] (1996) 2 Cr App Rep 241.
[15] (J4/42/2018) [2019] GHACA 2 (30 January 2019).
[16] {1996} 1WLR 257 at 260.
[17] New Patriotic Party v Attorney General; [1993-94] GLR 35 (SC).
[18] Supra, note 12.
[19] Kotey, E.N.A. Legal Control of Rents Premises in Urban Areas of Ghana: Lessons and Prospects (1989-90) 17 RGL.

for land to utilize by citizens and in effect, encroachment on state lands. The response of the state to this phenomenon is to embark on demolishing exercises from time to time[20], the latest, being a threat by the Minister for Lands and Natural Resources on the 13th of January, 2020 to embark on such exercises.

This response has been described as unfair by many people, particularly Mr. Herbert Krappa[21], who noted that the court's decision to classify the claimants as licensees in the case of ***Memuna Moudy***[22] left them in the middle of nowhere and without rights. Mr. Krappa then goes on to defend the 'victims' of the story when he notes that the failure of the state to secure and protect its property should not be the grounds to take the rights away from the claimants. Obviously, he was interchanging the meaning of the state with government and painted the picture of an all-powerful draconian entity that could devour its own citizens using public policy as a disguise.

One question which obviously may be raised in light of the analysis earlier, is why I have decided to disagree with a mentor, Mr. Krapa and side with the relatively harsh side of the justice system. The answer lies in the concept of the state and what it represents in the process of compulsory acquisition. Unlike what we perceive the state to be when we see artillery and weapons during military parades, the state is very powerless as it represents an abstract concept that citizens ascribe to. Encyclopedia Britannica,[23] for instance defines the state as;

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[20] Ghana News Agency, 'Minister vows to reclaim encroached state lands' (Accra, 12 January, 2020) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Minister-vows-to-reclaim-encroached-state-lands-835246> accessed 05 February, 2021.

[21] Herbert Krapa 'Adverse Possession of State Lands in Ghana: Does Memuna Moudy Raise Legal Questions For Our Jurisprudence' (2016) University of Ghana Student Law Journal; Volume VIII.

[22] Supra, note 12.

[23] https://www.britannica.com/topic/state-sovereign-political-entity accessed at 05 February, 2021.

"a form of human association distinguished from other social groups by its purpose, the establishment of order and security; its methods, the laws and their enforcement; its territory, the area of jurisdiction or geographic boundaries; and finally by its sovereignty. The state consists, most broadly, of the agreement of the individuals on the means whereby disputes are settled in the form of laws".

But this definition is not novel, as it finds root in the plethora of writings of philosophers that share the common notion of what the state is. From Plato,[24] who extensively wrote on the idea of the *polis*[25] as the association of man where his needs were satisfied in the larger group, to Hobbes[26], Machiavelli[27], even this paper and many others being written today, the state is seen as a concept which keeps human behavior in line with the greater ideals needed to maintain peaceful living and the improvement of the standards and dignity of man. This means that in stark contrast to the *State of Nature* that predated the existence of civilization, the creation of the state has had, at the core of its foundation, the betterment of man and his livelihood. In short, the state in and of itself, is a powerless concept that represents the embodiment of the people and the conscious decision they undertake to ensure adherence to a set of rules.

The State is different from the government. The government is the mechanism responsible for running this powerless concept and bridging the gap between the state and the citizens. The government of the day, compulsorily acquires the land not for itself but in the name of the state which exists in perpetuity as governments themselves come and go from time to time. It is conceded that

[24] B. Jowett (ed) *The Republic of Plato* (Clarendon Press).

[25] Means city state. It was a system of Ancient Greek societal organization that saw states organized in a metropolitan form. Hence the city was the state. Examples of city states today are the Vatican and Singapore. Examples of the polis include Athens, Corinth, Sparta among others.

[26] Thomas Hobbes, *The Leviathan* (1651).

[27] Niccolo Machiavelli, *The Prince* (1532).

the irresponsibility of government agencies has caused the phenomenon of encroachment, but this should not be used as a trump card to prejudice the position of the state in the process of land ownership. Since the state is perpetual, the acquisition is made for citizens of the state yet unborn[28] and an attempt by a few irresponsible citizens to hijack the plans for the future of the whole state and its people will make it next to impossible for the state to realize its potential and its core mandate of increasing the standard of living for all its citizens.

It is therefore prudent for us to look at the role of the courts in the system of governance as an arm of government itself. Justice Marshall, in the case of ***Marbury v Madison***[29] noted that it was within the ambit of the judiciary to state what the law is, after he had discussed effectively, the duties of the other arms of government. Thus he demonstrated the essence of the judiciary in the governance system of the United States. This position still holds to this day. Our courts, as recent as 2016 in the case of ***Ramadan and Another v Electoral Commission and Another***[30] made reference to the judgement of Marbury[31] and its effect in contemporary governance. If this is the duty of the court, then is it not prudent the court steps in to protect the state from a few opportunistic citizens when the executive and the legislature fail to do so? This is not an endorsement of the culture of irresponsibility, but an attempt to look beyond the sentiments that cloud opinions when critiquing this case (***Memuna Moudy v Antwi***[32]). The Memuna Moudy case represented the act of the judiciary stepping in to ensure that the failure of the Executive and the Legislature does not impede the prime duty of the state. The judiciary rose to

[28] A very good example is the University College of Gold Coast Acquisition which today has served as the basis of the expansion of the University of Ghana.
[29] 5 U.S. 137 (Cranch).
[30] (J1/14/2016) [2016] GHASC 83 (05 May 2016).
[31] Supra, note 39.
[32] Supra, note 12.

defend the defenseless state when other organs had failed to do so.

Such a brave act by the Judiciary was with the aim of ensuring the core mandate of the state - to ensure that people live in accordance with a code of conduct with the aim of bettering their lives by preventing the plans of the whole state from being stalled because of the activities of a minority.

CONCLUSION

In this article, we have analyzed the history of compulsory acquisition and its application in the Ghanaian legal system. We also went on to analyze why the general opinion of people on the ***Memuna Case***, concerning the ability for illegal occupants to acquire rights in compulsorily acquired land is false. We gleaned, from the judgement, the fact that these adverse claimants can acquire interest in compulsorily acquired property though that will be near impossible. We proceeded, then, to discuss the rationale behind the judgement and why that rationale of public policy is justified.

The core of the article, however, concerned the tug of war between rights of the individual regarding interests in compulsorily acquired property and the security of the state. It is indeed true that rights ought to be secured by the state and the Judiciary in the past, has stepped in when necessary to do so. But it also has a duty to secure the **right of the state** itself in the light of the capture of state resources by a few, when the need be.

To prevent encroachment, there needs to be sensitization on the process of purchasing property, which should include checks at the Lands Commission, and a conscious effort by government agencies like the Lands Commission and the Ministry for Lands and Natural Resources to prevent what happened to the

unfortunate claimants in the ***Memuna Case***[33].

But the failure of these same agencies to do this should not preclude the courts from stepping in when necessary to check the menace, that is, encroachment of public land. If the courts do not step in to limit the rights of adverse claimants, the notion of statehood that informs our adherence to a set of norms will become redundant and this redundancy will encourage the breakdown of that already fragile entity, that is the state.

