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CONTENTS

Interrogating the Imposition of Restrictions Law during the Covid-19 Pandemic in Ghana
Kwadwo Addo Tuffuor & Felix Awuah … … … … … … 1-20

The Religious Market in Ghana Today: Is there Legal Basis to Tax the Church?
George Anderson Jr., Alexander Hackman-Aidoo, Constantine K.M. Kudzedzi … 21-36

A Comparative Study of the Control of Exclusion Clauses in Consumer Contracts: Lessons for Ghana
Eugene Ablade Oninku … … … … … … … … 37-60

Appraising the Vexed Question of Absolute Immunity on State Executives under Nigerian Law
Kingsley Omote Mrabure … … … … … … … … 61-74

An Analysis of Regulatory and Institutional Challenges in the Gold Mining Sector of Ghana and the Way Forward
David Asumda … … … … … … … … … 75-84

The Possible Impact of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters on the Grounds of International Competence in Ghana
Solomon Okorley ... … … … … … … …85-112

Criminality in the Microfinance Sector: A Symptom of "Broken Window"
Edgar Takyi Akonor … … … … … … … ..113-132

Analysis of Ghana's SMEs Industrial Policy Approach: Call for a New Beginning
Francis Kofi Korankye-Sakyi & Elijah Tukwariba Yin … … … ..133-156

Mediation as an Option under Alternative Dispute Resolution: The Case of Ghana
Peter Apuko-Awuni … … … … … … … ..157-175

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INTERROGATING THE IMPOSITION OF RESTRICTIONS LAW DURING THE COVID-19 PANDEMIC IN GHANA

Kwadwo Addo Tuffuor[1] & Felix Awuah[2]

ABSTRACT

The world was confronted with both legal and political issues after the announcement by the World Health Organisation (WHO) on March 11, 2020 of COVID-19 as a pandemic. The declaration led many national governments to implement restrictions to combat the spread of the disease and also to enable them make preparations for the health systems to deal with the emergency on hand. Even though, fundamentally the COVID-19 pandemic is seen as a public health emergency, it has presented a challenge to human rights and the rule of law, which are all crucial in times of national crisis. In Ghana, the government enacted the Imposition of Restrictions law together with other Executive Instruments to enable it deal with the crisis. The need to strike a balance between the public health emergency and the rule of law has led many advocates to question the constitutionality of the legislation that was introduced during the pandemic. This paper aims at interrogating the legitimacy of these laws and whether the government could have explored other available alternatives in dealing with the pandemic, than promulgating a new legislation.

Keywords: Human Rights, Pandemic, Rule of Law, Executive Instruments, Public Health Emergency

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INTRODUCTION

What happened in Wuhan, China in December 2019 as an internal transmission of the 'novel coronavirus disease' has grown to become a pandemic. The COVID-19 pandemic which is caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) continues to wreck untold hardships on countries across the world.[3] It has been described as the worst human catastrophe since World War 11. In the view of Sarah Joseph,[4] COVID-19 has caused 'a global public health emergency, a global economic emergency and a global human rights emergency.' According to Bryant,[5] the destructive nature of the disease can be seen from its infectious nature, since the first hundred thousand (100,000) occurred within 67 days, the second hundred thousand in eleven days while the third hundred thousand occurred within four days. According to him, unless the world adopts proactive measures to deal with the pandemic, a lot of lives could be lost. The public health emergency presented by the COVID-19 pandemic means that countries all over the world must take prudent measures to protect the health and safety of their people.[6] The severity of the devastating impact of COVID-19 on areas of governance also means that, states must take urgent steps to reduce the impact of the COVID-19 pandemic on their populations.

The pandemic is seen as one of the significant challenges to human security in the 21st century, which has affected all facets of human lives.[7] It is undeniable of the fact that, as a result of the COVID-19 pandemic, countries all over the world have imposed restrictions on fundamental freedoms which include "freedom of assembly, association and movement."[8] Although these measures were necessary in view of the public health crisis on hand, many concerns have been raised on the way and manner governments handled the imposition of restrictions law that were passed as a result of the pandemic.[9]

The coronavirus pandemic has continued to affect mankind in an unprecedented manner in the area of social, economic, political, education and health.[10] The devastating effect, is what compelled the WHO to declare it as a Public Health Emergency of International Concern (PHEIC).[11] Classifying it as a PHEIC makes the disease in relation to others, the sixth PHEIC in accordance with International Health Regulations.[12] The impact of the COVID-19 pandemic has been felt in every continent of the world.

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[3] WHO, Coronavirus disease (COVID-19) (June 2021) https://www.who.int/health-topics/coronavirus#tab+tab 1 retrieved on 20/1/22.

[4] S Joseph, International human rights law and the response to the COVID-19 pandemic *British Journal of International Humanitarian Legal Studies* (2020) 249-269.

[5] N Bryant, #Coronavirus#CoronavirusUpdate#WHO (March 2020).
https://twitter.com/nickbrantny/status/1242272355159769089?lang+e accessed on 12/12/21.

[6] OHCHR, COVID-19 Response (April 2020).

[7] E Kharytonov, Kharytonova O, Kolodin D and Kalych M, The covid-19 pandemic and the rights of the individual in terms of private and public law *Revista de Derecho Lus Humani vol.* 9 (ii) (2020) 225-250.

[8] E Bethke, Amos J, Azer M, Baker D, Bashir R and Best C, COVID-19 and shrinking space (October 2020).

[9] Ibid.

[10] A D Dai-Kosi, The impact of COVID-19 social restrictions on culture and psychosocial well-being: The Ghanaian experience *Academia* (2021).

[11] Ibid.

[12] Ibid.

After the declaration by the WHO as a pandemic, various national governments took various steps to combat the spread of the disease.[13] The severity of the pandemic has also compelled many countries to take emergency measures which has been a challenge to respect for fundamental human rights and the rule of law.[14] Addadzi-Koom,[15] has intimated that the COVID-19 pandemic has become a catalyst for the abuse of human rights and violation of the rule of law under the cloak of lock down measures and public health security.[16] A lockdown is a "social distancing intervention that aims to minimise physical contact between individuals and groups in order to reduce transmission of a communicable disease."[17]

De Mesquita et al.,[18] have also opined that the destructive effects of COVID-19 on human rights has been felt in all facets of life. OHCHR[19] has argued forcefully that in such public health crisis, all measures taken to protect the health of the people must be based on law. The Africa Centre for Disease Control and Prevention (ACDC), has also opined that the pandemic will continue to wreak havoc in African countries in much the same way as the rest of the world, which invariably will lead to a deterioration of "constitutionalism and the rule of law" in the African continent.[20] Nearly every country in the world adopted emergency measures in response to the Covid-19 pandemic.[21]

Since the outbreak of the disease, various countries across the globe have implemented various measures to curb the spread of the virus[22] including lockdowns. The nature of lockdown measures have been similar, but the levels of strictness have varied from one country to another.[23] Lockdowns create enormous challenges within a country but are deemed to have a crucial impact on the spread of the pandemic.[24] The global lockdown initiated by various countries of the world starting from March 2020 after the declaration of COVID-19 as a pandemic by the WHO, is the first in this century.[25]

According to OHCHR, COVID-19 Response[26]:

> Emergency powers should be used within the parameters provided by international human rights law, particularly the International Covenant on

[13] K Antwi-Boasiako, Abbey COA and Ogbey P, Policy responses to fight COVID-19, the case of Ghana *Revista de Derecho* (2021).
[14] ME Addadzi-Koom, Quasi-state of emergency: Assessing the constitutionality of Ghana's legislative response to Covid-19 *The theory and practice of legislation* No. 3 (Routledge Taylor & Francis Group 2020) 311–327.
[15] Ibid.
[16] C Adlhoch, Baka A, Ciotti M, Dias JG, Kinsman J, Leitmeyer K, Considerations relating to social distancing measures in response to COVID-19 update second update (European Centre for Disease Prevention and Control Report March 2020).
[17] Ibid.
[18] JB de Mesquita, Kapilashrami A and Mason B M, Strengthening human rights in global health law: Lessons from the COVID-19 response Commissioned by The Independent Panel for Pandemic Preparedness and Response (Human Rights Centre University of Essex 2021).
[19] OHCHR, COVID-19 Response (April 2020).
[20] International Institute for Democracy and Electoral Assistance (IDEA), The Impact of the COVID-19 Crisis on Constitutionalism and the Rule of Law in Anglophone Countries of Central and West Africa 2020 (IDEA 2020).
[21] B Amanda, Edgell A, Lachapelle BJ, Lührmann CA and Maerz SF, Pandemic backsliding: Violations of democratic standards during Covid-19 *Social Science & Medicine* (Elsevier 2021).
[22] S Kharroubi and Saleh F, Are lockdown measures effective against COVID-19?. *Frontiers in Public Health* (2020) 610.
[23] OHCHR (n 4).
[24] Kharroubi S and Saleh F (n 19).
[25] H Onyeaka, Anumudu CK and Al -Sharify ZT, COVID-19 pandemic: A review of the global lockdown and its far-reaching effects (SAGE 2021).
[26] OHCHR (n 4).

> Civil and Political Rights (ICCPR), which acknowledges that States may need additional powers to address exceptional situations. Such powers should be time-bound and only exercised on a temporary basis with the aim to restore a state of normalcy as soon as possible.

In view of the fact that emergency measures concentrates power in the executive, it is trite that other institutions that play oversight roles such as the legislature, judiciary and other National Human Rights Institutions (NHRIs) act as a check on the executive power from abuse since there is the tendency that it could be used to violate the rights of the people as well as the rule of law. In spite of this, many governments have taken extensive actions that have restricted human rights without due cognisance of the Siracusa Principles[27] which require emergency measures to be legitimate, necessary and proportional.[28] Habibi et al.,[29] are of the view that, once the appropriate procedures are not followed in the implementation of restrictions public health will be undermined on the altar of justice. "Law is an important determinant of health," which requires the establishment of practical – based health interventions.[30]

In the view of Atalan[31] drastic measures have been taken by national governments which include the closure of schools, lockdown for epicentres of the disease to reduce the transmission of the virus of which the main mode of transmission is human to human contact. This has also been buttressed by Haider et al.,[32]who have intimated that strict lock down measures were adopted to halt the "exponential epidemic growth trajectories." Human rights and the rule of law have been overstretched to their full limits as a result of the COVID-19 health emergency.[33] Human Rights Watch[34] has intimated that, emergency measures implemented to control the pandemic has been arbitrarily exercised with security forces violating the rights of citizens. In most states, inclusive of Ghana non-compliance of the curfews, travel restrictions and quarantines were met with brute force by the security services. Many states' responses turned rapidly to criminal law to compel compliance with lockdowns, physical distancing, isolation, curfews and travel restrictions.

The International Development Law Organisation (IDLO)[35] has intimated that good governance and the rule of law are cardinal to the management of the COVID-19 Public health emergency and economic recovery of countries. Efficient and effective governments' response is contingent on measures adopted to make society recover from the effects and the various public institutions providing appropriate leadership to contain the disease. According to IDLO[36] it is only by providing quality leadership based on transparency, accountable actions and adhering to rule of law

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[27] Human Rights Watch (HRW), Applying Siracusa: A call for a general comment on public health emergencies *Health and Human Rights Journal* (2020).
[28]Ibid.
[29] MS Habibi, Cotter MP, Riley PA, Houston AC and Planche TD, Prior COVID-19 significantly reduces the risk of subsequent infection, but reinfections are seen after eight months (2021).
[30] Gostin et al., The legal determinants of health: harnessing the power of law for global health and sustainable development (Pubmed.gov April 2019).
[31] A Atalan, Is the lockdown important to prevent COVID-19 pandemic ScienceDirect (Elsevier August 2020).
[32] Haider et al., Lockdown measures in response to COVID-19 in nine Sub-Saharan African countries *BMJ Global Health* (October 2020).
[33] HRC, Action Plan (Helsinki 2020).
[34] Human Rights Watch (n 24).
[35] The International Development Law Organisation (IDLO), A rule of law-based response to the covid-19 pandemic (March 2020).
[36] Ibid.

principles that countries may recover quickly. The Sustainable Development Agenda for 2030,[37] especially GOAL (SDG) 16 highlights rule of law as key in the attainment of peace, justice and inclusiveness which are pivotal in making institutions accountable and stronger in reducing inequalities in dealing with the effects of the pandemic.

HUMAN RIGHTS PROTECTION AND EMERGENCY LEGISLATION

International law stipulates the grounds for "respecting, protecting and fulfilling the rights of all individuals" inclusive of health. The WHO[38] has stated that, it is incumbent on "all countries to strike a fine balance between protecting health, minimising economic and social disruption, and respecting human rights." Before the pandemic in 2019, it had been recorded that there was a "decline in global freedom" for the fourteenth consecutive year, which invariably undermine democracy and pluralism.[39] The Siricusa Principles[40] stipulates that, the law must make provision for adequate measures against illegal and abuse of fundamental freedoms. It has been argued by many advocates that, the COVID -19 crisis has made many governments to become authoritarian.[41]

International human rights obligations do not cease within global pandemics however, many governments have introduced laws that restrict rights to protect public health. The Siracusa Principles provided avenues for governments to use options for States to invoke "exceptional emergency powers," that could derogate from some international human rights treaty's obligations in emergencies such as the COVID-19 crisis in so far as they are "necessary, proportionate and non-discriminatory."[42] According to the Human Rights Committee,[43] derogating from an obligation in the protection of rights should be the last resort with the committee favouring restrictions of certain rights in the interest of public health.

The Human Rights Committee has expressed concern about national governments not following the right procedures in implementing lockdowns in accordance with the Siracusa Principles, which has invariably reduced the available opportunities for 'human rights safeguards and state accountability.' Respecting the enjoyment of human rights is an end in itself, as compared to being a means to an end and also not "inherently utilitarian."[44] It is therefore argued forcefully that, it is not expedient to sacrifice human rights, on the altar of a few people who will die from COVID-19.[45] International law requires governments to limit the rights of people only when it is 'necessary to achieve a legitimate, pressing objective,' and that same should not be too intrusive and

[37] UN, Sustainable Development Goals (SDG) 16, https://www.un.org/sustainabledevelopment/wp accessed on 18/1/22.
[38] WHO, Director General, media briefing Available at https://www.who.int/dg/speeches/detail/who-directorgeneral-s-opening-remarks-at-the-media-briefing-on-covid19 11-mar (2020).
[39] S Repucci, 'Freedom in the World 2020: A leaderless struggle for democracy' (Freedom House 2020) https://freedomhouse.org/report/ freedom-world/2020/leaderless-struggle-democracy).
[40] UN Economic and Social Council, "The Siracusa Principles on the Limitation and Derogation Provisions into the International Covenant on Civil and Political Rights") UN Doc E/CN.4/1985/4 (28 September 1984) para 18.
[41] Institutes for Development Studies, Navigating civic space in a time of COVID: Synthesis report Restrictions on the basic fundamental freedoms of the citizens have taken both 'overt and covert forms (UK Brighton 2021).
[42] UN Commission on Human Rights, Report on 40th session (6 February – 16 March 1984).
[43] Human Rights Committee, 38th meeting of states parties to the International Covenant on Civil and Political Rights (ICCPRs) (September 2020).
[44] Sarah Joseph (n 2).
[45] Ibid.

restrictive to abuse the intended objective, arbitrary nor discriminatory and lastly, people should be able to appeal against it or call for a review when their rights are trampled upon.[46]

Moreover, those who are vulnerable must be taken care of, and that there must be a "proportionality between the harmful effect of the measure limiting rights and the greater public good in achieving the objective."[47] After the declaration of COVID-19 as a pandemic, various countries adopted policies to restrict the rights of the citizenry, as a justification for protecting public health.[48] With some countries passing formal legislation to restrict movement, harassing people who are opposed to the regime and adopting "delegitimising tactics."[49] This has strained relations between the citizenry and their governments in some instances and has also been a restraint to governmental power in its quest to distribute 'public goods."[50]

The restrictions and lockdown measures as a result of the pandemic and the 'securitised response' has brought to the fore many insecurities that face people and the role played by national governments in perpetuating violence against the people. There is no doubt that the pandemic has hastened governments tendencies towards authoritarianism thereby violating the rights of individuals and the rule of law, and invariably becoming autocratic which has negatively affected the political landscape.[51] In the view of Anderson et al.,[52] the pandemic has brought to the fore "emergency legislation" which has brought restrictions on all facets of life. Implementation of lockdown measures increase executive powers since they control the police, army and other security services who are in charge to implement lockdown measures. It offered a platform for concentration of excessive powers in the executive which were sometimes abused by the security forces.[53] Even though the pandemic has slowed with the discovery of vaccines, securitisation has deepened with restrictive legislation and those who flout the law being punished under emergency laws passed by the executive, ostensibly violating the rights of individuals.