The government comprises the executive, legislature and judiciary. Where the executive and legislature fail in one regard, we cannot let the hands of the judiciary be tied when the judiciary itself has the power to solve the problem. We must allow the government to have its own self-cleansing mechanism to secure the interest of the state.

Even if the disrespect to the state was to be as a result of governmental action and incompetence, the good old judiciary should not be the culprit in the act of weakening the same creation it is bound to protect.

[33] Supra, note 12.

RENDER TO CAESAR WHAT IS CAESAR'S; TAXATION OF CHURCHES IN GHANA

Kwasi Gyamfi Boadu & Kofi Dankwa Osafo[1]

ABSTRACT

Government's firm commitment to generating more revenue by taxing the incomes of churches has been met with great hostility by the churches. This is because the churches aim at maximising income they generate to run their activities. Due to these hostilities, Government through the Finance Minister, Ken Ofori-Atta is liasing with churches to develop the Charities Bill in order to prevent conflict[2]. The Christian Council of Ghana has argued that the notion that churches do not pay tax is false. According to the Former General Secretary of the Council, Rev. Dr. Kwabena Opuni-Frimpong, churches already pay taxes on their revenue-generating business. Consequently, they have called on the Ghana Revenue Authority to clarify which of the activities of the churches they intend to tax[3]. The focus of this article is not to examine the payment of taxes by churches on their business income. Rather, this article examines the kinds of activities churches engage in. The aim of the writers is to examine the extent to which churches are taxed in Ghana; the exemptions granted them; the registration requirement imposed by the tax law as well as to make recommendations.

[1] Final year LL.B students of the University of Ghana School of Law, 2020.

[2] Madeline Teiko Larnyoh 'Ghana's Finance Minister, Ken Ofori-Atta, says the government is liasing with churches to develop Charities Bill' *Business Insider by Pulse* (Accra, 12 November 2019) <https://www.pulse.com.gh/bi/strategy/ghanas-finance-minister-ken-ofori-atta-says-government-is-liaising-with-churches-to/790mrkm> accessed 3 February, 2021

[3] Myjoyonline, 'We already pay taxes' – Churches demand clarity on tax (Accra, 10 August 2018) *MyJoyOnline* <https://www.myjoyonline.com/news/2018/August-10th/churches-already-pay-taxes-opuni-frimpong-demands-gra-clarity-on-plans-to-tax-churches.php> accessed 3 February, 2021

INTRODUCTION: RENDER TO CAESAR WHAT BELONGS TO CAESAR

'Render to Caesar what belongs to Caesar' is a well-known quote found in Matthew 22:21-22 of the Christian Bible. Matthew 22:21 reads as follows,

> *"21. Caesar's, they replied.*
> *Then he said to them, 'So give back to Caesar what is Caesar's and to God what is God what is God's*
> *22. When they heard this, they were amazed. So they left him and went away".*

When Jesus said, 'Render to Caesar what belongs to Caesar's,' He drew a sharp distinction between two kingdoms. There is a kingdom of this world and Caesar holds power over it, and another kingdom not of this world of which Jesus Christ is King[4] Under Caesar, we have certain obligations that involve material things. Under Jesus Christ, we have other obligations that involve spiritual things[5]

For purposes of this article, 'Caesar' is metaphorically used to represent the Government of Ghana.

Why this metaphor?

Caesar was a Roman consul between 59 - 44 BC[6]. 'Consul' was a title given to the head of State during the early Republic of the Roman Empire. They possessed the auspicium or the right to consult the gods on behalf of the state,

[4] John 18:36: "My kingdom is not of this world. If it were, my servants would fight to prevent my arrest by the Jewish leaders. But now my kingdom is from another place" (New International Version).

[5] Romans 6: 13 "Do not offer any part of yourself to sin as an instrument of wickedness, but rather offer yourselves to God as those who have been brought from death to life; and offer every part of yourself to him as an instrument of righteousness" (New International Version).

[6] William G. Boak, Arthur E. R. And Sinnigen, *A History of Rome to 565 AD*, (The Macmillan Company 1965) 166

and the imperium, which gave them the right of military command[7]. The imperium authority is just like the President being the Commander in Chief of the Armed Forces per Article 57 of the 1992 constitution of Ghana. He also had administrative and judicial authority. A head of State is the same as the head of government. If Caesar was a head of State, then by logical inference, he was the head of government. 'Render to Caesar what belongs to Caesar' is therefore a metaphor used to describe the imposition of tax by the State on its citizens.

WHAT IS A TAX?

A precise definition of what tax is has eluded tax practitioners, students and scholars for a long time. Oliver Wendell Holmes Jnr stated in his dissenting judgment in the US Supreme Court case of Compania General de Tabacos de Filipinas v. Collector of Internal Revenue[8] that, *"Tax is what we contribute for a civilized society".*

There have been questions as to whether all forms of levies a person pays to the State constitute tax. Tax policy designers and law makers often worsen the situation by arguing that some impositions are taxes and some are not. The Local Government Act, 2016 (Act 936) illustrates these problems because that law empowers the local government authority[9] to impose grants, levies, tolls, rates etc. on persons and property within their jurisdiction. Examples of such tolls, grants and levies are television license fees, market tolls, entertainment license fees and ground rents.

The International Tax Glossary defines tax as, *"a government levy that is not in return for specific benefit and not imposed by way of fine or penalty except in some cases*

[7] Ibid.
[8] 275 U.S. 87 (1927).
[9] Municipal, Metropolitan and District Assemblies.

where it corresponds to tax – related offences"[10]. What this definition suggests is that taxpayers do not get exclusive benefits as and when they pay the taxes. Taxes when paid to the government are used to provide services to the entire populace.

The Organization for Economic Co-operation and Development (OCED) in their Expert Group No.3 on Treatment of Tax Issues in the Multilateral Agreement on Investment (MAI) defined "taxes" to be confined to compulsory, unrequited payments to general government.[11] Taxes are unrequited in the sense that, benefits provided by government to taxpayers are not normally in proportion to their payments. The term "tax" does not include fines unrelated to tax offences and compulsory loans paid to government.

Text writers, Morse and Williams also observe that tax *is a compulsory levy imposed by an organ of government for public purposes.*[12]

According to Mr. Abdallah Ali-Nakyea in his treatise,[13] tax can be seen as the levying of compulsory contributions by public authorities to defray the cost of their activities. No specific reward is gained by the tax payer. The money collected is used for the common good, i.e. for the production of certain social amenities which are more efficiently provided by the State rather than individuals.

The various definitions of the word "tax" quoted above have three common features. They are that "tax" is

1. A compulsory levy;

[10] J Rogers-Glabush (ed), *International Tax Glossary* (7th rev edn, IBFD 2015) 464

[11] Organization for Economic Co-operation and Development, *'Definition of Taxes'* (DAFFE/MAI/EG2(96)3, 19th April 1996) <www.oecd.org/daf/investment> accessed 05 February, 2021

[12] G Morse and D Williams, *Davies: Principles of Tax Law* (4th Edn, Sweet & Maxwell 2000) 3

[13] Abdallah Ali-Nakyea, 'Taxation in Ghana: Principles, Practice and Planning' (3rd Edn, Black Mask, 2014)

2. Imposed by an organ of government; and
3. For public purposes.

It is in line with this definition that the trial judge in the Ghanaian case of Development Data & 2 others v. National Petroleum Authority[14] upheld the Plaintiff's second claim by holding that the characteristics of the ex-refinery differential imposed by the National Petroleum Authority fits the characteristics of a tax and was therefore an illegal imposition since the NPA did not comply with Article 174 of the Constitution.

THE CASE: Development Data & 2 Ors V. National Petroleum Authority & Anor[15]

The National Petroleum Authority Act, 2005 (Act 691) provides for the computation of the prices of petroleum products in Ghana using a prescribed petroleum pricing formula. However, contrary to the prescribed petroleum pricing formula, the first defendant, the NPA, announced new prices of petroleum products in Ghana by including in the computation, a component known as "ex-refinery differential."

The plaintiffs therefore sued for, inter alia, a declaration that the introduction of the "ex-refinery differential" by the NPA was unlawful and therefore, the ex-pump prices announced by the NPA were not in accordance with the prescribed petroleum pricing formula.

The NPA argued inter alia that per the letter and spirit of the NPA Act, the NPA was not bound to apply the prescribed petroleum pricing formula. Therefore, the "ex-refinery differential" was not an illegal imposition.

[14] Suit No. BC.533/2009 (Unreported).
[15] *Ibid.*

The High Court held inter alia that it is mandatory under Act 691 for the NPA to comply at all times with the prescribed petroleum pricing formula in the pricing of petroleum products.

Furthermore, it was the court's decision that Act 691 does not clothe the NPA with authority to unilaterally review or change the petroleum pricing formula. Consequently, by including the ex-refinery differential in the prescribed petroleum pricing formula, the NPA had illegally imposed tax contrary to Article 174 of the 1992 Constitution.

Therefore, the ex-pump price of petroleum products announced by NPA which included the "ex-refinery differential" was not in accordance with the prescribed petroleum pricing formula and was unlawful.

These were the words of the court-

> *"I agree with Counsel for plaintiffs that 'the characteristics of the ex-refinery differential imposed by the National Petroleum Authority fits the characteristics of a tax. In theory and in practice, the ex-refinery differential is a tax,' and says that it is an excise tax. The world dictionary defines excise tax as, 'a tax on the manufacture, sale or use of certain articles made, sold or used in a Country'. In that light the ex-refinery differential can be considered an excise tax and the intermediary used to collect it is Tema Oil Refinery (2nd defendant) on behalf of 1st defendant.*
>
> *As I have stated earlier by Article 174 of the constitution (1992). "No taxation shall be imposed otherwise 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…"*

Many hold the view that in order to define "tax", one must list all payments that we call taxes in the country as this style of defining "tax" limits the definition of tax and clears ambiguities.

The Revenue Administration Act, 2016 (Act 915) holds this view. Section 9(1) of Act 915 defines "tax" to mean:

"a duty, levy, charge, rate, fee, fine, interest, penalty or any other amount imposed by a tax law or to be collected by, or paid to, the Commissioner-General under a tax law".

"Taxes" therefore, properly so called, will have to be limited to monies paid or collected by the Commissioner-General. This means that Television license fees, the Entertainment fees and bridge tolls will not be deemed as taxes because they are collected by local governmental units.

WHO IMPOSES TAXES?

Tax is a creation of legislation and is imposed by a statute. In recognition of this principle, previous Constitutions of Ghana made provisions for taxation. Under Ghana's 1992 Constitution, Article 174 provides as follows:

(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 the 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 favor of any person or authority, shall be subject to the prior approval of Parliament by resolution.

Even military regimes in Ghana (apart from the National Liberation Council) that did not operate under formal constitutional documents, made similar provisions in their Establishment Proclamations. These Proclamations had identical provisions, which read, *"the Council shall have the power to impose taxes"*[16]

[16] Benjamin Kunbuor, et al, 'Law of Taxation in Ghana' (Type Company Limited, Accra 2017) 11.

Pursuant to the above general power to impose tax, Acts, Decrees and Laws are made by the appropriate legislative body at the relevant times. Since taxes are imposed by or under statutes, they are the subject of judicial interpretation and review.

CLASSIFICATIONS OF TAXES

Have you ever wondered why the price of a product stated in a receipt from a supermarket was slightly higher than the original price of the product? Well, yeah you are paying taxes. This is what we call an indirect tax. Indirect taxes are levied on goods and services. They are said to be indirect because the impact is on the person immediately paying the tax whereas the incidence is on the consumer.

Indirect taxes can be juxtaposed with direct taxes. Direct taxes are levied directly on individuals and companies. The incidence and the impact are both felt on the person. An example of a direct tax will be an income tax administered by the Domestic Tax Revenue Division in your neighbourhood.

The second forms of tax classification are the progressive, proportional and regressive taxes which are based on the level of income earned by the tax payer. With the proportional taxes, tax liability ratio increases as the income of the tax payer increases. On the contrary, the ratio falls as the income of the tax payers increase under the regressive taxing. The ratio remains constant in the proportional taxes regardless of the person's level of income.

The next form of classification is done according to tax base. This includes taxes charged on income which includes income tax on individuals and corporate or non-corporate bodies as well as tax on rent. They also include taxes on capital such as Capital Gains Tax on individuals and companies, property tax on land, wealth tax and gift tax. Taxes on expenditure such as

consumption or production as in Value Added Tax (VAT).
Income Tax in Ghana is regulated by the Income Tax Act, 2015 (Act 896).

The Concepts of Chargeable and Assessable Income

I. Chargeable Income: Section 1, the charging section, of the Income Tax Act of 2015, (Act 896) imposes income tax on the chargeable income of a person for each year of assessment. Section 1(1) states,

"Income tax is payable for each year of assessment by;
(a) a person who has chargeable income for the year; and
(b) a person who receives a final withholding payment during the year".

Abban J.A. (as he then was) of the Ghanaian Court of Appeal in the case of Kubi and Others v. Dali[17] stated as follows, *"The income tax laws of this country impose an obligation on all income earners of a certain category to pay taxes on their earnings. The plaintiff, without doubt, falls under that category, and the fact that she stated in her evidence that she had not been paying taxes did not absolve her from that liability."*[18].

Section 2 defines the chargeable income of a person and in effect details how the computation is done. Section 2(1) states that, *"The chargeable income of a person for a year of assessment is 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".* Mathematically represented, it is computed as follows; ASSESSABLE INCOME – ALLOWABLE DEDUCTIONS = CHARGEABLE INCOME.

This is in line with one of the fundamental features of a good tax system as stated by Adam Smith in his treatise, "The Wealth of Nations"[19]- certainty of imposition.

[17] [1984-86] GLR 501–510, CA.
[18] Ibid at p. 509.
[19] The Wealth of Nations, 1952 Book 1, Chap. VI.