Even though public health emergency like COVID-19 could allow states to derogate from some of their human rights obligations, this has been abused in some countries.[54] Derogations is about the 'temporary suspension of some rights' and are allowed only in so far as it is required by the exigencies of the time and consistent with international human rights law. Any state which also wants to derogate from international human rights law must also duly comply with the notification processes stipulated under Article 4 of the ICCPR,[55] and the emergency triggering the derogation must be published to the citizenry and communicated effectively to them as well. In the view of Erasmus,[56] when a limitation is put on a right, the important attributes of the right must be

[46] Bonn et al., Canadian HIV/AIDS Legal Network, Addressing the syndemic of HIV, hepatitis C, overdose, and COVID-19 among people who use drugs: The potential roles for decriminalisation and safe supply *Journal of Studies on Alcohol and Drugs* (2020).

[47] E Mykhalovskiy, Kazatchkine C, Foreman-Mackey A, McClelland A, Peck R, Hastings C and Elliot R, Human rights, public health and COVID-19 in Canada (Springer Canadian Journal of Public Health 2020).

[48] Institutes for Development Studies (IDS) (n 38).

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] C Anderson, McGee R, Nampoothiri N, Gaventa J, Forquilha S, Ibeh Z and Alex S, Navigating Civic Space in a Time of Covid: Synthesis Report. Institute for Development Studies (2021) 1-52.

[53] Ibid.

[54] A Spadaro, COVID-19: Testing the Limits of Human Rights (2021).

[55] Article 4 of ICCPR.

[56] G Erasmus 'Limitation and suspension' in D van Wyk et al. (eds) Rights and constitutionalism: The new South African legal order (1996) 640 28.

"maintained and not extinguished." The limitation must be construed narrowly, or strictly in favour of the rights bearer.[57] In this sense, rights limitation will be measured objectively, in regard to the situation on hand as compared to 'the subjective intentions or importance for which the rights that are to be limited are being curtailed in the new enactment. This is the litmus test with which rights limitations are to be tested.

Allan[58] has argued that, in instances where an enactment confers a discretion on a state authority, the exercise of that discretion must 'be construed consistently with legal principles and individual rights.' Invasions are only necessary in the public interest in conformity with law. It is in times of crisis that civic space, transparency and the free flow of information are more critical than ever for building and maintaining the trust needed for effective responses.[59] Addadzi-Koom,[60] has emphasised 'the need for a rights-based approach' to the COVID-19 pandemic, where states and non-Governmental actors must take urgent steps to empower the people and not criminalise people who violate lockdown measures. The right to move freely within the territorial boundaries of a country, within one's region and at the international level have been hampered as a result of measures put in place by governments to curb the spread of COVID-19.[61]

In times of national emergencies such as COVID-19, it is incumbent on law enforcement agencies as well as security services to work with government and health workers to deal with the spread of the disease.[62] During a pandemic, law enforcement agencies and officers play a crucial role to provide necessary public services and maintain order.[63] The pandemic has led to the imposition of restrictions in an unprecedented level, with the ultimate aim of reducing the destructive effects of the disease.[64]

Moreover, the COVID-19 pandemic has led to the suspension of a lot of fundamental freedoms to achieve the "public good" and this has led to the perpetuation of a lot of authoritarian tendencies. Article 4 of the ICCPR stipulates that, "countries may derogate from some rights if necessary during a "time of public emergency which threatens the life of the nation."[65] To derogate from an obligation connotes the suspension in the implementation of some provisions of a law,[66] all but temporary[67] or to deviate from the performance of the obligation[68] or as intimates, to

[57] Ibid.

[58]TRS Allan, Deference, defiance, and doctrine: Defining the limits of judicial review *University of Toronto Law Journal*, *60* (1) (2010) 41-59.

[59] UN, Guidance Note on Civic Space (September 2020).

[60] ME Addadzi-Koom. Quasi-state of emergency: Assessing the constitutionality of Ghana's legislative response to Covid-19 *The Theory and Practice of Legislation* 8(3) (2020) 311-327.

[61]LIBE committee Monitoring Group on Democracy, Rule of Law, Fundamental Rights European Parliament The impact of COVID-19 measures on Democracy, the rule of law and Fundamental Human Rights in the EU (2020).

[62] WG Jennings and Perez MN, The Immediate Impact of COVID-19 on Law Enforcement in the United States *American Journal of Criminal Justice* (2020) 45:690–701 https://doi.org/10.1007/s12103-020-09536-2.

[63] Richards, Rathbun, Brito & Luna, The role of law enforcement in public health emergencies (US Department of Justice 2006).

[64] A Sheikh, Zakariya S1, Sheikh A, Novel approaches to estimate compliance with lockdown measures in the COVID-19 pandemic www.jogh.org • doi: 10.7189/jogh.10.010348 1 June 2020 • Vol. 10 No. 1 • 010348).

[65]United Nations (2020).

[66] EM Hafner-Burton, Helfer LR and Fariss C J, Emergency and escape: Explaining derogations from human rights treaties *International Organization 65*(4) (2011) 673-707.

[67] DL Richards and Clay, K C, An umbrella with holes: Respect for non-derogable human rights during declared states of emergency, 1996–2004. *Human Rights Review* 13(4) (2012) 443-471.

[68] The Siricusa Principles (n 37).

eliminate a legal obligation in honouring provisions relating to political and civil rights under international law.

International human rights law thus allow national governments to temporarily curtail the enjoyment of some rights in times of national emergencies[69]. Any derogation must also conform to laid down procedure and the UN Secretary General must be put on notice. The norms of emergency measures are dealt with under international law and states are obliged to follow the regime on derogations. In the view of Criddle and Fox-Decent,[70] in times of political or health crisis pressures on governments serves as an impetus for states to violate the fundamental freedoms of the citizenry. Emergency laws which have introduced "rule by decrees" have placed a limitation on the functions of the legislature, judiciary and other National Human Rights Institutions. The fast pace in which laws were passed to deal with the pandemic have compromised the legality of some of the laws passed.[71]

De Mesquita et al.,[72] have stated that emergency legislation should have checks that will protect the rights of people and parliamentary scrutiny as well as oversight by the courts. "Parliaments must also continue to debate, scrutinise and explain the intended use of executive powers.[73]

COVID-19 PANDEMIC AND THE RULE OF LAW

The COVID-19 pandemic has brought to the fore the relationship between states response to the public health emergency and the rule of law.[74] Interventions by national governments globally to curb the spread of the disease have had a negative impact on upholding the law which has threatened state institutions and violated the fundamental human rights of the people.[75] In the quest to implement lockdowns necessitated by the pandemic, states passed emergency laws to restrict movement, curtail social gatherings which did not take into consideration people's livelihoods. The coronavirus disease (COVID-19) legislations have narrowed civic space and threatened fundamental freedoms, which are crucial attributes of the rule of law. The nexus between rule of law principles and public emergencies (including PHEIC) is set out in both international instruments and national legal frameworks.

It is trite knowledge that rule of law is the most value-laden of all the constitutional law principles.[76] Embedded within this stipulation is the fact that, the concept helps guarantee a measured government and respect for fundamental freedoms. The rule of law may either be seen as a "philosophy or political theory" but in either way the basic requisites are laying down the significant conditions of law or as a procedure by which those who wield power are to rule under the law.[77] The purpose of the rule of law is that of the supremacy or sovereignty of law over man. According

[69] See Yin et al. (2021) on rights and religious belief in maintaining prison social order. Yin shows how the right to freedom of movement is also curtailed in prison.
[70]Criddle Fox-Descent (2012).
[71] De Mesquita et al., (n 15).
[72] Ibid.
[73] Julinda et al, 2021).
[74] Role UK, Rule of law in times of Health crisis (A4ID 2020).
[75] Ibid.
[76]KA Tuffuor, Human rights and rule of law in Africa: Legal and institutional frameworks for sustainable peace in SB Kendie, P Osei- Kufuor, KN Bukari & S Bukari (eds) *Towards sustainable peace in Ghana: Essays in memory of Francis Kojo Azuimah* (Accra Sub-Saharan Publishers 2021).
[77]H Barnett, *Constitutional and administrative law* (Cavendish 2000) 85.

to Gomes,[78] rule of law requires "lawfulness, regularity and continuity in the preservation of public order." The International Bar Association[79] stipulates that under the concept of rule of law, no one is above or beyond the law. "Everyone is subject to and governed by the law." The United Nations[80] has given out the characteristics of the rule of law as follows:

> It refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The "rule of law" refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[81]

The World Justice Project has also described the concept of rule of law as follows:[82]

> see[s] the rule of law as a regime where government and its officials and agents, as well as individuals and private entities, are accountable under the law. The laws are clear, and laws are applied evenly and protect fundamental rights – including the security of persons and property, justice delivered timely by a competent, ethical and independent judiciary and reflected the make-up of the communities.

Clearly put, every authority is likely to become oppressive and tyrannical as intimated by moral philosophers from Plato to Thomas Aquinas and to John Locke. In illustrating the concept of rule of law, Locke put it succinctly as follows:[83]

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[78]TMRC Gomes, Promoting the rule of law in Serbia. What is hindering the reforms in the justice sector? *Communist and Post-Communist Studies 50*(4) (2017) 331-337.

[79] International Bar Association, *Commentary on the IBA Council 'Rule of law' Resolution of September, 2005* Retrieved from https://www.ibanet.org/Search/Search.aspx?query=commentary%20on%20the%20IBA%20council%20rule%20of%20law accessed on 12/12/21.

[80] UN, *The International Covenant on Civil and Political Right* (2006) Retrieved from https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf

[81] United Nations, Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies (2004).

[82] The World Justice Project (WJP) On rule of law (2014).

[83] MW Slann, *Introduction to politics: Governments and nations in the post-cold war era* (McGraw-Hill 1988).

> whosoever in authority exceeds the power given him by the law and makes use of the force he has under his command to compass that upon the subject which the law allows not, ceases in that to be a magistrate, and acting without authority may be opposed, as any other man who by force invades the right of another.

The European Court of Human Rights refer to the notion of the rule of law as follows, that the rule of law must make provision for the protection of human rights, which are significant to the development of every society.[84] In 2016, the Bingham Centre for the Rule of Law[85] adopted some priority benchmarks for the assessment of adherence to rule of law within a state in a manner that is 'objective, thorough, transparent and equal.' These are that, the law should be applied at all times and should not be based on discretion, power must be reasonably exercised based on the reasons for its conferment, equality before the law and accessible dispute resolution. Others are the protection of rights, fair trial and rule of law in the international arena. The Venice Commission's report[86] also identified a consensus on six necessary elements of the rule of law. These are that, there should be legality (transparency and accountability), legal certainty, prohibition of arbitrariness, equality before the law, access to justice including judicial review and respect for civil liberties.

According to the Rule of Law Index[87] there has been a "deterioration and stagnation" in eight critical areas as a result of restrictions imposed by governments. IDLO[88] also posited that the resulting emergency measures as a result of the pandemic heightened autocratic tendencies "risking descent from rule of law to rule by law." The enforcement of emergency measures must be subject to oversight by an independent judiciary.[89] Ordinary courts should maintain their jurisdiction to adjudicate complaints relating to a violation of a non-derogable right.[90] The main provisions under the international Bill of Rights stipulates limitations on the rights contained. According to the author, governments guaranteeing the basic fundamental freedoms of the individual under law, is one of the core attributes of the 'rule of law and constitutionalism.'

Beqira et al.,[91]have posited that, in a democracy the essence of rule of law is to check arbitrary use of power and that rule of law is a key pre-requisite for the legitimacy of governments. It is worth noting that, in times of emergency when power is conferred on governments to deal with the crisis on hand "it is essential to look back to what good law is about and why the Rule of Law is so important."[92]In the view of John Locke, "law should serve, not to abolish or restrain, but to

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[84] S Wheatley, *The idea of international human rights law* (Oxford University Press 2019).

[85] Bingham Centre for Rule of Law, A Research Report by the Bingham Centre for the Rule of Law for the All-Party Parliamentary Group on the Rule of Law (Bingham Centre for Rule of Law 2016). Available on https://www.biicl.org/documents/860_final_full_rule_of_law_in_parliament_research_report_2013-14_2014-15.pdf.

[86]Venice Commission, Venice Commission Report 2021. Retrieved from https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2021)016rev-e.

[87]World Justice Project, 'Rule of Law Index 2020' (2020) available: https://worldjusticeproject.org/our-work/research-anddata/wjp-rule-law-index-2020. See also: United Nations, Rule of Law Indicators, 2011, available: https://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf).

[88] IDLO (n 32).

[89] The Siricusa Principles (n 32) para 22.

[90] ICCPRs, Report available: https://undocs.org/CCPR/C/21/Rev.1/Add.11.

[91] J Beqiraj, Stennett R and Weinberg N, The rule of law and COVID-19 related technologies (Birmingham Centre for Rule of Law 2021).