II. Assessable Income: Section 3(1) of Act 896 defines the assessable income of a person in the following words, *"The assessable income of a person for each year of assessment is the income of that person from any employment, business or investment".* The assessable income of a person under Ghanaian law is dependent on the tax residence status of the taxpayer, to wit, under Ghana's Income Tax law, the income of a resident person and that of a non-resident person are treated differently. This is because there are two (2) systems of taxation- (i) Worldwide system of tax; and (ii) Territorial system of tax. A careful reading of section 3 indicates that Ghana operates a hybrid tax system by employing the worldwide system of tax for resident persons, and the territorial system of tax for non-resident persons.

Under the worldwide or global system of tax, the tax is imposed on the income of resident persons[20] irrespective of the source of the income. Thus, income by resident persons in a foreign country is taxable in the country where the income earner is resident for tax purposes. This system of taxation has been adopted in Ghana for resident persons in sections 3(2) (a)[21] and 111(1)[22].

Under the territorial system of tax which is applied to non-resident persons, the assessable income is limited to income from employment, business or investment which has a source in Ghana per section 3(2)(b)(i), or income effectively connected with a Ghanaian permanent establishment of the person irrespective of the source of the income per section 3(2)(b)(ii).

[20] Section 101 defines who a resident person is for tax purposes.

[21] Section 3(2)(a) states that, "The assessable income of a person for a year of assessment from any employment, business or investment is (a) in the case of a resident person , the income of that person from each employment, business or investment for the year, whether or not the source from which the income is derived has ceased".

[22] Section 111(1) states, "The income of a resident person derived from a foreign source is taxable".

Benjamin Kunbour, Abdallah Ali-Nakyea and William Kofi Owusu Demitia state in their treatise that, "The taxation of income under the territorial concept is justifiable on grounds that the activity, which produces the income, takes place within the borders of the country and the income earner is expected to contribute towards the payment of the expenditure incurred by the state in making facilities available to produce the income"[23].

INCOME EXEMPTED FROM TAX

Act 896 exempts certain sources of income from tax. The exemptions can be found primarily in section 7 and other sections of the Act, sections 97,[24] 98,[25] 99[26] and 100.[27] The focus of this article is to examine the provisions in Act 896 in relation to churches.

Section 97 covers charitable organizations, and subsection (4) exempts the income accruing to or derived by a charitable organization from tax. However, it is important to note that the exemption does not apply to the business income of a charitable organization, to wit, a charitable institution that engages in business[28] is liable under the law to pay tax on income it derives from that business[29]. It is therefore inaccurate to say churches do not pay taxes because they pay taxes on their business income.

The interesting part of section 97 is in the definition of a charitable organization. There are **two (2)** requirements an institution or organization

[23] Supra note 14 at p. 33.
[24] Approval of charitable organization.
[25] Clubs and trade associations.
[26] Building and friendly societies.
[27] Contributions and donations to a worthwhile cause.
[28] Section 133(1), the interpretation section of the Act, defines business to include "(i) a trade, profession, vocation or isolated arrangement with a business character; and (ii) a past, present or prospective business; but (b) excludes an employment".
[29] Section 97(5).

must meet in order to qualify as a charitable organization under section 97 and therefore be entitled to the tax exemption. The first requirement is that, it must either be;

(i) A charitable institution of a public nature;

(ii) **A religious institution of a public nature**;

(iii) A body of persons formed for the purpose of promoting social activities or sporting activities; and

(iv) A registered sporting club[30].

With respect to religious institutions, the genesis of the exemption granted them by the law can be seen under the repealed Income Tax Decree of 1975 (SMCD 5). Under SMCD 5, religious bodies like the Catholic Church were exempted because they built schools and other facilities which addressed society's needs. Ordinarily, monies obtained from the imposition of taxes are used for such purposes. Accordingly, where such amenities are provided by the religious organizations, it is only fair that they be exempted from the payment of tax.

The second requirement under section 97 is that,

The entity must have a written constitution that prohibits that entity from

(i) engaging in a party-political activity, supporting a political party or using its platform to engage in party politics;

(ii) performing functions other than those specified in section 97(2)(a), for example, a church performing non-religious functions; and

(iii) conferring a private benefit, other than in pursuit of a function of the entity specified in Section 97(2)(a).

[30] Section 97(2)(a).

From the above analysis of the law, it is clear that churches do fall under the category of charitable organizations. Churches must again have a written constitution aiming to prevent them from:

1. Engaging in a party's political activity, supporting a political party or using its platform to engage in party politics. An example is where a church uses its platform to host political parties in their premises and use their platform to spread political messages. Another example will be an instance where a church leader or any member of the church uses the church's platform to propagate political party agenda. An instance like that makes the church liable to pay tax.
2. Performing functions other than those specified in section 97(2)(a)[31] ; and
3. Engaging in activities that confer a private benefit other than in pursuit of a function of the church.

It is noteworthy that section 97(3) empowers the Commissioner-General to for good cause or for the contravention of a requirement specified in subsection (2) revoke an approval granted under subsection (1), and the Minister[32] is empowered to make regulations for the effective implementation of section 97 through a legislative instrument.

Furthermore, section 100 which covers contributions and donations to a worthwhile cause provides that where a person has made a donation or contributed to a worthwhile cause, the person may claim a deduction that is equal to the contribution and donation made by that person during that year

[31] Section 97(2)(a) states, "The Commissioner-General shall, before approving an entity under subsection (1), ensure that (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; or (iv) a registered sporting club".

[32] Section 133(1) defines "Minister" to mean "the Minister responsible for Finance".

for a worthwhile cause approved by Government under subsection (2), and subsection (2)(a) provides that a charitable organization organization which meets the requirements of section 97 is a worthwhile cause. Therefore, if a person makes a contribution and donation to a church, that donation can be deducted for purposes of calculating the chargeable income of that person.

CONCLUSIVE REMARKS - RECOMMENDATIONS

The question we should ask ourselves as a people is, how many churches comply with the requirements provided under the law- section 97?, how many have registered with the Commissioner-General?, do churches have a written constitution in the first place?, and for those that have, do their written constitutions specifically prohibit them from using their platforms to promote political activities by inviting political agents to campaign?, do churches pay taxes on their business incomes?, and do they perform functions that only confer private benefits?

If the government is truly focused on generating more revenue domestically, then it must through its agency, the Ghana Revenue Authority (GRA) enforce the provisions of section 97 in line with the objects and functions of the Ghana Revenue Authority under sections 2 and 3 of the Ghana Revenue Authority Act of 2009 (Act 791), so that churches that do not meet the two requirements are taxed like other entities that do not qualify as charitable organizations.

TRADE WITHOUT DISCRIMINATION: A DISCUSSION ON WHETHER THE EXCEPTIONS IN THE GATT'94 UNDERMINE THE MOST FAVORED NATION PRINCIPLE

Emmeline Ziwu & Kwabena Owusu Boateng[1]

ABSTRACT

Equality of States is a cardinal principle in international economic relations. It is a well-known principle in international law that all the five major agreements that substantially relate to trade— GATT, GATS, TRIPS, Agreement of Dispute Resolutions and Trade Policy Reviews as well as all annexed agreements which include treaties, conventions and regulation—are based on two fundamental principles: The Most Favored Nation principle and National Treatment principle. These principles are widely touted as the foundation of transactions in the International realm. The conflict that however arises is whether the exceptions stipulated under the specific articles of General Agreements on Tariffs and Trade 1994 (GATT'94) undermine the purpose of the Most Favored Nation principle in its attempt to curb discrimination in trade. This article stresses the relevance of the Most Favored Nation principle in preventing discrimination among countries in International trade and argues that the principle is not undermined even in the face of the exceptions stipulated in the treaty.

INTRODUCTION

Article I of the GATT'94 provides that any advantage, favor, privilege, or immunity granted by any contracting party to any product originating in or

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destined for any other country shall be accorded immediately and unconditionally to be the like product originating in or destined for the territories of all other contracting parties.

The fundamental rationale of the Most Favoured Nation principle, hereinafter referred to as MFN principle is that member countries must not discriminate between trading partners. This is to the effect that, the preferential treatment that a country grants to its trading partner must also be granted to all other World Trade Organization (WTO) members. Although its name implies favoritism toward another nation, it denotes the equal treatment of all countries. The MFN principle as such seeks to increase the efficiency of production, reduce the cost of determining an import's origin to the barest minimum, and reduce the cost of maintaining the multilateral trading system.

Arguments have however surfaced, that the exceptions that are stipulated under certain provisions of the GATT'94 appear to be undermining the primary purpose of the MFN principle, rendering it ineffective. This article, thus, seeks to show that the various conditions and tests which precede the exceptions under the specified articles preserve the purpose and sanctity of the MFN principle.

THE MOST FAVOURED NATION PRINCIPLE

The Most Favored Nation principle requires Members to accord the most favorable tariff and regulatory treatment given to the product of any one Member at the time of import or export of "like products" to all other Members. The concept of like products is not defined in the GATT'94. However, the Appellate Body in the EC-Asbestos case[2] suggested that like

[2] Panel Report, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R

products are products that share a number of identical or similar characteristics. It is accepted however in the case stipulated above that the concept of like products varies in meaning in different contexts in which they are used. In the Spain Unroasted coffee case[3], a new Spanish law had introduced certain modifications in the tariff treatment applied to imports of unroasted coffee according to which imports into Spain of unroasted non-decaffeinated "unwashed Arabica" and "Robusta coffee" were now subject to a tariff treatment applied by Spain to imports of unroasted coffee. Brazil being the main supplier of coffee to Spain argued that by introducing a 7% tariff rate on imports of the unwashed Arabic and Robusta groups while according duty free treatment to coffee of other groups, the new Spanish tariff regimes are discriminatory against Brazil, which exports mainly unwashed Arabica and as such in violation of Article I:1 of GATT'94. The panel in its attempt to determine what "like products" are considered three main points: the characteristic of the product, their end use and the tariff regimes of other members. The panel upon examination of geographical factors, allocation methods, processing of the beans and other genetic factors, held that the unroasted non-decaffeinated coffee beans was considered a like product and as such the tariff was discriminatory.

Essentially, the MFN is a non-discriminatory principle which requires member states not to discriminate among the imported goods from either state in comparison with the rest of the states. Thus, it prohibits discrimination between "like products" originating from different countries.

Any advantage offered to a member of the WTO in respect of trade in goods, such favor must be granted unconditionally and immediately to all other

[3] Spain – Tariff Treatment of Unroasted Coffee, Report of The (GATT) Panel adopted on 11 June 1981, (L/5135 - 28s/102)

nations in the WTO. As such if a state offers any advantage to any contracting member to goods originating from member states, that state is under an obligation to treat other members in the same vain if they are like products. Once a WTO member has granted an advantage regarding imports from a given country, it cannot make the granting of that advantage to imports by other WTO members subject to a specified condition or payment in return for such advantage. In the Indonesia-Autos case[4], the panel held that trade advantages under Article I:1 cannot be made conditional in any criteria that are not related to the imported product itself. If a country gives favorable treatment to one country regarding a particular issue, without treating all other member countries equally with respect to the same issue, it would be a clear violation of Article I:1 of GATT'94. As such a three-tier test[5] of whether the MFN principle has been breached or violated by a member state is set out. These are:

i. Whether the measure at issue confers a trade "advantage" of the kind covered by Article 1?
ii. Whether the products concerned are "like products"?
iii. Whether the advantages at issue is granted immediately and unconditionally to all like products concerned?

The three tests stipulated above apply concurrently such that where a State fails one condition, it would be a violation of the said obligation. Discrimination in the WTO agreements generally covers two types of which the MFN principle seeks to prevent. The De Jure discrimination and De Facto discrimination. It is said that a measure discriminates de jure when it is clear from the wording of the legal instrument that it provides an advantage to a

[4] Panel Report, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Doc No 98-2505, ITL 014 (WTO 1998), DSR 1998:VI, 2201, 2nd July 1998, World Trade Organization [WTO].
[5] See Article 1 of GATT'94

product from a member or non-member, without extending such advantage to like products from all WTO members. E.g. A reduction in the tariff rates for the importation of groundnut by 20% solely to Malta. A de facto discrimination occurs when the discrimination does not appear on the text or the face of the legal instrument but in practice and effect it is discriminatory. This is when an apparently neutral legal instrument, is in effect or in fact discriminatory. For instance, a country may apply a different tariff rate to a particular variety of unroasted coffee, but if that variety and other varieties of coffee beans were considered to be "like products" the differential tariff may have an effect on imports only from specific countries. This may be considered a violation of the MFN rule.

In the Canada-Autos case[6], the Appellate Body rules that the scope of Article I of the GATT'94 covers both de jure and de facto discrimination. The dispute at hand was that under the Canadian legislation which implemented and automotive products agreement (Auto Pact) between the US and Canada, only a limited number of motor vehicles manufacturers were eligible to import vehicles into Canada duty free and to distribute the motor vehicles in Canada at the wholesale and retail distribution level. Based on the legislation, Japan requested consultations with Canada in respect of the measures being taken alleging that these measures were inconsistent with GATT I:1, III:4 and XXIV.

EXCEPTIONS TO THE MFN

GATT'94 provides exceptions to the general principle of the MFN treatment. In order to strengthen economic relation between two countries, regional trade agreements are permitted for customs unions or free trade areas under certain conditions. These arrangements liberalize trade among countries

[6] Canada - Certain Measures Affecting the Automotive Industry - Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes - Award of the Arbitrator
WT/DS139/12 WT/DS142/12 | 4 October 2000

within the region, while maintaining trade barriers with countries outside the region or regions. As such this may lead to results that are contrary to the MFN principle because countries inside and outside the region are treated differently. Thus, countries outside the region may be disadvantaged, however, completely prohibiting such agreements is considered too severe and GATT allows them under strict conditions.[7]

GATT Article XXIV provides that regional integration may be allowed as an exception to the MFN principle only if the following conditions are met: (1) tariffs and other barriers to trade must be eliminated with respect to substantially all trade within the region; and (2) the tariffs and other barriers to trade applied to outside countries must not be higher or more restrictive than they were prior to regional integration.[8]

The second specific exception has to do with the General System of Preferences Program.[9] The Generalized System of Preferences (GSP) is a system that grants certain products originating in developing countries preferential or lower tariff rates than those normally enjoyed under MFN status. GSP is a special measure granted to developing countries in order to increase their export earnings and to promote their development. The GSP is defined in the GATT decision on "Generalized System of Preferences" of June 1971. Granting of GSP preferences is justified by the 1979 GATT decision on "Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries" or the "Enabling Clause".