[92] Ibid.

fundamentally preserve and enlarge freedom." Rule of Law fundamentally rejects abuse of power in an arbitrary manner, which constraints people as well as institutional actions. This means harms that are to be protected through law in normal times, should not be introduced because there is a pandemic. The European Court of Human Rights has opined that "[even] in the framework of a state of emergency, the fundamental principle of the rule of law must prevail.[93]"

It is only under rule of law that the legitimacy of restrictions imposed can be acceptable. It also strengthens public confidence in institutions and consolidate the legality of the restrictions introduced, which invariably serve as an impetus for its effectiveness and compliance. Under the 'thin' rule, states are required to make laws that are clear, this must be done in a transparent manner, and that the laws must be applied fairly and in an impartial manner by the justice system.[94] As required by the "thick" spectrum, rule of law goes beyond safeguards provided within the contents of the law to include state compliance with international law and respect of the fundamental human rights of the individual.[95]

Joseph Raz[96] has emphasised that, the key features of the concept of rule of law are that the law must be stable, predictable, intelligible, limitations on the use of discretionary power, equality before the law and access to justice since these are key to all jurisdictions. In the words of Judge Spano the concept transcends international borders, traditions and cultures and constitutes a key principle in democracies when a 'system of communal human life is regulated by legally binding norms.[97] This is why it is captured in the preamble of the United Nations' Universal Declaration of Human Rights. And that in any civilized polity with a health emergency such as COVID-19, which has necessitated lockdown, it is only by resorting to the rule of law that power can be exercised lawfully, predictably and in a human manner. In the view of Fuller, it is only in times of such crisis that the "bond of reciprocity" between the state and the citizens becomes very important - the bond between the ruler and the ruled - becomes so important.[98] In Krygier's teleological account of the Rule of Law[99] there are three modes of exercising power that make people vulnerable to arbitrary treatment. Power is arbitrary when it is uncontrolled, unpredictable and/or unrespectful. Now after knowing what is required to be done in times of emergency we will subject what occurred in Ghana to these core values.

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[93] ECHRs, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', Piskin v. Turkey (no. 33399/18), 15 December 2020 Citation from Robert Spano para. 153 *European Law Journal* (January 2021) 5.

[94] Venice Commission Report (n 86).

[95] Ibid.

[96] J Raz, On the Rule of Law as a universal principle see Joseph Raz, 'The Law's Own Virtue' *Oxford Journal of Legal Studies* 39 (1) (2019) 4.

[97] Ibid.

[98] R Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary' *European Law Journal* (7 January 2021) 5.

[99] M Krygier, 'The Rule of Law and State Legitimacy' in Martin Krygier, Legitimacy (Oxford University Press 2019) https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198825265.001.0001/oso-9780198825265-chapter-7).

IMPOSITION OF RESTRICTIONS LAW IN GHANA

The country had its first experience of infection of the COVID-19 disease on 12 March 2020 after two persons tested positive to the virus.[100] In Ghana, a GH¢1.2 billion (about US$200 million) Coronavirus Alleviation Programme was established by the government to support affected households. The disease grew exponentially and by the 7 of September 2020, the country had 44,869 cases, but out of these about 43,801 recovered and discharged while 283 people could not survive the disease.[101] In an address to the nation on 15 March 2020, the President Nana Addo Dankwa Akufo-Addo directed the Attorney-General to table before Parliament an emergency legislation immediately, in accordance with the 1992 Constitution of Ghana.[102] The Minster for Health was also directed to declare the COVID-19 as a public health emergency pursuant to the Public Health Act, 2012 (Act 851)[103] to govern the relevant measures.

In addition to this, Parliament passed the Imposition of Restriction Act, 2020 (Act 1012)[104] which was assented to by the President and the Imposition of Restrictions (COVID-19) Instrument, 2020 (E.I. 64) adopted as a mitigating measure to curb the spread of the virus.[105] This enabled the authorities to close the country's borders on the 21 of March 2020, and a lock down imposed on Greater Accra, Tema, Kasoa and Greater Kumasi Metropolis for first two weeks and additional one week and all social activities prohibited including religious gatherings, funerals, weddings and parties and those that were allowed were not to have more than twenty five (25) people.[106]

In addition to the above, all places of work-public as well as private were to adopt a shift system, adopt the use of virtual means for business, while adhering to all COVID-19 safety protocols.[107] It has been argued that, the country in responding to the emergency used the derogation clause under Article 31 (10) in the 1992 Constitution to restrain the exercise of some fundamental freedoms. The imposition of restrictions laws therefore limited the enjoyment of some fundamental freedoms. With respect to free movement of persons, measures such as 'temporary quarantine, ban on public gatherings, demonstrations and protests, the closure of schools and places of worship' were put in place to control the spread of the disease since the main mode of spread is human to human transmission. Added to the above, human rights violations have been reported by some citizens of brutalities meted to them by the Ghana Police Service (GPS) and the military in an attempt to restrict the movement of people.[108]

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[100] A Y Osman et al., Lockdown measures in response to COVID-19 in nine sub-Saharan African countries *BMJ Global Health* (2020) 5: e003319. doi:10.1136/ bmjgh-2020-003319.

[101] Ministry of Health Report (2020).

[102] Article 21(4) (c), (d) & (e) of the 1992 *Constitution* of Ghana.

[103] Section 169 of the Public Health Act, 2012 (Act 851) Communications Bureau, 'President Akufo-Addo Addresses Nation on Measures Taken by Government to Combat the Coronavirus Pandemic' (Speech 15 March 2020) accessed 10/12/ 2020.

[104] Republic of Ghana, *Imposition of Restriction Act* (2020).

[105] E Kumi, Pandemic democracy: The nexus of COVID-19, shrinking civic space for civil society organizations and the 2020 elections in Ghana *Democratization* (2022) 1-19.

[106] N Haider, Osman AY, Gadzekpo A, Akipede GO, Asogun D, Ansumana R and McCoy D, Lockdown measures in response to COVID-19 in nine sub-Saharan African countries *BMJ Global Health* 5(10) (2020) e003319.

[107] KPMG Ghana – COVID-19: Update on Travel Policies and Restrictions on Social Activities (2021) Retrieved from: https://assets.kpmg/content/dam/kpmg/gh/pdf/gh-COVID-19-Update-on-Travel-Policies-and-Restrictions-on-Social-Activities.pdf

[108] Kumi (n 98).

According to Anderson et al.[109] while the COVID-19 inspired legislations are legitimate as mandated by the Constitution, Public Health Act, 2012 (Act 851), the Imposition of Restriction Act, 2020 (Act 1012) and the Imposition of Restrictions (COVID-19) Instrument, 2020[110] (E.I. 64) are justified in the protection of public health, its application has constrained privacy rights, freedom of movement, peaceful assembly, expression and association which invariably has negated civic space. The disease also created a lot of challenges for the conduct of the 2020 general elections. Moreover, the COVID-19 pandemic created uncertainties for the 2020 general elections which threatened democratic governance as stipulated in the Constitution. This is due mainly to restrictive measures that were introduced to curtail mass gatherings which affected the campaigns of some political parties.[111] Even though the compilation of a new voters register was to be done in April, this was postponed to June by the Electoral Commission (EC) of Ghana.

Five days after the President's address, the Attorney-General also presented to Parliament the Imposition of Restrictions Bill, 2020 to Parliament under a certificate of urgency. The bill was passed by Parliament into law after the third reading and was given a Parliamentary approval which was assented to by the President and published in the gazette and became operational.[112] On 23 March 2020, the Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic Instrument, 2020 (E.I. 64) regulated by articles 31 and 32 of the Constitution was also published in the gazette and entered into force.[113] State of emergency in the country is regulated by the 1992 Constitution[114] and the Emergency Powers Act 1994, Act 472.[115]Even though these are the main statutes governing emergencies there are other provisions contained in other specialised statutes. Addadzi-Koom[116] has described the Imposition of Restrictions law, 2020 as 'a terse enactment' with only seven sections which are intended to deal with restrictions as and when an emergency occurs to ensure public safety, public health and protection.

Under section 4 of the Imposition of Restrictions Law, 2020 restrictions could last for a maximum of three months when there is an emergency. The President may also shorten or extend the duration of the restriction for not more than one month at a time where the exigencies of the circumstances so require. Under the 1992 Constitution and the Emergency Powers Act, Parliament is mandated to either shorten or extend the duration of an emergency, but the Imposition of Restrictions Law, 2020 gives the power to the President without any Parliamentary scrutiny. Three Executive Instruments that came into effect as a result of Act 1012 are E.I. 64 (Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) Instrument 2020. E.I. 64, E.I. 65 (Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 2) Instrument 2020 came into effect on 30 March 2020, while E.I. 66 (Imposition of Restrictions Coronavirus Disease (COVID-19) Pandemic) (No. 3) Instrument 2020 also came into effect on 3 April 2020 placed restrictions on movements to Ghana by air, land and sea.

One is liable to a fine of not less than one thousand penalty units and not more than five thousand penalty units, with one penalty unit being GH₵12 as stipulated in the Fines (Penalty Units)

[109] Anderson et al. (n 50).
[110] Republic of Ghana, *Imposition of Restrictions (COVID-19) Instrument, 2020* (EI 64).
[111] AG Abdulai and Sackeyfio N, Introduction: The uncertainties of Ghana's 2020 elections *African Affairs* (2021).
[112]Adadzi-Koom (n 15).
[113] Ibid.
[114] Republic of Ghana, Articles 31 and 32 of the Constitution and the Emergency Powers Act 1994, Act 472
[115] Republic of Ghana, Emergency Powers Act 472.
[116] Addazi-Koom (n 15).

(Amendments) Instrument, 2005 (LI 1813). One could therefore be fined GH¢12,000.00 to GH¢60,000.00 or suffer a prison term of not less than four years and not more than ten years or to both.[117]The Presidency also committed GH¢ 572 million (US$ 100 million) as part of the preparations to deal with the pandemic. A coronavirus National Preparedness and Response Plan, which sought to strengthen the capacity of health facilities, laboratories, and points of entry to detect and control viral spread and to create public awareness were put in place.

The lockdown restrictions were further extended for additional one week till 20 April 2020. Each and every individual was instructed to remain at home, but could go out only when needed to get essentials such as food and medicine and services such as banking transactions, attending to public toilet and medical facilities. Inter-city movement of 'vehicles and aircrafts for private and commercial purposes' were also curtailed, with the exception for those that provide essential services and haulage of cargo.**[118]** On 31 January 2021, the president of Ghana gave an update1 on the country's coronavirus (COVID-19) infections and outlined measures which sought to reverse some of the restrictions that had earlier been relaxed.[119] The KIA has been reopened with international passenger travel since the 10th of September 2020 while schools opened in January, 2021.[120]New measures were again announced effective Monday 1 February 2021 which saw to the revision of COVID-19 test fees at KIA for nationals from Economic Community of West African States (ECOWAS) and restrictions placed on social gatherings such as weddings, parties, and funerals. Land and sea borders remained closed,[121]but have been opened recently.

CONSTITUTIONALITY OF THE IMPOSITION OF RESTRICTIONS LAW

In the view of Bagaric,[122] "the Constitution controls for the worst of times, so that we may more regularly enjoy the best of times." And that, to defer from a legislation is in accordance with its true purpose, which in a democratic setting must be in consonance with a constitutional order. If a derogation will lead to an injury to rights, then it is imperative that then there should be a change so that the legislature will not be seen as violating the rights of the people according to Allan. It is trite knowledge that in a Constitutional setting "freedom and individual rights are not unlimited."

Addadzi-Koom has described the Impositions of Restrictions Act, 2020 Act 1012 as follows:

> it has no legitimate constitutional blessing. Consequently, the place of the IRA in Ghana's emergency regime is unprecedented and puzzling. It creates what we may call a 'quasi state of emergency'.

It is argued here that, the constitutional provisions under a state of emergency, as well as the Emergency Powers Act were enough to be invoked to deal with the pandemic. And that, a proclamation by the President on 15 March, 2020 would have been enough to deal with the emergency on hand. People arrested in defiance of the government's directives who were

[117] Republic of Ghana, Imposition of Restrictions law (2020).
[118] Kumi (n 98).
[119]Republic of Ghana, Ghana – COVID-19: Update on Travel Policies and Restrictions on Social Activities GMAS Flash Alert, Immigration Edition (February 2021).
[120] Kenu E, Frimpong J, Koram K, Responding to the COVID-19 pandemic in Ghana *Ghana Medical Journal* 54 (2) (2020) 72-73.
[121]Republic of Ghana (n 112).
[122]M Bagaric, 'Originalism: Why some things should never change – or at least not too quickly' 19 *University of Tasmania Law Review* (2000) 187-186.

arrested is deemed to be unconstitutional. In a review by Appiagyei-Atua[123]he also noted that the retrospective nature of Act 1012 was also in contravention of the 1992 Republican Constitution since the fundamental law frowns on retrospectivity under Article 107 (b).

The Imposition of Restrictions law make the President "a benevolent dictator" since there is no parliamentary check on his powers thereby negating the whole concept of accountability. The law took away the consultative powers which the constitution gave, that in times of emergency the Council of State should be consulted first under article 31 (1) and also getting approval from Parliament under article 31 (2) of the 1992 Constitution. This also sins against the rule of law which stipulates that, laws must be clear, stable, transparent and fair. Again, when the President had not declared a state of emergency under article 31 of the Constitution, it was wrong for him to have invoked the Electronic Communications Act, 775 section 99 and 100 to support contact tracing in relation to the pandemic. Appiagyei-Tua has argued that, there ought to have been a state of emergency invoked under the constitution before the Parliamentary Act could be invoked and that this was the intention of Parliament. The impositions of restrictions law as it is currently, sins against the dictates of the 1992 Constitution and its continuous existence is challengeable.

Locke put it succinctly as follows, when those in authority abuse the power given them, they cease to be magistrates and such laws may be opposed. In the view of Aquinas and locke, "every authority is likely to become oppressive and tyrannical unless restrained by law." One of the fundamental principles in rule of law based-setting is that, the law must be supreme over man and there should also be a measured government. Indeed, in Constitutional law the constitution is deemed to be superior and nothing or no law should prevail over it or conflict with it. But with the new law which has no room for accountability and puts excessive powers in the hands of one man in a democratic country is a source of concern. If the Constitution is to have "a meta-objective," then this should be the exercise of control of governmental powers especially in times of emergency.

Emergency legislation should only be introduced when there is no existing law to take care of the situation on hand. It must conform to the principles of rule of law – accountable, transparency, predictable, frowns on retrospectivity and the use of arbitrary discretion. Above all, there should be respect for the fundamental human rights of the individual before, during and after the state of emergency. Interfering in rights conferred by the Constitution on the altar of public interest is only acceptable when it is in tandem with the rule of law. Need be to say here that, it is even in times of crisis that the rights of the citizenry should be protected. People should have a trust in the justice delivery system. From the standpoint of human rights, a state of emergency only provides a legal justification for the taking of extra-ordinary measures which should not violate peoples' rights. It is also imperative that, once law is a crucial determinant of public health as stated supra, all legislative enactments promulgated in the future to control public health emergencies should conform to the rule of law.

CONCLUSION

The COVID-19 pandemic has put mankind on notice that, it is not only conventional war such as armies fighting each other that can bring the world to its knees, but rather unconventional issues

[123] K Appiagyei-Atua, 'Emergency without a State of Emergency: Effect of Imposition of Restrictions Act, 2020 on Rights of Ghanaians' (MyJoyonline 2 April 2020) accessed 12 January 2021.

such as health as the pandemic has shown can also affect the world tremendously as armies do. The pandemic has affected state-citizen relationship as a result of measures that curtailed the basic liberties of the individual such as free movement of goods, services and people, curtailing freedom of assembly through the implementation of emergency measures. Ghana passed the imposition of restrictions law due to the pandemic, but when assessed in the light of principles governing the rule of law as found in the 1992 Republican Constitution there were deficits. It is posited here that, in view of the fact that the Constitution make provision for a state of emergency and an Act of Parliament on emergency situations in the country it was needless to pass a new law to deal with the pandemic. In future, authorities should haste slowly when other national emergencies occur, so that constitutional hitches such as these will not occur. People incarcerated under the law should also be given amnesty, since they were convicted under arbitrary legislations which sins against the rule of law.