The GSP has the following characteristics: First, preferential tariffs may be applied not only to countries with special historical and political relationships

[7] Article xxiv of GATT'94

[8] See Chapter 16 "Regional Integration", Part II of GATT'94.

[9] Part II WTO Rules and Major Cases; *2015 Report on Compliance by Major Trading Partners with Trade Agreements – WTO FTA/EPA and IIA*

(e.g. the British Commonwealth), but also to developing countries more generally (thus the system is described as "generalized"). Secondly, the beneficiaries are limited to developing countries; and finally, it is a benefit unilaterally granted by developed countries to developing countries.

In addition, of GSP beneficiaries, the least developed countries (47 countries) are provided with further preferential treatment such as duty-free, etc. for items subject to special preferential treatment. All 3 conditions must be met in order for a state to fall within these exceptions.

There are also general exceptions to the GATT that may be applied to the MFN treatment obligation. This includes GATT XX regarding general exceptions for measures necessary to protect public morals, necessary to protect human, animal or plant life or health, relating to the importations or exportations of gold or silver, necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices, etc. and also Article XXI with regards to security exceptions.

The general exceptions under Article XX applies only where there is an inconsistency of a measure with any provision in the GATT.[10] In such a case, the measure would be invoked to justify the inconsistent GATT measure. The conditions are however limited as they are exhaustive. Before any of the exceptions can be invoked, they have to pass a two-tier test. Article XX sets out a two-tier test for determining whether a measure, otherwise inconsistent

[10] United States - Section 337 of the Tariff Act of 1930 and Amendments Thereto - Request to Join Consultations - Communication from Canada
WT/DS186/2 | 1 February 2000

with GATT obligations can be justified[11]. For the measure to be justified, it must meet;

i. The requirements of one of the exceptions in paragraphs (a) to (j) of Article XX
ii. The requirement of the introductory clause popularly known as the Chapeau of Article XX.

The Chapeau which is found in the preamble under Article XX stipulates that; "*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ……*"

The Chapeau of Article XX imposes the requirement that such measures stipulated in the provision are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or it is a disguised restriction on international law. With respect to the purpose of the chapeau, the Appellate Body ruled in the US-Gasoline case that, it addresses the manner in which the measure is applied. The measure must not be applied so as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. In brief, the objective and purpose of the chapeau of Article XX is to avoid that provisionally justified measures are applied in such a way as would constitute a misuse or abuse of the exceptions. In the US Gasoline case, Venezuela and Brazil alleged that a US Gasoline regulation discriminated against gasoline imports in violation of Article I:1 and III.

[11] United States - Standards for Reformulated and Conventional Gasoline - Status Report by the United States - Addendum
WT/DS2/10/Add.7 | 26 August 1997

The case further arose because the United States applied stricter rules on the chemical characteristics of imported gasoline than it did for domestically refined gasoline. Venezuela said this was unfair because US gasoline did not have to meet the same standards. The US argued that the Gasoline Rule was consistent with Article III, and, in any event, was justified under the exceptions contained in GATT Article XX, paragraphs (b), (g) and (d). The Panel however found that the Gasoline Rule was inconsistent with Article III, and could not be justified under paragraphs (b), (d) or (g). On appeal of the Panel's findings on Article XX(g), the Appellate Body found that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Article XX(g), but failed to meet the requirements of the "chapeau" (introductory paragraph) of Article XX.

Also, in the Shrimp Turtle case[12], the panel was convened by India, Malaysia, Pakistan and Thailand to examine a prohibition imposed by the United States on the importation of certain shrimp and shrimp products under section 609 of Public Law 101-162 ("section 609") and associated regulations and judicial decisions. Section 609 states that all shrimp imported into the US must be caught with methods that protect marine turtles from incidental drowning in shrimp trawling nets. Particularly, the law requires the US government to certify that (a) the importing country has comparable laws to the US regulations on incidental taking of sea turtles, and (b) the average rate of incidental taking is comparable to the US. As such violations of Articles I, XI and XIII of the GATT 1994, as well nullification and impairment of benefits, were alleged. The panel in the instant case found that the U.S. measure was unjustified within the meaning of the chapeau of art. XX, and therefore did not qualify for any exception from the prohibition of art. XI. Having addressed

[12] United States - Import Prohibition of Certain Shrimp and Shrimp Products - Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU - Action by the Dispute Settlement Body.
WT/DS58/23 | 26 November 2001.

the chapeau of art. XX, the panel found that it did not need to address art. XX (b) or (g).

The panel applied a novel requirement that the measure to be expected under art. XX must not "undermine the multilateral trading system." The Appellate Body rejected the panel's reasoning and engaged in its own analysis. The Appellate Body reached the same conclusion to the effect that the U.S. measure does not comply with the chapeau after analyzing the availability of an exception under art. XX (g). The Appellate Body interestingly established a balancing test for satisfaction of the requirements of the chapeau and proceeded to examine the U.S. measure using means-ends analysis and a least trade restrictive alternative test analysis. The Appellate Body also found that the U.S. measure contained actual discrimination the way that it was applied.

CONCLUSION

Although, prima facie, the exemptions stated in the GATT'94 appear to undermine the MFN principle, a close analysis of the aforementioned article reveals that the exceptions actually aid in preserving the sanctity of trade relations between states. Before a state will qualify for an exemption, it must meet strict requirements which are not compromised upon. This evaluation method used in ensuring the legitimacy of a state's claim for an exemption goes a long way in ensuring that the core reasons for which the MFN rule was developed is maintained.

Moving forward, conversations and updates on the MFN rule should not cease. The principle should be as current as possible to maximize its impact and ensure efficiency for generations to come. Trade that is devoid of discrimination is essential to general world development and as such a principle that seeks to maintain this should be kept in high repute.

THE KILLING OF IRANIAN GENERAL QASEM SOLEIMANI: THE SLIPPERY SLOPE OF ANTICIPATORY SELF DEFENCE

Oheneba Kwame Safo Acheampong[1]

ABSTRACT

US-Iranian relationship has been hostile for a very long time, dating all the way back to an orchestrated coup of a democratically elected Iranian Prime Minister Mohammad Mossadeq in 1953 by American Intelligence to the US Embassy hostage crisis from November 1979 to January 1981; to the shooting down of an Iranian passenger plane by an American warship in 1988 killing 290 people; to the withdrawal of the USA from the Iranian nuclear deal. There is no doubt that relations between Iran and America could not have gotten more toxic than the assassination of Iranian General Qasem Soleimani on the 3rd of January 2020 on the order of American president Donald Trump and retaliation by Iran which left dozens on a Ukrainian airliner dead. This article examines the justification for the rarely touched principle of use of force and anticipatory self-defense as a means to bringing an end to the life of an Iranian state official, General Soleimani.

INTRODUCTION

On the 31st of December 2019 an American embassy in Baghdad Iran was attacked by an angry mob of Iraqi Shite militiamen. Dozens of the demonstrators then smashed through a main door of the checkpoint, set fire to the reception area, raised Popular Mobilization Forces (PMF) militia flags

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and anti-American posters and sprayed anti-American graffiti.[2] America blamed Iran for the attack and Qasem Soleimani as its mastermind. On the backdrop of this, there was an authorized drone attack by the USA president Donald Trump described by news outlets, such as BBC and NBC, as an assassination. What this article looks at is assessing the justification for the assassination and determining whether this is in line with international law doctrines on the use of force by states and the defence of anticipatory self-defence.

JUSTIFICATION OF THE UNITED STATES OF AMERICA

The justification of the United States government was that Qasem had amongst other things been responsible for the death of an Iraqi-American contractor in a rocket attack in December 2019. Amongst other excuses were that Soleimani had approved the American embassy attack in Baghdad and one primary justification being that Soleimani was targeted because Soleimani was plotting imminent attacks including attacks on American diplomats. Donald Trump took to twitter on the 3rd of January at 1:54 pm tweeting "*General Qassem Soleimani has killed or badly wounded thousands of Americans over an extended period of time, and was plotting to kill many more…but got caught! He was directly and indirectly responsible for the death of millions of people, including the recent large number.*"

WHAT DOES THE LAW SAY?

Article 2(4) of UN Charter provides that "*all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the*

[2] www.wikipedia.org/wiki/Attack_on_the_United_States_embassy_in_Baghdad

purposes of the United Nations".[3]

Article 51 of the UN charter provides that "*Nothing in the present Charter shall impair the inherent right of individual or collective self defence* ***if an armed attack occurs*** *against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security*". [4]

Article 22 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that "*The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three*".[5]

In discussing self-defence as a rationale for the killing of general Soleimani it will be prudent to look at the address of Daniel Webster, who was an American Secretary of State to Henry Fox who was a British Minister, at Washington concerning the destruction of the Caroline. The address asserted that: "*A just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground for justification".*[6]

[3]Article 2(4) of the Charter of the United Nations

[4] Article 51 of the Charter of the United Nations

[5] Article 22 of Draft Articles on Responsibility of States for Internationally Wrongful Acts

[6] Webster 1841: Letter from Daniel Webster, US Secretary of State, to Henry Fox,

Webster further defined absolute necessity as a 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.'[7] In the Caroline case the British seized an American vessel which was said to have been used to transport supplies for rebel forces that were creating an insurrection in Canada. To put an end to this practice, on 29 December 1837, British forces crossed into American territory, without the consent of the American government, took possession of the Caroline and sent it over the Niagara Falls, with some loss of life in the process. In order to ascertain whether the idea of anticipatory self-defence is inherent or permissible under Article 51 of the UN Charter, the phrase "if an armed attack occurs" in the said Article has been interpreted using 3 different approaches; a positivist approach, a realist approach and a neutral approach.

The Positive Approach

The positive approach adopts a literal interpretation of the phrase 'if an armed attack occurs.' Hence, a distinction is drawn between an armed attack and an anticipated armed attack. Lauterpacht who is an earlier scholar in the debate on anticipatory self defence asserts that "*On the other hand, the Charter confines the right of armed self defence to the case of an armed attack as distinguished from anticipated attack or from various forms of unfriendly conduct falling short of armed attack. Moreover, the right to use force in self defence is permitted only for so long as the Security Council has not taken the necessary steps to maintain or restore international peace and security*".[8]

British Minister in Washington, 24 April 1841, in British and Foreign State Papers, 1840-1841, Vol. 29 (1857). James Ridgway and Sons, London, pp 1132-1134

[7] Ibid., at page 1138

[8] Lauterpacht (1952), 156. At 159 he wrote: 'It does not follow from the character of the right ofconceived as an inherent, a natural, right – that the States resorting to it possesses the legal facultyof remaining the judges of the justification of their action. They have the right to decide in the first instance, when there is periculum in mora,

Kelsen also reaches the conclusion that the right of self-defence occurs only after an armed attack occurs[9]. However, both scholars do not provide or go far as to claim that a state must suffer the physical commencement of an attack before defending itself. Scholars such as McCoubrey and White [10]were also of the opinion that the idea relies on anticipatory self-defence was likely to lead to its abuse due to its inherent subjectivity and flexibility. Randelzhofer was also of the view that '*the imminence of an armed attack cannot usually be assessed by means of objective criteria' and that the 'manifest risk of an abuse by a self-defending state's discretion would undermine the restriction'.*[11]

The Realist Approach

The second way of interpreting Article 51 in relation to the existence of anticipatory self-defence is the realist approach. The realist approach to Article 51 is that even though the wording of Article 51 is clear it is wrong to interpret it in the sense that a state had to suffer from an armed attack before their right to self- defence is invoked. Jessup suggests that Article 51 should be interpreted liberally to enable the inherent right of self-defence to be exercised at some time before a self-defending state is physically attacked.[12]

Bowett believes that the intention of the UN Charter was not to prohibit anticipatory self-defence as the prohibition of self- defence was inconsistent

whether they are in the presence of armed attack calling for armed resistance.'

[9] Kelsen 1951. The law of the United Nations 2nd ed

[10] McCoubrey and Nigel D. White, International law and Armed Conflict 1992

[11] Randelzhofer Article 51 in Simma (ed) (2004), 792 [9] –793 [13], 803 [39] and 805 [43]–806 [45]. For other expressions of the same view see McDougal, 'The Soviet Cuban Quarantine and Self-Defence' (1963) 57 American Journal of International Law 597–634, 629 and John Norton Moore, 'The Secret War in Central America and the Future of World Order' (1986) 80 American Journal of International Law 43–127, 83.

[12] Jessup 1948, 166-167

with current state practice. Bowett further argues that for a state to endure the physical commencement of such an attack will destroy the state's capacity for further resistance and will jeopardize the state's own existence. Bowett believed that defensive war was only prudent to protect certain legal rights possessed by states. These rights were territorial integrity, political independence, security on the high sea, protection of nationals and economic interests.[13]

Hence the right of anticipatory self-defence was only lawfully exercised if the national security of the defending state was threatened. Scholars within this school of thought are also of the view that the travaux preparatoires of Article 51 did not have the intention of negotiating states to impair inherent rights of self-defence. Realists believe that Article 51 was to preserve a customary understanding of the rights as prescribed by the Caroline criteria.

The Neutralist Approach

A third way of interpreting Article 51 was through the neutralist approach as provided by Muray Colin, as acknowledging both the positivist and realist approach without unconditionally adopting either. One of the neutralists was said to be Brownlie who provided that any use of force even in circumstances of self-defence was subject to the provisions of the UN Charter. Brownlie draws the conclusion that Article 51 was to be interpreted restrictively however the launching of ballistic missiles or an enemy fleet steaming towards the territorial waters of a self-defending state after a declaration of 'hostilities' are threats of armed force against which the inherent right can lawfully be exercised under Article 51.[14]

[13] Derek Bowett 1972; Reprisals involving recourse to armed force. American Journal of International law 66:1

[14] Goodrich and Hambro (1949), 105–106.