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THE RELIGIOUS MARKET IN GHANA TODAY: IS THERE LEGAL BASIS TO TAX THE CHURCH?

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ABSTRACT

This paper is a rehash of the existing debate on whether or not the church should be subject to tax. Unlike many others, the paper approaches the issue from a legal perspective and explores the relevant principles of taxation as established by statutes and case law in Ghana. In the main, this paper argues that given that majority of the churches in Ghana engage in transactions which may be properly classified as business, the Commissioner of Income Tax is empowered by law to demand tax from the church in respect of the income accruing therefrom. Thus, using the interpretive paradigm mainly through interviews, observation as well as reliance on statutes and case law, the paper concludes that transactions such as the taking of service fees, sale of anointing oil and other religious products constitute trade and the income arising thereto must be subject to tax.

Keywords: Religious Market, Trade, Tax, Church, Ghana

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INTRODUCTION

It is difficult to rule out religion in human existence since it is apparently part and parcel of the social fabric that satisfies human needs.[3] In indigenous religions, which pre-lived established ones, ritual functionaries sell herbal medicines for supposed cure of all kind of sicknesses. Similarly, Judaism permitted commercialisation of religious items. This practice appears to have reached its climax at the time of Jesus who condemned the practice. The Catholic Church in the Medieval Age was also involved in sales of bulls, one of the major factors that occasioned the Reformation.[4] The abuse of power by this official religion at the time made it necessary for European thinkers at the time to sever its influence over state or public life.

The 19th and 20th centuries, however, saw the resurgence of Christianity in the global North and proliferation of New Religious Movements of Pentecostal brands in the global south, particularly Asia and Africa.[5] Pentecostal Christianity is that type of Christianity that emphasises the active presence of the Holy Spirit and the manifestation of the power of the Spirit in concrete signs and miracles as an integral part of the Gospel and its proclamation.[6] This shows that religion is pretty much alive globally, and that it has not died out as predicted by the Enlightenment scholars.

In many African countries, there are 'business' interactions between pastors/prophets on one hand and their clients, mostly congregants or religious window-shoppers, on the other over the sale of religious products and services.[7] In Ghana, Churches, particularly, the Pentecostal ones compete with each other over membership in the religious field.[8] This apparent yearn for niche and membership compels these Churches to use diverse strategies to make themselves attractive to prospective members. For instance, stories about miraculous healings from strange diseases, and liberation from demonic attacks attract huge followership.[9]

The churches also commercialize religion or offer for sale religious products and services such as 'special prayers', anointing oil, 'holy water', and many others to congregants who are in constant search for 'successful marriages', 'well-paid jobs', 'access to visas' and other miraculous interventions. Commercialisation of religion, as used in this sense, refers to the exchange processes that involve the use of money by religious actors (both church and non-church members) to acquire Christian religious items/products and services offered for sale by some

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[3] Kofi Asare Opoku, *West African Traditional Religion*. Singapore: FEP International Private Ltd., (1978). See John S. Mbiti, *African Religions and Philosophy*. (2nd rev. ed.). London: Heinemann Educational Books, (1989). See Yin's writings (2018; 2020; 2021; 2022) on religion in prison. He demonstrates the pervasive nature of religion in Ghanaian society through inmates' social construction of their religious reality.

[4] Jack L. Arnold, *The Cause and Results of the Reformation*. III Magazine Online: 1, 2. (March 8-14 1999).

[5] David B. Barrett, *Schism and Renewal in Africa: An Analysis of Six Thousand Contemporary Religious Movements*. Oxford: Oxford University Press, (1968).

[6] Emmanuel K. Larbi, *Pentecostalism*: *The Eddies of Ghanaian Christianity*. Accra, Ghana: Centre for Pentecostal and Charismatic Studies, (2001); Cephas N. Omenyo, *A Study of the Development of Charismatic Renewal in the Mainline Churches in Ghana.* Zoetermeer: Uitgeverij Boekencentrum, (2002)*;* Johnson K. Asamoah-Gyadu, *Signs, Wonders, and Ministry*, 33-46.

[7] Pius O. Abioje, *The Mass Media and Commercialisation of Religions in Nigeria,* 3; Bureau of Market Research, An investigative study of the commercialisation of religion in the Republic of South Africa 2016: Gauteng Pilot Study. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, (August 2016): xii.

[8] Johnson K. Asamoah-Gyadu, *African Charismatics,* 14; Koduah, A. *Christianity in Ghana Today*. Accra, Ghana: Advocate. (2004); George Anderson Jnr, *Commercialization of Religion in Neo-Prophetic Pentecostal/Charismatic Churches in Ghana*, 1.

[9] Henri Gooren, *Religious Conversion and Disaffiliation,* 132.

Churches in Ghana[10]. The orthodox churches such as the Roman Catholic Church, the Anglican Church, the Methodist Church, and the Presbyterian Church which have not yet been completely taken over by the excesses of the Pentecostal wave have equally devised means to generate income. Some of these orthodox churches own rubber plantations which are major sources of income. Others operate hostel facilities on University campuses as a means to generate revenue for the church.

It is this exchange of religious products and money between pastors/prophets in Pentecostal churches and clients in Ghana as well as other business ventures of some of the churches that this paper investigates. The objective is to ascertain whether the Commissioner of Income Tax has locus to make an assessment of the tax liability of these churches. The paper is significant to the extent that it re-awakens the debate on church taxation and provides a legal framework for determining whether or not it is time to demand tax from the church.

Pentecostal Christianity in Africa focuses on prosperity and active involvement in society. In Pentecostal churches in Ghana, the theology of being wealthy and rich connotes a sign of God's blessings and every Pentecostal seeks it. This type of blessing is in the form of material possession such as cars, houses, money, and fame.[11] Traditionally in Ghana, money or wealth is perceived as a sign of God's blessings and of spiritual power and authority.[12] This view reflects African traditional religious interpretation of salvation in terms of material prosperity and wealth that has been adopted in Pentecostalism.

Perceptively, the church and religious ideology are understood as an arena for negotiating claims to wealth as well as displaying wealth, and success; the pastor depends on mobilising support and establishing a congregation. It means that wealth is also in people, in social relations and has a cultural meaning that change over time. Wealth is closely linked to social identity and to the making of social relations. It is also about recognising it, claiming it, and displaying it.[13]

METHODOLOGY

This paper is qualitative as it relies mainly on descriptive and analytic tools in dealing with the subject under study. As Cartik R. Kothari[14] maintains, descriptive analysis allows for an in-depth observation of a particular phenomenon and to define its parameters. Therefore, since the matter under consideration cannot be subjected to microscopes in the laboratory, the appropriate tool to employ is language which helps to describe phenomenon.

Data was produced through personal interviews and participatory observation from April 2016 to December 2017 from four Pentecostal/Charismatic churches. One church from Cape Coast (Central Region), and three from Kumasi (Ashanti Region). Respectively, the churches were;

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[10] George Anderson Jnr. Commercialisation of Religion in Neo-Prophetic Pentecostal/Charismatic Churches in Ghana: Christian Ethical Analysis of their Strategies. *Journal of Philosophy, Culture and Religion*, *5*(42), (2019): 2.

[11] Paul Gifford, The Complex Provenance of Some Elements of African Pentecostal Theology, in Corton, A. & Marshall-Fratani, R. (Eds.). *Between Babel and Pentecost. Transnational Pentecostalism in African and Latin America*. Bloomington and Indianapolis: Indiana University Press, (2001): 62-65; Birgit Meyer, Commodities and the Power of Prayer: Pentecostalist Attitudes Towards Consumption in Contemporary Ghana, Development and Change, 29, (1998): 751-776.

[12] Karen Lauterbach, *Wealth and Worth,* 106.

[13] Karen Lauterbach, *Wealth and Worth,* 107.

[14] Cartik R. Kothari, *Research Methodology: Methods and Techniques,* (2nd rev. ed.). New Delhi: New Age International (P) Limited, Publishers, (2004): 2.

House of Prayer for All Nations, International God's Way Church, Ebenezer Miracle Worship Centre, and Run for your Life Ministry. These churches were chosen because they are famous for what may be termed as 'commercialisation of religion'. Consequently, using these as case studies was proper because their activities are reflective of churches with similar doctrines in Ghana. There were also occasional visits to the orthodox churches such as the Roman Catholic Church, the Presbyterian Church, the Methodist Church, and the Anglican Church, in Cape Coast and Takoradi. Such visits were purposive in that they were designed to have personal communication with Rev. Ministers and where appropriate some church elders over the subject under study. Apart from the primary data collected through in-depth interviews, the paper also relied on secondary data, including statutes and case law. Twelve females and eighteen males were purposively sampled, and interviewed. Analysis was done by drawing connections between the field data, literature, statutes and case law.

THEORETICAL FRAMEWORK

The paper dwells heavily on the religious market theory. This theory posits that religious firms (churches) provide religious products/services to consumers in an exchange process which takes place between religious actors comprising existing church members and religious window-shoppers on one hand, and religious organisations (churches) [represented by their pastors/prophets sic] on the other. The exchange process forms the principal operation in this market.[15] Here, churches supply the products/goods and services in the form of social, psychological, religious, emotional demands of religious actors. The religious actors rationally weigh up the costs and benefits of the choices available and pay for those that satisfy their needs. Of truth, the religious market exchange mechanism in Ghana reflects this exchange processes. For many of the churches, particularly the Pentecostals in Ghana, this presents business opportunities to explore because there are existing needs. The quest for fruit of the womb or the desire for a decent job can only find meaning in religion. This religious climate often leads desperate religious actors, mostly women, to seek help from these pastors/prophets. In the end, these religious actors are compelled to buy religious products or pay for religious services in the hope that their desires will be achieved.

HISTORY OF GHANA'S TAX LAW

The earliest attempt to introduce direct tax in Ghana dates back to 1852 when the then Poll Tax Ordinance was introduced. The purpose of the Ordinance was to generate sufficient revenue to meet the rising cost of British Administration in Ghana. Each person, including even children under British protectorate were required by law to pay one shilling. However, the Poll Tax Ordinance failed mainly because it had a weak system of tax collection. Following the failure of the Poll Tax Ordinance, another attempt was made in 1931 to introduce direct tax but the tax bill was met with opposition and therefore it could not materialize. In 1943, the Income Tax Ordinance (ITO) [Cap 27] was introduced. Although home-made, Cap 27 was modelled after the Income Tax Act of the United Kingdom.[16] A principal feature of this Act was that it imposed tax on income with

[15] Rodney Stark, & Roger Finke, *Acts of Faith: Explaining the Human Side of Religion.* Berkeley. CA: University of California Press, (2000):118-125.

[16] Benjamin Kunbuor, Abdallah Ali-Nakyea, and William Kofi Owusu Demitia, *Law of Taxation in Ghana*, (2nd ed.) Ghana: Type Publishers, (2017).

its source in Ghana only. Ten years thereafter, a new ordinance was introduced in 1953 following amendments to Cap 27. Nonetheless, the 1953 Ordinance was overthrown by the Income Tax Decree, 1966 (NLCD 78). This was followed by the Income Tax Decree, 1975 (SMCD 5). The SMCD 5 was the longest operative Income Tax Act having been in force for 25 years until it was repealed by the Internal Revenue Act, 2000 (Act 592). Currently, Ghana's tax system is based on the Income Tax Act, 2015 (Act 896) with its amendments.[17]

Ghana's Tax Regime

Ghana's tax regime applies what may be termed as the *source and residence* rule.[18] The source rule implies the imposition of tax on income from a specified source or origin. Such sources may include but not limited to dividends, royalties and rent. Section 3(3) of Act 896, provides that the income of a person … has a source in this country if the income accrues in or is derived from Ghana. Generally, all income arising thereto within Ghana's territory is liable to tax. Thus, once the income is earned in Ghana, it is subject to tax. In *Kubi v. Dali [1984-86] GLR 501, Holding 4,* Per Abban J.A, "the income tax laws of this country impose an obligation on all income earners of a certain category to pay taxes on their earnings" and that "the amount of damages awarded for loss of earnings should take into account the income tax which the plaintiff would have had to pay if he/she had continued to trade or work".

Until recently Ghana's income tax jurisdictional basis was hinged on the source being Ghana, that is, tax is imposed only on income having its source in Ghana and therefore foreign income if not brought into or received in Ghana cannot be subject to tax. In *Republic v. Commissioner of Income Tax Ex Parte Fynhout (1971)1 GLR 213*, Archer J.A. took the view that a non-resident company in Ghana which only buys timber and carries on the business of trade outside Ghana, could not be required to pay income tax. According to the learned judge, such an activity did not fall within the meaning of 'carrying on trade in Ghana'. In effect, it is only income earned in or accrued in or derived from Ghana or brought into Ghana or received in Ghana from wherever that is subject to tax. Nonetheless, under Act 896, the source of the income need not exist at the time of assessment. The relevant matter for consideration is that the income is traceable to a source.

The residence rule on the other hand determines tax liability on the basis of a person resident within the country. A resident person[19] may be required to pay tax on any income, investment or employment regardless of whether the source is in Ghana. Section 3(2) of Act 896 provides that "*Any resident Ghanaian is liable to pay tax on income from employment, business or investments irrespective of the sources".* The effect of section 3(2) is that even foreign income is liable to tax provided the income earner is resident in Ghana and whether or not the income is received or brought into Ghana. For non-resident persons, section 3(2) (b) provides that the *assessable income is the income of that person… to the extent to which that income has a source in this country and where the person has a Ghanaian permanent establishment income of the year connected with the permanent establishment, irrespective of the source of income.* In effect, if the

[17] Benjamin Kunbuor, Abdallah Ali-Nakyea, and William Kofi Owusu Demitia, *Law of Taxation in Ghana*, (2nd ed.).
[18] Benjamin Kunbuor, Abdallah Ali-Nakyea, and William Kofi Owusu Demitia, *Law of Taxation in Ghana*, (2nd ed.).

[19] Section 101(1) defines a resident person to include a citizen without a permanent home outside who lives in that permanent home for one year, an individual present in the country for an aggregate of 183 days or more in any 12 months commencing and ending within that year, an employee or government official posted abroad for that year, a citizen who is temporary absent for not more than 365 continuous days but have a permanent home in Ghana.

person is not resident it is only the aspect of the income that is earned, or has accrued or derived from Ghana which is subject to tax. Therefore, for non-residents the source must necessarily be Ghana.

Consequently, Ghana through Act 896 now combines Ghanaian source rule for non-residents and a global source and approach rule for residents and permanent establishments as the basis of income tax liability. Thus with regards to resident persons, income tax is now based not on source in Ghana alone but global whether or not brought or received in Ghana whilst with non-residents it will only be taxed if the source is Ghana. This is a marked departure from previous enactments.

Tax may be imposed on income, capital gain and on expenditure. Since this paper focuses on incomes that accrue to the Church, we will dwell largely on income tax. Nonetheless, to place the discussion within the proper context, we shall attempt a definition of income in law. To ascertain what constitutes income, one must have regard to law and fact. Unfortunately, most tax statutes do not define income. Instead, they state what constitutes taxable income. In *Oxford Motors Ltd v Minister of National Income (1959) 18 DLR 2d Dominican Law Report 712* Per Abbot J., 'No one has ever been able to define income in terms sufficiently concrete to be of value for taxation purposes… where it has to be ascertained whether a gain is to be classified as an income gain or capital gain, the determination of that question must depend in large measure upon the particular facts of the particular case.' Therefore, the test adopted by the English Courts in determining what is meant by income is looking at: a. Income which is not capital and b. Treating capital as a tree and income as the fruit.