The wording of Article 51 per Muray Colin was seen as a compromise that both prohibited illegal use of force and guaranteed the right of self-defence against such use of force. In addressing the topic of the slippery slope of anticipatory self-defence, it would be crucial to examine the bush doctrine which represented one of the means where the USA used anticipatory self-defence as one of the means of rooting out terrorism post 9/11.

The Bush doctrine; this was a phrase first used in June 2001 after the 9/11 attack which was used to describe specific policy elements including a strategy of pre-emptive strikes as a self-defence mechanism against an immediate or perceived future threat to the security of the United States. This policy principle was applied particularly in the Middle East to justify the invasion of Iraq.

In the instance of the invasion of Iraq, one of the main justifications by America was that Iraq had reconstituted its nuclear weapons programme and launched war against Iraq assassinating its leader then, Sadam Hussein. A year later, the United States Senate officially released a senate report of pre-war intelligence on Iraq which found that statements made by the Bush administration on Iraqi Weapon of Mass Destruction were misleading. A US- led inspection later found that Iraq had ceased WMD (Weapon of Mass Destruction) production and stockpiling.

The issue of anticipatory self-defence could be seen as the rationale for the Bush doctrine. The Bush doctrine represents how the concept of anticipatory self defence can be stretched for political gains. Political scientist Karen Kwiatowski in 2007 wrote in her article, 'Making sense of the Bush doctrine': '*We are killing terrorists in* ***self-defence*** *and for the good of the world you see. We are taking over foreign countries, setting them up with our favourite puppets in charge controlling their economy, their movements, their dress code, defensive projects, and their*

dreams solely because we love them and apparently can't live without them'.[15]

It is without doubt that the self-defence employed by the Bush doctrine was one of an anticipatory self-defence which was overstretched to achieve the objective of such an international actor.

Armed Attack under Article 51

Another important aspect of Article 51 to consider is the question of what constitutes an armed attack and whether the accusations levelled against General Soleimani came under an armed attack to necessitate the anticipatory self-defence by the USA. The courts have found that for an action to amount to an armed attack there was a prerequisite of a grave use of force and included both use of force and interventions. In the Nicaragua case, by defining grave use of force the court was of the view that not all actions by irregulars would constitute an armed attack rather those that by their scale and effects would not amount to a mere frontier incident had they been conducted by regular forces. The understanding from this is that low level attacks by either regular or irregular forces are not considered armed attacks.

It is hence safe to presume that the threshold for triggering self-defence, not to even talk of anticipatory self-defence, is one which is set at a very high standard. Hence these questions arise; Can the attack on an embassy resulting in no fatalities be said to have breached this high threshold provided for necessitating self-defence? Could the killing of an American contractor be said to be enough grounds to get all guns blazing or as in this case, to get all drones and missiles blazing? Does this mean states with foreign nationals who get killed by state apparatus in those lands have the right to exact revenge through the use of force on such foreign states if they have the means and weapons to

[15] Karen Kwiatkowski 'Making sense of the Bush Doctrine' 2007

do so, rather than abide by international laws? One important thing that must be noted as well is that, all of the 'supposed' justification haven't been proven beyond reasonable doubt that General Soleimani was indeed responsible. Justification provided such as General Soleimani being on a mission to kill more Americans, from the experience of the world could not be no different from cooked up stories of Iraq having weapons of mass destruction (WMDs)

COMMENTARY

From the provided law above, a consensus can be reached that even though the positivist argue that states are generally required to defend themselves after they have been attacked by another actor, they generally do not provide for a sufficient solution as to what states are supposed to do when faced with imminent threat of use of force or an armed attack by another state. It is fairly right to say that the expectation is that any state faced with such a threat has the right to protect or defend their states from such an attack.

The question and reason for this article is that in the situation where states assert that they are under threat or imminent use of force what is the appropriate way by which states are supposed to defend themselves. Article 51 of the UN Charter per my interpretation is that, when states take measures to protect themselves that is, after an armed attack, these measures are supposed to be consistent with acts that are in line with one of the major principles of the Security Council which is the principle of maintaining peace and restoring international security. This notion reasonably should apply to self-defence which are taken in anticipation to use of force.

This brings me to the action by the United States of America when they decided to assassinate General Qasem Soleimani by drone attack taking into consideration whether such an act was qualified to be termed as the right way of carrying out anticipatory self-defence. However, the first thing to assess was

whether the USA had the best of justifications to trigger the right of self-defence under Article 51 of the UN charter. The justification by the USA was that General Soleimani was planning to kill many American diplomats. He was to be attributed to the killing of an American contractor and also the attack on the American embassy in Iraq which resulted in no casualty.

The question still hangs; is this justification enough to prove that the United States of America was in imminent danger of threat of use of force as to the extent that they had to assassinate the general of another state and in such a manner as to undermine the sovereignty of another state? The criteria set in the Caroline case still remains intact and that is one of absolute necessity. An action by a perpetrator which was so overwhelming and left no time for deliberation left the state under attack no option. The criteria set for the use of anticipatory self-defence under this set of facts were clearly not in the contemplation of even realists who chose to interpret Article 51 as providing anticipatory self-defence. To use anticipatory self-defence the threat had to be imminent and the defence had to be proportional. However, in this case it cannot be said, or better still proven, that the USA was in imminent danger and that the only option left was to blow up the general of a recognized state under international law. Most importantly, was the action one that would maintain international peace and security? The answer is a big no, as the whole world was on tenterhooks and getting ready for world war three.

Agnes Callamard, a renowned human rights investigator who serves as the UN Special rapporteur on extra judicial killing on BBC Hard Talk made an argument that, the UN Charter was predicated on the notion that, we should do all we can to prevent armed conflicts and that the use of force should be narrowed down to very few scenarios. This killing targeted a state official of another country; a tactic reserved for terrorists and not state officials. She further hit on the point that the letters presented by the USA to the Security council only highlighted attacks that occurred in the past and scantly any pre-

emptive attacks and hence, allowed any state to target any Minister of Defence of any country because of actions that happened in the past or something that may happen in future.

Even if General Soleimani in this case was the villain in this story, was the answer to go after him with drones especially in a manner that undermines the sovereignty of another state? Most importantly is this the modus operandi befitting of a state that prides itself as the leader of the free world, a state that believes in principles such as democracy and rule of law; Is it then right for every other state to hide behind anticipatory self-defence to wipe out state officials of other countries they dislike? I think it safe to say that the international space is one of rules and there must be resistance of an attempt to turn the international space into a jungle where the strong prey on the weak.

CONCLUSION

The requirements of anticipatory self-defence from the interpretation of Article 51 of the UN charter are that of an armed attack, the armed attack has to be imminent and immediate, the response to this armed attack has to be in line with the UN Charter of promoting peace and security, with the justification for the self-defence being that, the armed attack left the attacked state with no option, and that the defence was hence necessary. However, these requirements in the assassination of General Qasem Soleimani were thrown in one of the trash cans in the White House to attain political objectives.