To determine what income is, one must thus draw a distinction between a sale of a fixed capital or asset of a business as against its circulating asset or capital. Capital assets are referred to as fixed capital or fixed assets and these are assets which relate to the permanent structures of the business. Those assets which are constantly being worked over (the fruits) are referred to as Circulating Capital. Those assets which form part of the permanent structure of the business and are the means whereby profits are made are regarded as the capital assets and therefore receipts of such assets are capital and cannot be taxed as income.[20] Thus, by law what constitutes income implies whether or not the receipt is for loss of a permanent assets (Capital) or in lieu of trading profits (Income) as was established in *Able UK Ltd v. HRMC [2007] EWCA Civ. 1207*. In *Van den Berghs Ltd V. Clark 1935 AC 431*-the applicant Company entered into an agreement with a rival Dutch Company which provided for sharing of profits of their respective magazine business in specified proportions and the creation of joint arrangements as to price and markets. Following a dispute, the agreement was terminated and the Dutch Company paid a sum of money to the applicant company to compensate it for the cancellation of its future rights. It was held that the sum in question was for the cancellation of the Company's future rights under an agreement which constituted a capital asset and therefore the sum was a capital receipt and therefore not taxable.

In contrast, in *Kelsall Parsons Co v. IRC [1938] 21 TC 608 at 621*, a firm of manufacturers' agents received compensations for the termination at the end of the second year of a three (3) year agency agreement. The issue was whether the compensation received was income or capital. It was held that the compensation was a trading receipt and therefore the income was taxable. In essence, the modern approach is that, whilst the distinction as to capital and income is relevant,

[20] Benjamin Kunbuor, Abdallah Ali-Nakyea, and William Kofi Owusu Demitia, *Law of Taxation in Ghana*, (2nd ed.).

one must also be guided by the Statute in question and the facts of the case. The net effect is that a legal definition of income may be greeted with much uncertainties as one cannot predict what the court may classify as income. Essentially, what may constitute income subject to tax in United Kingdom may be different from what is income subject to tax in Ghana having regard to the statute and facts of each case.

In Ghana, for an income to be subject to tax, it must be shown that the income is derived from *employment, business, (trade, profession or vocation) or investment* as provided for under section 2.1 of Act 896. Section 133 of Act 896 defines business to include *a trade, profession, vocation or isolated arrangement with a business character and a past, present or prospective business but excludes employment.* Any activity therefore of a commercial nature of the past, present or future, for which a person earns an income other than from *employment or investment* is therefore a *business* and this includes *engaging in a trade, practicing a profession, and or a vocation* (emphasis added). To determine income from business under Ghanaian law therefore, regard must be had to what constitutes trade, profession, and vocation.

The ordinary dictionary defines '*trade'* as shop keeping, commerce, buying or selling (20th Edition of Chambers Dictionary). Under U.K tax law, *trade* has been defined to include *"every trade, manufacture, adventure or concern in the nature of a trade"* as was affirmed in *Griffiths v. Harrison Ltd. 1963 AC 1.* With individuals, trade includes a profession and vocation unlike artificial persons such as companies or corporations. It is however settled under English law that, whilst trade has no precise definition in law, for a tax payer to be held to be trading, certain features must exist. The tax payer firstly, must have adopted commercial methods and secondly the activity must have been repetitive, regular or continuously carried on. Thus whether or not a person is trading and subject to tax is therefore a question of law and fact. In *Ransom v. Higgs [1974] 3 All ER 964,* Lord Wilberforce intimated thus 'trade normally involves the exchange of goods or services for reward…there must be something which the trade offers by way of business. Trade moreover presupposes a customer.' Similarly, in *Pickford vs. Quirke [1927] 13 T.C. 251* Roland J. remarked that "it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic then he becomes a trader and the profits of the transaction are not taxable so long as they remain isolated but becomes taxable as items of trade as a whole". Nonetheless, under English law, for an isolated transaction (once a while transaction) to be subject to tax, it must be established that there is a profit motive and that the transaction is recurrent. Under Ghanaian law however trade does not include isolated transactions and profits made therefrom are not taxable generally unless it is of a business character, i.e. with a profit motive. As provided for under section 133.

As stated by Jesse M.R. in *Erichsen vs. Last [1881] 8 QBD 414 at 418*, there is no principle of law which lays down what the carrying on of trade is. It is a multiple of things which together make the carrying on of trade. These multiple of things, known as the *badges of trade,* are matters which the Courts take into consideration in determining whether or not a particular transaction is trade. In the subsequent paragraphs, we shall consider some of these matters.

In determining whether or not a transaction constitutes trade, the court considers the nature of the Commodity involved or the subject matter of the transaction. Commodities which are normally the subject of trading are always regarded as being bought for the purpose of trade. Thus property which yields to his owner neither income nor personal enjoyment merely by the nature of ownership is likely to be the subject matter of a trading transaction. The decision in *Rutledge v.*

IRC [1929]14 TC 490 provides some guidance. In that case Rutledge was a businessman in the film industry in UK. He travelled to Berlin and purchased 1million toilet rolls for 1000 pounds and resold it in UK at a profit of 11,000 pounds. He was held to have carried on trade and therefore the profit was taxable on the basis that the quantity shows an intention of resale.

In addition, the court would equally give consideration to length of ownership of the property. The period between the acquisition of the property and its sale can determine whether the property was acquired with an intention of reselling for trading purposes. If there is a long time lapse between the date of purchase and the date of resale it will negative the finding of a trade and vice versa. Thus a quick sale is more consistent with trading than something kept for the long term. This is however rebuttable as a special reason may account for the quick sale (*Wisdom v. Chamberlain [1969] 1 All ER 332*). As indicated above, repetitive transactions of the same subject matter is an indication of trade.

Moreover, whether or not the tax payer has made alterations to the property acquired in order to make it more marketable or whether he had set up an organization to sell the property is evidence of trade. In *Cape Brandy Syndicate v. IRC [1921]2KB 403* ABC engaged in wine trade formed a syndicate and purchased 3000 pounds worth casks of Cape Brandy and they blended with French Brandy, recasked and sold in lots over an 18-month period. They were held to be trading.

The circumstances surrounding the sale or the realization of the income may equally be a factor as to trade or not. Forced sales to raise money for emergencies raise a presumption that such transactions are not trade. Sales by executors in the course of winding up of a deceased estate or by liquidators and receivers of insolvent company and forced sales in the case of auctions to satisfy judgment debts are some of such examples.[21]

The court also takes into account the motive of the transaction. Where therefore a transaction is undertaken to realize a profit it amounts to trading. However, the absence of a profit motive is not indicative of a commercial transaction amounting to trade neither is the fact that an asset purchased with the ultimate intention of resale at a profit will itself lead to a finding of trade. Other elements must be present. Again, where money is borrowed to finance the transaction a strong but rebuttable presumption of trade is implied. Thus, to determine that a particular transaction constitutes trade one or more of the factors must be present.

Having dealt extensively with trade, we now turn attention to discuss what constitutes a profession and vocation. Profession was defined in *IRC v. Matse [1919] 1 K.B* per Scrutton L. J. as the 'idea of an occupation requiring either purely intellectual skill or manual skill controlled by the intellectual skill of the operator'. Thus, whether or not a person is carrying on a profession is a matter of law and fact. Additionally, there must be some element of continuity with the profession. The question that arises is, what standard of intellectual skill or manual skill or specific education should a person have to qualify as a professional? The authorities lean very heavily in favour of people with formal education. In *Hugh Cecil v. IRC [1919] 36 TLR 164* the issue was whether or not Mr. Cecil a photographer could be said to be carrying on a profession. It was considered by the IRC that Mr. Cecil was a photographer of great merit, individuality and artistic conception but because he had no formal education, it was held that he was a non-professional, that is, he was not carrying on a profession to be taxed as such.

[21] *Cohan's Executors v. IRC [1924] 131 LT 377*

Vocation has proven difficult to define. However, Lord Denman in *Partridge v. Mallandaine [1886] 18 QBD 276* defined vocation as '…the way in which a man passes his life''. According to the learned judge, "vocation is analogous to the word calling". Persons engaged in vocation such as pastors, doctors, nurses and others are expected to carry on their work with dedication without worrying about salaries but for tax purposes this is not so. Lord Denman held in this case that a man who accepted bets was carrying on an organized vocation. What then is income from business under Ghana Law? By section 5.1 of Act 896, the income of a person from a business for a year of assessment is the gains and profits of that person from that business for the year or part of the year. Section 5.2 requires that in ascertaining the gains and profits of that person or another person from a business for a year of assessment, the Commissioner must take into consideration all but not limited to the following: Service fees (consultation fees for our purpose), consideration received in respect of trading stock (for our purpose; sales from religious items such anointing oil, church paraphernalia and many others), a gift received by the person in respect of the business (for our purpose; money, other movable and immovable properties given as gifts to pastors), an amount derived that is effectively connected with the business and that would otherwise be included in calculating the income of the person from investment. In what follows hereafter, we shall establish whether or not there is sufficient ground to require churches, and even to some extent pastors to pay taxes. Could pastors be deemed to be carrying on a profession or a vocation which is subject to tax?

RESULTS

As has already been indicated in the methodology, data was produced from four Pentecostal/Charismatic churches and four orthodox churches. The Pentecostal/Charismatic churches were House of Prayer for All Nations (Cape Coast), International God's Way Church, Ebenezer Miracle Worship Centre, and Run for Your Life Ministry, all in Kumasi. The orthodox churches included the Roman Catholic Church, Takoradi, the Presbyterian Church, the Methodist Church, and the Anglican Church, all in Cape Coast. The research questions sought to gather some biographical data on respondents, particularly pastors; i.e. age, educated or not and whether called into the prophetic, healing or teaching ministry. However, for confidentiality purposes, we employ pseudonyms as a means to identify our respondents. In the main, we discovered that majority of the Pentecostal/charismatic pastors are less educated as compared to their counterparts in the orthodox churches who spend considerable time schooling. In all, there were three principal questions that formed the basis for conversation with our respondents. These were: *Is the church engaged in any form of business*? *What is the nature of the business*? *Does the Church pay tax on the income accruing therefrom*?

In response to the first question, the Pentecostal/charismatic churches denied engagement in any business venture. It was evident from the responses, however, that the core mandate of the church in bringing salvation to the lost was much alive in the orthodox churches than it is in the Pentecostal/charismatic churches. The Pentecostal/charismatic churches focused on what may be termed as the 'prosperity gospel' which is aimed at bringing hope to the hopeless in society. For these Pentecostal/charismatic churches, freedom from demonic attacks, fertility of humans, promotion at the work place is to be interpreted within the broad spectrum of salvation. Therefore, anybody who worked to prevent the attainment of a person's well-being is an enemy and must be dealt with. But Christians must take practical steps to frustrate the works of the enemy by any

means possible. One of the means to deal with the enemy is reliance on religious products such as anointing oil, anointed salt, water from the well (*aburamu nsuo*), among others.

At International God's Way Church, childless couples are given toffees popularly called 'baby toffees' to be eaten after which they meet the pastor to offer an offertory in his office. The couple is also required to buy anointing oil. There were other products such as handkerchiefs, stickers, plastic bottled water, bangles, and T-Shirts which were on sale for those who desired other miracles. There were also 'special sessions' where pastors/prophets consulted with clients (religious actors) at a fee. However, the religious items, according to the pastor/prophets informants, must be accepted in faith for them to be supernaturally efficacious − remedying the required or expected physical or spiritual problem. The oil, for instance, comes in smaller and bigger bottles with their respective price tags.[22]

At Ebenezer Miracle Worship Centre in Kumasi, we also discovered the *ɔpata ko agye ko abɔwobo* (literally, separator of fight and collector of fight) and *dadie bi twa dadie* (literally iron cuts iron) as two types of anointing oil which have gained prominence among religious actors. These types of oil are believed to have the power to enhance businesses, protect and resist attacks from malevolent spirits, provide favour, and render success to users.[23] Besides these religious items, one could also have *personal meeting* with the pastor/prophet at a fee. In a study conducted at Ebenezer Miracle Worship Centre, Kumasi, George Anderson Jnr[24] reported that an attractive offertory of about US $ 125 (GH ¢500) and more attracted two bigger bottles of anointing oil and two eggs and a personal meeting with Ebenezer Adarkwa Yiadom. However, a twenty (GH ¢20) special offertory only attracts two smaller bottles of anointing oil without any personal meeting with the pastor. This implies that the amount of money that is paid determines the kind of religious products/service one receives.

At House of Prayer for All Nations we discovered the 'back to sender' anointing oil with a special price tag. It is used for spiritual protection and dissolution of attacks from malevolent spirits. Many of the respondents alluded to these types of oil and the type of ailments and problems they address. Felicia, Herty and Esi for instance, indicated that their predicaments necessitated that they met the 'Prophet One' (founder of the church). After meeting with the prophet, they were told to buy *ɔpata ko agye ko abɔwobo* anointing oil at a cost of US $ 250 (GH ¢1000).[25] In House of Prayer for All Nations, Grace shared her testimony about how she had suffered from a perennial stomach ache. She visited the hospital and some churches in search for a cure. However, all her efforts proved futile. Upon meeting the head pastor of House of Prayer for All Nations, she was advised to buy the 'back to sender' anointing oil for US $5 (GH ¢20). According to her, she bought the oil and was given *akwankyerɛ* (guidance) on how to use it and at what time and day. Grace intimated that after she has meticulously followed the prophetic guidance, she has not ever felt the stomach ache again.[26] Besides these specifics, we discovered that the sale of anointing oil, anointed salt, hand-fans, necklaces, hand bangles, eggs, calendars, and stickers was common to all the Pentecostal/charismatic churches. For the orthodox churches, with the exception of anointing oil, anointed salt and eggs, the rest of the religious products listed above were equally

[22] Jonathan E. T. Kuwornu-Adjaottor, *Contemporary Prophetism in Kumasi,* 62–68.
[23] George Anderson Jnr., *Commercialization of Religion in Neo-Prophetic Pentecostal/Charismatic Churches in Ghana,* 5.
[24] George Anderson Jnr., *Commercialization of Religion in Neo-Prophetic Pentecostal/Charismatic Churches in Ghana,* 5.
[25] Interview with Felicia, Herty and Esi at, Ebenezer Miracle Worship Centre, Kumasi, November 19, 2017.
[26] Interview with Grace at, House of Prayer for All Nations, Cape Coast, May 25, 2016.

common to them. We noted that most of the religious items have been embossed with the pictures of pastors/prophets or General Overseer of the respective churches.

According to the pastors of these churches, the religious items were prepared under divine instructions and guidance, and consecrated through fervent prayers to address the spiritual and social needs of religious actors such as cure for HIV/AIDS, hepatitis, cancer, birth complications, spiritual marriage, bareness, blindness, broken marriages, rejection by family members who live in abroad, and challenges faced in trying to secure a visa.[27]

It would appear that an important tool in the hands of these pastors/prophets is the 'fear technique'. The pastors/prophets and elders emphasised the idea of constant spiritual battle by the enemy, (*ɔtamfo*) against humans. These spirits oppose human progress, success and wellbeing. Ronald Enroth contends that the religious worldview about the belief in malevolent spirits as the cause of death, misfortunes and other ills by Pentecostals induces 'fear' in their congregants or religious consumers. Plutarch buttresses Enroth's observation by taking a broader look at fear or anxiety factor within the context of superstition.[28] What is unique about Plutarch's analysis is that he does not apply the term "superstition" in isolation, but with two collateral indexes.[29] He shows that religious "doing" occurs as a continuum on a scale that runs from "atheism" on one end of the extreme, to "superstition" on the other end. On the pole of superstition, religious patronage is high as compared to the pole of atheism. The high patronage of religion is attributable to the factor of fear - the predominant tool in the regulation of religious behaviour. In Ghana, religious actors believe that they actually have physical or material problem that only a man of God can solve. Admittedly, such beliefs are also induced by Pentecostal Christianity which always teaches that evil spirits are the cause of people's problems. Assessing the socio-economic role of Pentecostal Christianity in Africa, Paul Gifford concurs that Pentecostal beliefs in spiritual warfare and prosperity do not only undermine social capital, but also diminish personal agency, and discount scientific rationality. For Gifford, this brand of Christianity is anti-development and that its beliefs and practices are 'dysfunctional'.[30]

One can infer from the data that even though the Pentecostal/charismatic churches deny involvement in any business venture, in practice religious actors pay for the religious products/services they obtain. This is in tandem with the religious market theory which states that any time an exchange process takes place, rewards in the form of religious products are given to rational actors while the latter also offer money to the religious organisation. Whichever, way one looks at the phenomenon, it appears that some income accrues to these churches in respect of the sale of these religious products. In what follows, we shall establish whether or not such income must be subject to tax in accordance with law.

[27] Interview with all the Head Pastors/Prophets, and Elders in all the four churches, May 25, 2016; July 23, 2017; November 19, 2017; December 26, 2017)

[28] Frank Cole Babbitt, (Ed. and Trans. in English). *Plutarch's Moralia*, vol. VI, London: Cambridge Mass, (1938).

[29] Simon Kofi Appiah*, Ethics of Religion in Health Care.*

[30] Paul Gifford, *Christianity, Development and Modernity in Africa*.

DISCUSSION

Having regard to section 3(3) of Act 896 and being guided by the decision in *Kubi v Dali* (supra), it is settled that the income earned through the sale of these religious products and services has its source in Ghana and must be subject to tax. We have already established that by law what constitutes income implies whether or not the receipt is for loss of a permanent asset (Capital) or in lieu of trading profits (Income). But what type of income is this? Is it income from business as in trade, profession or vocation? By offering to religious actors, items such as anointing oil, handkerchiefs, anointed salt, calendars, bottled water and others, could the church be said to be trading? Where do we place the church's act of maintaining a rubber plantation or operating a hostel facility, a business as in trade or merely a patriotic act aimed at contributing to the export earnings of the state or easing the burden on government to provide accommodation facilities at the tertiary level respectively?

Elsewhere in this paper and in reliance on section 2.1 of Act 896, the position of the law has been stated that in Ghana for an income to be subject to tax it must be shown that the income is derived from *employment, business, (trade, profession or vocation) or investment*. Business has been defined by section 133 of Act 896 to include *a trade, profession, vocation or isolated arrangement with a business character and a past, present or prospective business but excludes employment.* Any activity therefore of a commercial nature of the past, present of future, for which a person earns an income other than from employment or investment is therefore a business and this includes engaging in *a trade, practicing a profession, and or a vocation* (emphasis added). Trade has been defined as shop keeping, commerce, buying or selling (20th Edition of Chambers Dictionary). In *Ransom v. Higgs* (supra) Lord Wilberforce intimated thus *'trade normally involves the exchange of goods or services for reward…there must be something which the trade offers by way of business. Trade moreover presupposes a customer.'* In relating this to the data produced, it is safe to conclude that the act of buying anointing oil or salt and selling same to religious actors at a price above the purchasing price, constitutes trade because there is a profit motive. We discovered that most of the churches buy, for instance, anointing oil from the ordinary market and re-package them into different containers with embossed pictures of the pastors/prophets. As was held in *Cape Brandy Syndicate v. IRC [1921]2KB 403* ABC engaged in wine trade, formed a syndicate and purchased 3000 pounds worth casks of Cape Brandy which they blended with French Brandy, recasked and sold in lots over an 18-month period. The court held that they were trading.

The point has also been made that for a tax payer to be held to be trading, certain features must exist. The tax payer firstly, must have adopted commercial methods and secondly the activity must have been repetitive, regular or continuously carried on. The adopted commercial method in these churches particularly the Pentecostal/charismatic churches, is the fear factor which is induced in religious actors to the effect that a certain personality is responsible for their misfortunes and further getting the vulnerable religious actors to come to the point of accepting that the salvation could only be found in an ordinary oil prayed over. Moreover, these activities are repetitive which satisfies the second feature which must exist for an activity to be held to be trade. We discovered that, to sustain the transaction, many of the churches employed the services of artisans who prepared the products for sale.

We maintain also that for individuals, trade includes a profession or vocation. With guidance from Scrutton L. J. in *IRC v Matse* (supra), a profession is an occupation which requires intellectual or

manual skill controlled by intellectual skill of the operator. In effect the operator must have formal education. As indicated earlier, it was discovered that majority of the Pentecostal/charismatic pastors are less educated as compared to their counterparts in the orthodox churches who have received considerable training as ministers of the Gospel. Therefore, having regard to Lord Scrutton's guidance in *IRC v Matse*, (supra) one may conclude that only pastors from the orthodox churches could be said to be carrying on a profession. Therefore, whatever that is earned by way of carrying on the profession of a reverend minister must be subject to tax because it is income. Nonetheless, with the definition of vocation, it does not appear that Pentecostal/charismatic pastors are completely left off the tax hook. In *Partridge v. Mallandaine* (supra) Lord Denman defined vocation as being "analogous to the word calling". He held that persons engaged in vocation such as pastors, doctors, nurses and others are expected to carry on their work with dedication without worrying about salaries but for tax purposes this is not so. Many of the pastors/prophets we interviewed claimed that they felt called by God to establish a church. In our view, the absence of formal education in the case of Pentecostal/charismatic pastors places the transaction properly under vocation. In effect, whatever income that is earned thereto must be subject to tax.

Additionally, section 5.2 requires that *in ascertaining the gains and profits of that person or another person from a business for a year of assessment,* the Commissioner must take into consideration the service fees (consultation fees for our purpose), consideration received in respect of trading stock (for our purpose; sales from religious items such anointing oil, church paraphernalia and others), a gift received by the person in respect of the business (for our purpose; money, other movable and immovable properties given as gifts to pastors), an amount derived that is effectively connected with the business and that would otherwise be included in calculating the income of the person from investment. These Pentecostal/charismatic pastors take consultation fees in addition to income realized from the sale of religious products. Some pastors also confirmed that there have been occasions where pastors have received gifts in the form of chattels and immovable properties. We are of the considered opinion that if any of these gifts is sold and some profits realized, the income must be subject to tax.

CONCLUSION

In the main, this paper has argued that there is legal basis for requiring the church to pay tax. Thus to the extent that the church is engaged in buying and selling of religious products, the income accruing thereto must be subject to tax. Anointing oil, anointed salt, necklaces, bangles and calendars which are offered to religious actors in exchange for money is, in the eye of the law, trade and the Commissioner of Income Tax has locus to demand tax from the church. Similarly, the orthodox churches which have established business such as maintaining rubber plantation and hostel facilities must do the needful; that is if they are not already doing that. The paper also considers it appropriate to require pastors/prophets to pay tax on whatever their profession or vocation earns for them as income either through gifts or service fees. Asking the church to pay tax on income is fit and proper. After all Christ, a model for the church, in responding to the question whether it was right to pay tax to Caesar, instructed in Mark 12:17 as follows: G*ive to Caesar what belongs to Caesar*, *and give to God what belongs to God."*

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A COMPARATIVE STUDY OF THE CONTROL OF EXCLUSION CLAUSES IN CONSUMER CONTRACTS: LESSONS FOR GHANA

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ABSTRACT

A lot of concerns have been raised over the use of exclusion clauses, especially in respect of transactions involving parties with unequal bargaining power since they are usually not voluntarily subscribed to by the weaker party, but rather imposed on him/her. The problem is compounded by the fact that everyone is a consumer one way or the other, and therefore at risk of the exploitative effects of exclusion clauses. The paper adopts a comparative research methodology in an attempt to evaluate both the judicial and legislative controls of exclusion clauses in consumer contracts under Ghanaian law, as well as those of the United Kingdom (UK) and the Republic of South Africa. The paper reveals that the legislative and judicial controls of exclusion clauses under Ghanaian law are not robust, thereby creating the need for certain reforms to be introduced under Ghanaian law to effectively protect the consumer. The paper concludes by proffering recommendations for legislative interventions which can be introduced to better protect the Ghanaian consumer.

Keywords: Exclusion Clauses, Consumer Protection, Consumer Contracts

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INTRODUCTION

The function of an exclusion or exemption clause as noted by Yates and Hawkins is to delimit the extent of the obligations undertaken by the *proferens i*n the contract.[2] Even though exclusion clauses are indispensable in commercial contracts, it also appears that they cannot be allowed to operate unfettered in every situation.[3] The use of exclusion clauses in contracts has therefore been met with protest over the years, especially when it has to do with transactions involving people of unequal bargaining power.

The hostile attitude of the courts towards the use of exclusion clauses is based on the premise that they are not usually agreed upon freely by one party but are usually one-sided and are foisted on the other party, who has no option but to accept the terms, however detrimental they may be to his/her interest. This concern was expressed by Lord Reid in *Suisse Atlantique Societe d'Armarment Maritime SA* v*. NV Rotterdemsche Kolen Centrale*[4] when he said:

> Exemption clauses differ greatly in many respects. Probably the most objectionable are found in complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining…

The above concern expressed by the court in *Suisse Atlantique,* brings to the fore the need for a critical evaluation of the control of exclusion clauses which are commonly used in consumer contracts. This concern is further heightened by the situation that everyone is a consumer one way or the other, and thus susceptible to the exploitative consequences associated with the usage of exclusion clauses in consumer contracts.

The thesis of this paper is that even though certain measures have been put in place under Ghanaian law to control the use of exclusion clauses to protect the consumer, compared with what pertains in the UK and the Republic of South Africa, the control measures under Ghanaian law are not robust to effectively protect the Ghanaian consumer.

Over the years, and even more recently, the research and publication materials on the research subject area have focused on the extent to which the law and practice of consumer protection in Ghana is effective, [5] a general assessment of how effective the consumer protection statutes in Ghana are,[6] and a discussion of the common law principles in respect of exclusion clauses.[7] For instance, Ansa-Asare's article[8] examines the Price Control Decree of Ghana, 1974 (NRCD 305), among others, as well as some judicial decisions of the Ghanaian courts germane to consumer

[2] D Yates & AJ Hawkins, *Standard Business Contracts: Exclusion and Related Devices*, (London: Sweet & Maxwell, 1986).
[3] Krish Maharaj, "Limits on the Operation of Exclusion Clauses", (2012) 49(3) *Alberta Law Review,* 635-654.
[4] [1966] 2 WLR 944, 965 (hereinafter referred to as *Suisse Atlantique*) (emphasis added)
[5] K Ansa-Asare, "The Case for a Comprehensive Framework of Consumer Protection in Ghana", (1981-82) 13& 14 RGL 73.
[6] C Dowuona-Hammond, "Protecting the Purchaser of Goods Under Ghanaian Law", (1993-95) RGL 105.
[7] C Dowuona-Hammond, *The Law of Contract in Ghana*, Frontiers Printing and Publishing Company (2011).
[8] See note 5 above.

protection generally in Ghana to ascertain how effective they are. The author, concludes that the consumer protection regime in Ghana is ineffective and thus makes a case for legislative reforms in Ghana to eliminate the anomalies and inconsistencies in the law. On the part of Dowuona-Hammond, her work[9] assesses how effective the statutes in Ghana, such as the Sale of Goods Act, 1962 (Act 137), and Hire Purchase Act, 1974 (NRCD 292), among others, have been in the protection of consumers in Ghana, and whether there are some new areas which require regulation, and if so, what form of regulation is required. The author concludes that the consumer protection regime is not effective and therefore recommends some legislative interventions to deal with the situation. Dowuona-Hammond, again, in another work, [10] discusses some of the principles associated with the control exclusion clauses under the common law. However, none of the aforementioned previous studies on the research subject area entails an in-depth comparative study of the legislative and judicial controls of exclusion clauses under Ghanaian law with other countries with effective consumer protection legal regimes on the research subject matter in a bid to acquire a better understanding of the legal regime in Ghana, as well as to learn and obtain knowledge of the laws of those countries on the control of exclusion clauses. This paper, therefore, aims at bridging the gap in the research subject area, by adopting a comparative research methodology in a bid to comprehensively evaluate both the legislative and judicial controls of exclusion clauses in consumer contracts under Ghanaian law with other countries with strong consumer protection legal regimes in order to further deepen the understanding of the legal regime in Ghana and to also learn and gain knowledge of the laws of those other countries on the control of exclusion clauses.

The paper adopts the comparative research methodology in an attempt to evaluate the judicial and legislative controls of exclusion clauses under Ghanaian law, as well as those of the UK and the Republic of South Africa. The comparative research methodology the paper adopts is a thriving area in the study of the law which has attracted, in the last decades, a growing interest in legal scholarship and legal education.[11] This research methodology is used as an instrument for acquiring a better understanding of one's legal system and also learning and acquiring knowledge of the law elsewhere.[12] Despite the aforementioned benefits associated with comparative research methodology, some of the limitations or constraints associated with that methodology are that it is more difficult, and more time-consuming than research that is not comparative in nature.[13] The comparative research methodology is employed because the paper aims to identify the similarities and differences between the control of exclusion clauses under Ghanaian law and those of the UK and the Republic of South Africa with the view to identifying some possible legal gaps under Ghanaian law, as well as drawing on some useful lessons which can provide the basis for legal reforms under Ghanaian law.

The UK has been chosen as the basis for the comparative study because of its strong history of protecting consumer rights and its reliance on laws that protected purchasers of goods and services, as well as outlawing unfair contract terms even before the European Union acted in that

[9] See note 6 above.
[10] See note 7 above.
[11] E Orucu, *Developing Comparative Law* in E Orucu & D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007), 43
[12] ibid
[13] Seyed Mojtaba Miri & Zohreh Dehdashti Shahrohk , "A Short Introduction to Comparative Research" (May 2019). Available at file:///C:/Users/User/Downloads/ComparativeMethod.pdf (accessed on May 13, 2022)

area.[14] The Republic of South Africa has also been chosen for the comparative study by virtue of the various provisions in its Consumer Protection Act of 2008 which make significant inroads into the common-law positions on the control of exclusion clauses to effectively protect the consumer.[15]

The paper is structured as follows. The second section examines the judicial and legislative controls of exclusion clauses in contracts under Ghanaian law. The third and fourth sections examine the judicial and legislative controls of exclusion clauses in contracts under the laws of the UK and the Republic of South Africa, respectively. The fifth section focuses on a comparative study of the use of exclusion clauses under Ghanaian law with those of the UK and the Republic of South Africa. The paper then concludes by proffering useful recommendations on measures that can be put in place under Ghanaian law to better protect the consumer.

CONTROL OF EXCLUSION CLAUSES IN CONTRACTS UNDER GHANAIAN LAW

In Ghana, the mechanisms available in the control of exclusion clauses in consumer contracts are mostly limited to those inherited from the common law as well as some protection offered by some statutes.[16] Thus under Ghanaian law, just like other common law jurisdictions, for the courts to enforce an exclusion clause, the party seeking to rely on the exclusion clause must prove that the said exclusion clause has been properly incorporated into the contract.[17] Also, an interpretation of the exclusion clause must clearly establish that it covers the breach or loss which has transpired.[18]

In addition to the above-stated common law principles applied by the Ghanaian courts, a party seeking to rely on a particular exclusion clause must also establish that the said exclusion clause, depending on the nature of the transaction, is not contrary to specified legislation, such as the Sale of Goods Act, 1962 (Act 137), Contracts Act of Ghana, 1960, (Act 25) and the Hire Purchase Act, 1974 (NRCD 292). The focus of the paper on the control of exclusion clauses under Ghanaian law will therefore be on the judicial control of exclusion clauses which is heavily reliant on the common law, as well as the control of exclusion clauses under the aforementioned statutes.

A. Judicial Control of Exclusion Clauses in Ghana

As has already been stated, the judicial control of exclusion clauses under Ghanaian law is largely based on the common law. The courts therefore generally adopt a hostile attitude towards their usage, especially in contracts between parties of unequal bargaining power, and strictly apply common law principles in this regard as follows:

[14]EU (Withdrawal Bill) Factsheet 9: Consumer Protection, Department for Exiting the European Union. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714380/9.pdf (accessed on February 4, 2022)

[15] W Jacobs, PN Stoop & R Van Niekerk," Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: a Critical Overview and Analysis," (2010) PER Potchefstroom vol.13 n.3 Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812010000300009 (accessed on February 4, 2022)

[16] Dowuona-Hammond, n 6 above

[17] *Parker* v. *Southern Eastern Railway* [1877] 2 CPD 416

[18] *Canada Steamship Lines* v. *The King* [1952] AC 192 (Hereinafter referred to as *Canada Steamship*)

1. Proper Incorporation of Unsigned Exclusion Clauses in Contracts

The common law rules on this principle vary, depending on whether the said exclusion clause has been signed or not.

(i) Unsigned Exclusion Clause

For an unsigned exclusion clause to be considered to have been properly incorporated into a contract, the party seeking to rely on it must establish that he took all reasonable measures to bring the said exclusion clause to the attention of the consumer, regardless of whether the said consumer read the terms of the contract.[19]

(ii) What the Courts Consider as Constituting Reasonable Notice

Where the document containing the exclusion clause is defaced or obliterated, the courts are likely to conclude that reasonable steps have not been taken to bring it to the attention of the consumer.[20] Also, where the exclusion clause in question has far-reaching consequences, a party seeking to rely on it must prove that he took special measures to bring that to the attention of the customer. For example, in *Thornton v Shoe Lane Parking Ltd,*[21] an exclusion clause displayed inside the garage of a car park which purported to exclude the defendant from liability for any damages caused to vehicles parked at that place, as well as any personal injuries partly sustained due to the negligence of the defendants was not enforced by the court. The court held that owing to the exceptionally far-reaching and unusual implications of the said exclusion clause, the defendants should have taken extra measures, by printing it in red ink to make it very legible to the customer and that displaying it in the car garage was not sufficient under the circumstance.

Furthermore, for an exclusion clause to be held to be enforceable, it has to be established that it was brought to the notice of the customer before the contract was entered into and not after the contract has been made. [22]There are however instances where an exclusion clause would be enforced, even when there has not been any actual notice of it given to the other party. This applies only where there has been a consistent course of dealings between the parties concerned in respect of the said exclusion clause. In such a situation, the other party would be deemed to have constructive notice of the said exclusion clause.[23]

(iii) Signed Documents Containing Exclusion Clauses

Where the document containing the exclusion clause has been signed by the customer, in the absence of fraud or misrepresentation, the customer of full age and understanding is bound by it, regardless of whether he read it or not. Thus, in *Inusah v. DHL Worldwide Express,*[24] a plaintiff who read and signed a receipt containing an exclusion clause limiting the liability of the defendant to $ 100, was held to be bound by it even though the loss he incurred was far more than that amount. On the contrary, the court will not enforce an exclusion clause, even when it has been

[19] *Parker v. South Eastern Railway*, n 17 above
[20] *Richardson, Spence & Co v. Rowntree* [1894] AC 217.
[21] [1971] 2 QB 163.
[22] *Olley v. Marlborough Court Ltd* [1949] 1 KB 532.
[23] *McCutcheon v. David Macbrayne Ltd* [1964] 1 WLR 125.
[24] [1992] 1 GLR 267.

signed by a customer, where the effect of the exclusion clause was misrepresented by the defendant to the customer.[25]

B. Construction of Exclusion Clauses by the Courts

The courts have over the years adopted strict rules in respect of the interpretation of exclusion clauses in contracts to protect weaker parties. The courts have thus devised certain principles of interpretation of exclusion clauses in this regard as follows:

1. Contra Proferentum Rule

This rule of construction posits that where there is an ambiguity in the wording of an exclusion clause, it will be construed by the courts against the party seeking to rely on it.[26] The party seeking to rely on the exclusion clause must establish that the words used when construed in their ordinary sense, adequately cover the loss or event which has transpired.

2. Exclusion of Liability for Negligence

In situations where the exclusion clause is intended to absolve a party from liability for a negligent act, a restrictive approach is adopted by the court in the construction of such clauses. In this sense, the courts will only enforce the said exclusion clause, where its words clearly cover the negligent act. Thus, as a matter of general rule, if the wording of the exclusion clause is not clear in this respect, it will not be interpreted to cover the negligent act which has arisen. The tests to be considered by the courts in assessing whether a clause excludes liability were laid down in *Canada Steamship Lines v. The King.*[27] This may arise in two situations. Firstly, where the clause contains language, which expressly exempts the party relying on the clause from the consequences of negligence, then an effect ought to be given to it. For example, if the word 'negligence' or its synonym is used in the clause as illustrated in *EE Caledonia Ltd v. Orbit Valve Co. plc*[28] where the court held that the clause excluding 'any claim, demand, cause of action, loss, expense or liability from the death of an employee' did not expressly exclude negligence. Secondly, Where the clause does not expressly exclude liability for negligence but excludes damages which would be negligent damage, then effect ought to be given to it, as was illustrated in *Alderslade v. Hendon Laundry Ltd*[29] where an exclusion clause that restricted recovery for lost items to twenty times the laundering charge of the items was given effect to by the court because it covered negligent liability(breach of duty of care for the items).

3. Doctrine of Fundamental Breach of Contract and its Subsequent Modification

This doctrine is premised on the principle that a party to a contract could only be entitled to rely on an exclusion clause, where he is fulfilling his part of the bargain, and not when he has fundamentally breached a term of the contract.[30] The application of the doctrine as a substantive

[25] *Curtis v. Chemical Cleaning and Dyeing Co.* [1951]1 KB *805.*
[26] *Houghton v. Trafalgar Insurance Co. Ltd* [1954] 1 QB 247.
[27] *Canada Steamship*, n 18 above, 208.
[28] [1994] 1 WLR 1515
[29] [1945] 1 KB 189
[30] *Nichol v. Godts* [1854] 10 Exch. 191. Other relevant cases on this point include, *Karsales (Harrow) Ltd v. Wallis* [1956] 2 All ER 866 and *Alexander v. Railway Executive* [1951] 2 K.B 882.

rule however came to an end in *Photo Production v. Securicor Transport,*[31] where the House of Lords held that the doctrine was no longer applicable as substantive law and that in all cases, the issue as to whether and to what extent an exclusion clause under a contract was applicable was something which ought to be applied based on the interpretation of the contract as a whole and that where the parties involved have equal bargaining power, then they are at liberty to allocate risks as they deem fit, based on agreed terms. The doctrine is now replaced by the test of reasonableness laid down in *George Mitchell (Chesterhall) Ltd v. Finney.*[32]

C. Control of Exclusion Clauses under Specific Legislation in Ghana

The discussion under this section will focus on statutes such as the Contracts Act of Ghana, 1960, (Act 25), the Sale of Goods Act, 1962 (Act 137), and the Hire Purchase Act, 1974 (NRCD 292) which are littered with some provisions on exclusion clauses.

1. Regulation of Exclusion Clauses under Act 25

Section 5 of Act 25 is the relevant provision on the control of exclusion clauses. Section 5(1) of Act 25 makes it possible for a person to rely on or enforce a contract to which he/she is not a party provided such a contract is intended to confer some benefits on that person.[33] Section 5(2)(b) is however quick to state that the provision in section 5(1) does not apply to: 'A provision in a contract purporting to exclude or restrict any liability of a person who is not a party thereto.' The legal implication of section 5(2)(b) of Act 25 is that a person who is not a party to a contract that contains an exclusion clause, but for whose benefit the said exclusion clause has been incorporated in the contract, cannot rely on the said exclusion clause for protection. Therefore, based on section 5(2)(b) of Act 25, a consumer, in the event of a breach can sue the servants or employees who are not parties to the contract for negligence even if there is a clause in the contract expressly purporting to exclude liability of the supplier's employees and servants.[34]

2. Regulation of Exclusion Clauses under Act 137

The sale of goods transactions in Ghana is governed by Act 137. As a way of restricting the use of exclusion clauses, Act 137 has created several implied duties which must be read into every contract of sale of goods, thereby forbidding a seller in specific cases from inserting an exclusion clause in a contract of that nature, in a bid to evade such implied duties. One of such provisions is section 13. Section 13 has been described to be one of the most innovative legislative achievements in sales law in Ghana.[35] Based on sections 13(1) (a) and (b) of Act 137 there is an implied duty on the part of every seller of goods to ensure that goods supplied are free from defects unknown to the buyer before or at the time when the contract is made; as well as a duty to ensure that goods supplied are reasonably fit for the purpose for which they are required. Because these duties are implied, a breach of any of them amounts to a breach of a fundamental

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[31] [1980] A.C 827 (hereinafter referred to as *Photo Production).*

[32] [1983] 2 A.C 803. The test considers factors, such as whether the contract is a commercial one between parties of equal or unequal bargaining power, such as between an individual and a company; whether there was an opportunity to insure; the level of remuneration received for service; any attempt to allocate risks between the parties and the efficiency of the arrangements.

[33] S.K Date-Bah, "The Enforcement of Third Party Rights in Ghana" (1971) 18 UGLJ 76.

[34] Dowuona-Hammond, n6 above.

[35] Dei-Annang, *"*Caveat Venditor Ghaniensis*,"* (1967) 90 *University of Ghana Law Journal*,100-111.

obligation, which gives the buyer the right to reject the goods and recover or refuse to pay the price.[36]

It is however worthy of note that the limitation offered under section 13(1) against the use of exclusion clauses, is not absolute. In other words, there are certain situations where no such implied conditions would be read into a contract for the sale of goods. For instance, where the buyer has examined the goods in respect of defects that ought to have been detected by such examination;[37] and in the case of a sale based on a sample, in respect of defects that could have been detected by a reasonable examination of the sample,[38] and where the goods are not sold by the seller in the ordinary course of his business in respect of defects of which such a seller was not and could not reasonably have been aware.[39]

Under section 13(2) of Act 137, a seller of goods of a particular description can exclude liability for the poor quality of goods supplied provided he proves that before the contract was made, the exclusion clause was brought to the attention of the buyer and its effects made clear to him. This provision, it must be said, undermines the protection given to the consumer concerning the quality of the goods, since it provides the leeway for the seller to evade liability if he proves that he drew the buyer's attention to the said exclusion clause. Also, based on section 13(2), the limitation on the use of exclusion clauses to exclude liability for the poor quality of goods is not applicable in purely private transactions, where the seller does not sell that type of goods in the 'ordinary course of his business'.

The meaning of the phrase 'ordinary course of his business' as used in Act 137 was explained by Ghana's Supreme Court in *Andreas Bschor v. Birim Wood Complex.* [40]In that case, the court held that the purpose of the statutory condition of quality and fitness is to protect buyers who rely on the skills and knowledge of business sellers. The Court thus construed section 13(1) (b) of Act 137 and gave effect to its purpose by including any sale where there is an element of regularity showing that the seller has been selling goods of that description as part of his business, whether it is his main business or not; or where the seller accepted an order from the buyer to supply goods of that description and that where the goods were sold on 'where is' basis the provision is not applicable.

The decision in *Andreas Bschor* demonstrates that apart from the element of regularity which must be established to prove that the seller has been selling goods of that description, section 13(1) (b) of Act 137 could also be invoked even in situations where even though there is no element of regularity, the seller accepted to supply the buyer goods of a specific description. However, based on the Court's decision that the purpose of the statutory condition of quality and fitness is to rely on the skills and knowledge of business sellers, it appears the protection will therefore not be afforded under that section to a buyer if because of his occupation, skill, or expertise he is, in fact, more knowledgeable then the seller concerning the nature or efficacy of the goods supplied to him. This is so because, with such a level of expertise on the part of such

[36] Section 49(1) (b).
[37] Section 13(1)(a)(i).
[38] Section 13(1) (a) (ii).
[39] Section 13(1)(a) (iii).
[40] [2016] 96 GMJ 1 SC (hereinafter referred to as *Andreas Bschor*).

a buyer, he will have a herculean task in demonstrating that he relied on the expertise of the buyer.

3. Regulation of Exclusion Clauses under the Hire Purchase Act, 1974, NRCD 292

Various interventions have also been made under NRCD 292 to regulate exclusion clauses. For example, the Act makes provision for a list of conditions that are prohibited from being included in any hire purchase agreement, failing which the agreement will be deemed to be void. For instance, the owner or seller or anyone authorised by him is forbidden from going into the private property of the buyer to take possession of goods that have been let under a hire purchase agreement or is relieved from liability for such entry or any term in the hire purchase agreement which purports to relieve the owner or seller from liability for the acts or defaults of any person acting on his behalf in respect of the hire purchase agreement.[41] These conditions are prohibited because they are considered to be unconscionable to the buyer.

NRCD 292 also contains several provisions that limit the use of exclusion clauses by implying in every hire purchase agreement conditions in respect of the quality of the goods, fitness, and correspondence with the description or sample by which they are sold.[42] To prevent owners or sellers from avoiding these implied conditions, section 14 of the Act regulates the use of exclusion clauses to avoid the statutory implied terms by stating that any exclusion clause in a contract that purports to exclude liability for breach of these implied terms as to merchantable quality shall not be effective unless it is established that the said exclusion clause was brought to the attention of the buyer or hirer and its effect made clear to him, and where the exclusion or modification is in respect of a defect, it must be brought to the notice of the hirer or buyer.

CONTROL OF EXCLUSION CLAUSES UNDER UK LAW

For an exclusion clause to be binding and operable upon the parties, under United Kingdom (UK) law just like in other common law jurisdictions, the clause must be incorporated into the contract as a term,[43] and must also pass the test of construction.[44] In addition, the clause must not be rendered unenforceable by the statutory provisions in the Unfair Contract Terms Act, 1977 and the Consumer Rights Act, 2015. The focus of the paper at this stage will therefore be on the evaluation of both the judicial and legislative control of exclusion clauses under UK law, as well as the above-stated statutes to ascertain the level of protection afforded the consumer under UK law.

A. Judicial Control of Exclusion Clauses under UK law

Because the judicial control of exclusion clauses under the law of the UK is also largely based on the common law, the courts also tend to develop a hostile attitude towards exclusion clauses, especially in respect of contracts made up of parties of unequal bargaining power, and have formulated several principles on the control of exclusion clauses as follows:

[41] Section 4.
[42] Sections 13-15.
[43] *Parker* v. *Southern Eastern Railway*, n 17 above.
[44] *Canada Steamship*, n 18 above

1. Restrictive Interpretation of Exclusion Clauses

(i) Contra Proferentum Rule

The UK courts also apply the contra proferentum rule which allows them to construe an ambiguous exclusion clause against the person seeking to rely on it.[45]

(ii) The Exclusion clause when construed must cover the loss or event which has occurred.

Based on this principle, the courts will only enforce an exclusion clause where based on an ordinary construction of the clause it applies to the loss or event which has transpired and will not extend it to include the loss or breach which has happened.[46]

(iii) Reluctance of the Courts to Enforce Exclusion Clauses Which Exclude Liabilities other than Contractual Matters.

The tests to be considered by the courts in assessing whether a clause excludes liability were laid down in *Canada Steamship.*[47]

(iv) Exclusions Clauses and the Doctrine of Fundamental Breach of Contract and its Modification

Just like other common law jurisdictions, this doctrine was also one of the devices adopted by the courts to control the use of exclusion clauses, until it ceased to be applied as a substantive rule following the decision in *Photo Production Ltd* v. *Securicor Transport Ltd.*[48] The doctrine is now replaced by the test of reasonableness laid down in *George Mitchell (Chesterhall) Ltd* v. *Finney.*[49]

a. The Exclusion Clause Must be Properly Incorporated

Where the exclusion clause is included in a contract that has been signed, this will be held as incorporated into the contract even where the party who signed the contract did not peruse the contract.[50] In the case, where the exclusion clause is in a contract not signed, the party seeking to rely on it must prove that he took the necessary steps to bring the said exclusion clause to the attention of the other party.[51] Also, if there has been consistency in dealings between two parties over a certain amount of time, the normal terms of the contract will be considered to be incorporated despite no actual express incorporation, if there are circumstances establishing that the other party ought to have known that the contract was based on those terms and conditions.[52] Furthermore, an exclusion clause can also be held to be incorporated into a contract, where the parties involved both belong to a particular trade, and it can be deduced that both parties are familiar with the fact that the said exclusion clause is generally applicable to the contract entered into between them.[53]

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[45] *Houghton v. Trafalgar Insurance Co. Ltd*, n 25, above.
[46] *Andrews Bros (Bournemouth) Ltd v. Singer & Co. Ltd* (1933) All ER 479
[47] *Canada Steamship*, n 18, above.
[48] *Photo Production,* n 31, above.
[49] *George Mitchell (Chesterhall) Ltd v. Finney*, n 32, above
[50] *L'Estrange v. E. Gracoub Ltd* [1934] 2 KB 394
[51] *Parker v. South Eastern Railway*, n 17, above.
[52] *Mccutcheon v. David Macbrayne Ltd,* n 23, above.
[53] *British Crane Hire Corporation v. Ipswich Plant Hire Ltd* [1975] QB 303

b. The Clause Must Not Be Rendered Unenforceable by Statutory Provisions

Another requirement under UK law for the enforcement of exclusion clauses is that it must follow certain statutes. The statutes which are most relevant in this regard, and which will form the basis of evaluation in this section of the paper are as follows:

1. The Unfair Contract Terms Act, 1977
2. The Consumer Rights Act 2015

(B) Control of Exclusion Clauses Under the Unfair Contract Terms Act 1977 (UCTA)

The UCTA prevents the exclusion of liability in certain circumstances. It applies both to exclusions of contractual and tortious liability in contracts in respect of matters done or to be done in the context of business liability.

1. Relevant Sections of UCTA on Exclusion Clauses

(i) Liability for Negligence Under UCTA

Negligence in the context of the Act refers to the obligation to take reasonable care or exercise reasonable skill in relation to the express or implied terms of a contract.[54] Section 2(1) stipulates that any exclusion clause which entirely excludes or limits liability for death or personal injury arising from negligence will be unenforceable. Section 2(2) also states that clauses which provide exclusion of limitation for liability for any other loss or damage arising from negligence may be enforceable if the term in question meets the test of reasonableness requirement.

(ii) Contractual liability and limitations under UCTA

Section 6 of UCTA applies to provisions that attempt to exempt liability for terms that are implied by statute into contracts for the sale or supply of goods. Examples here include the implied terms as to the satisfactory quality, fitness for purpose, and correspondence with samples;[55] implied terms that the seller has title to the goods and the right to sell them.[56] The implied terms as to Section 6(1) (a) of UCTA prevents exclusion of this term, regardless of whether the seller is dealing as a consumer or during business. It is however instructive to note that whether these terms can be excluded under a contract depends on whether the contract is made in the course of business or as a consumer. If one party is dealing as a consumer, liability for these breaches may not be excluded.[57] Where however the party seeking to enforce liability is not a consumer, the exclusion clause may be valid only if it is reasonable.[58]

(iii) The Reasonableness Test Under UCTA

The reasonableness test which forms the basis of most of the provisions can be found under section 11 of UCTA, which defines the test, as to whether the term is a fair and reasonable one to have included in the contract, considering all circumstances known (and ought to be known) at the time of contracting. Thus, any information that was discovered following the making of the

[54] Section 1(1) of UCTA
[55] Sections 13-15 of the Sale of Goods Act of the UK, 1979.
[56] Section 12 of the Sale of Goods Act of the UK, 1979.
[57] Section 6(2)(a).
[58] Section 6(3).

contract would be irrelevant. Section 11(5) states that the burden of proving this reasonableness relies on the party seeking to rely on the exclusion clause. The factors to assess reasonableness are factors identified by legislation and factors identified by courts as follows:

(iv) Factors to Assess Reasonableness identified by legislation.

Section 11(2) points to Schedule 2 of UCTA for some guidelines which must be considered in assessing reasonableness:

- Bargaining positions of the parties.
- Was agreement to the exemption clause because of inducement?
- Could any condition for the enforcement of liability be complied with?
- Were the goods made specifically at the request of the buyer?
- Was the contracting party aware of the existence and extent of the term, irrespective of any rules of incorporation such as notice or signature?

(v) The Effect of Finding Unreasonableness in The Clause

Where it is established that the exclusion clause is unreasonable, the clause in question will not be enforceable.[59] However, where the unreasonable term is part of a composite term, which includes different types of exclusion clauses, it has been held that the courts, in such a situation should separate the unreasonable parts of the composite term and treat the remaining reasonable terms as valid.[60]

(C) Control of Exclusion Clauses under the Consumer Rights Act 2015 (CRA)

The UK CRA is a consolidation of various statutes such as the Sale of Goods Act 1979, Unfair Contract Terms Act 1977, Unfair Terms in Consumer Contracts Regulations 1999, and the Supply of Goods and Services Act 1982.[61] The consolidation of these various laws, without a doubt, provides the basis for better reference and brings about consistency to the laws on consumer protection in the UK which were hitherto littered in various legislations. The Act applies to contracts between a consumer and a trader. [62]The CRA defines a consumer notice as a notice that relates to rights or obligations between a trader and a consumer or where the trader is seeking to restrict liability.[63] This definition of consumer notice, therefore, deals with exclusion clauses.

1. Fairness of an Exclusion Clause

Under the Act, an exclusion clause is subjected to the 'fairness test' to ascertain whether it is fair to the consumer. A breach of the 'fairness test' will render the said clause unenforceable.[64] The 'fairness test' which generally applies to all consumer notices (including exclusion clauses) not specifically mentioned in the UK CRA, operates alongside other specific exclusion clauses which

[59] *Phoenix Interior Design Limited v. Henley Homes plc* [2021] EWHC 15.
[60] *J Murphy & Sons Ltd v. Johnston Precast Ltd* [2008] EWHC 3024 TCC.
[61] The Consumer Rights Act: Consolidating UK Consumer Protection Laws. Available at https://www.out-law.com/en/topics/commercial/consumer-protection/the-consumer-rights-act-consolidating-uk-consumer-protection-laws/ (accessed on March 23, 2021)
[62] Section 1(1)
[63] Section 61(4).
[64] Section 62(2).

are prohibited under the UK CRA.[65] Section 62(4) of the CRA defines a term as unfair if it 'creates a significant imbalance in the rights of the parties under the contract to the detriment of the consumer'. To evaluate this, the courts will take account of the subject matter of the clause and all the relevant circumstances.

Even though such an unfair exclusion clause is not binding on the consumer, the said consumer can rely on it if he decides to do so.[66] The courts can also on their own raise an issue concerning the fairness of exclusion, even where the parties have not raised that issue, where the court has enough legal and factual basis to do so.[67] The effect of this provision is that sellers or traders must be prepared to answer questions in respect of the fairness of consumer exclusion clauses, even where it has not been raised by the consumer in his pleadings before the court.

There is however an exception to the application of the fairness test. Thus the test does not apply where the exclusion clause is transparent and prominent.[68] For purposes of the Act, a term is transparent if it is in a plain and intelligible language and it is legible.[69] A term is also prominent if it is brought to the attention of consumers in such a way that an average consumer would be aware of it.[70] An average consumer is reasonably well informed, observant and circumspect.[71] It can be gleaned from this exception to the fairness test that the drafters wish to strike a balance between protecting the interests of both the consumer and the seller. Therefore, a well-informed consumer of a prominent and transparent term of a contract enters such contract at his/her peril.

(2) Exclusion of Negligence Liability

Section 65(1) of the CRA is akin to Section 2(1) of UCTA, rendering all clauses attempting to exclude or restrict liability for personal injury void and of no legal effect. Section 65(1) also excludes the restriction or exclusion of liability for any other loss or damage arising from negligence. Under UCTA, this term is excluded only if it passes the test of reasonableness. However, under the CRA, if the clause is fair under the fairness test of Section 62, such a clause will be held to be valid. Both sections are relevant, as UCTA still applies to business-to-business contracts, whereas the CRA applies to contracts involving a consumer.

(3) Blacklisted Terms Under the CRA

This refers to terms and consumer notices (including exclusion clauses) prohibited under the UK CRA. Examples of these blacklisted terms are terms that purport to exclude or limit trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader, excluding, or limiting the legal rights of the consumer to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader.[72] These non-exhaustive terms have been couched in general terms to make them applicable to all manner of transactions. The blacklisted terms also cover very crucial aspects of the relationship between the trader and consumer and are intended to ensure that the consumer is not exploited by the trader under any circumstances.

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[65] Section 62(8).
[66] Section 62(3)
[67] Section 72(2) & (3)
[68] Section 64(2)
[69] Section 64(3)
[70] Section 64(4)
[71] Section 64(5)
[72]See Part 1 Schedule 2 of the UK CRA for detailed list of blacklisted terms.

(4) Requirements for transparency of consumer notices or exclusion clauses under UK CRA

The Act makes it mandatory for a trader to ensure that a written term of a consumer notice, which includes an exclusion clause is expressed in plain and intelligible language and is legible.[73] Also, the Act codifies the contra proferentum rule, by stipulating that any ambiguous consumer notice will be construed in favour of the consumer.[74]

CONTROL OF EXCLUSION CLAUSES IN CONTRACTS UNDER THE LAW IN THE REPUBLIC OF SOUTH AFRICA

The Republic of South Africa has put in place some judicial control measures based largely on the common law, which are akin to the situations under both Ghanaian and UK laws. Apart from the judicial control measures, certain statutes have been passed to regulate the use of exclusion clauses.[75] Thus, under the law of the Republic of South Africa, for an exclusion clause to be valid, just like in other common law jurisdictions, it must have been properly incorporated into the contract,[76] and the construction of the exclusion clause must clearly establish that it covers the breach or loss which has transpired.[77] Also, the said exclusion clause, depending on the nature of the transaction, must not be contrary to specified legislation, such as the Consumer Protection Act 68 of 2008.

A. Judicial Control of Exclusion Clauses under South African Law

Being a common law jurisdiction, various formulations of common law principles on judicial control of the use of exclusion clauses have been upheld by the South African courts as follows.

1. Exclusion Clause to Absolve a Party from Liability for Fundamental Breach of Contract

For instance, the fall of the common law doctrine of fundamental breach of contract as a substantive law, which prevents a party who has not fulfilled his part of the bargain from relying on an exclusion clause, following the landmark decision in *Photo Production v. Securicor*[78] has been adopted by the South African court. Thus, in *Elgin Brown and Hamer (Pty) Ltd v. Industrial Machinery Suppliers (Pty) Ltd,*[79] the court reasoned that the doctrine of fundamental breach of contract is a question that goes to the root of the contract and whether a party to a contract can rescind it and that the doctrine no longer has an influence on how exclusion clauses are interpreted by the courts. This decision has led to the irresistible conclusion that under South African law, no law proscribes the use of an exclusion clause to exclude the consequences of a fundamental breach.[80]

2. An Exclusion Clause to Absolve a Party from Liability for Negligence

Under South African law, a party can rely on an exclusion clause against liability for negligence, provided the said exclusion clause when construed in its ordinary meaning covers the breach or

[73] Section 68(2)
[74] Section 69(1)
[75] The main statute is the Consumer Protection Act 68 of 2008.
[76] *Mercurius Motors* v. *Lopez* 2008 (3) SA 514
[77] *Afrox Healthcare Bpk* v. *Strydom* 2002 (6) SA 21 (SCA)
[78] *Photo Production,* n 31, above.
[79] 1993 (3) SA 424 (A) 4301-J.
[80] RH Christie, *The Law of Contract in South Africa*,6th edn. (Durban: Lexis Nexis, 2011), 193.

the loss which has occurred. Therefore, in *Afrox Healthcare Bpk v. Strydom,*[81] the court upheld an exclusion clause that absolved a private hospital from liability for negligence, which had led to harm occasioned to some patients at the hospital. The court in *Johannesburg Country Club v. Stott*[82] however suggested that it was unlikely for the court to absolve a party from liability, based on an exclusion clause purporting to exclude liability for the death of another person since that would be contrary to public policy.

3. Restrictive Construction of Exclusion Clauses

The courts generally adopt a hostile attitude towards the use of exclusion clauses, especially in contracts between parties of unequal bargaining power, and thus, strictly apply common law principles in the construction of exclusion clauses. The courts will also interpret an ambiguous exclusion clause against the party seeking to rely on it, based on the common law contra proferentum rule. Therefore, in *Drifters Adventure Tours v. Hircock,*[83] the court held that in the case where an exclusion clause is capable of more than one meaning, the meaning given to the clause must be against the party seeking to rely on it.

4. The Common Law Incorporation Rules

Under South African law, an exclusion clause will be enforced where it has been agreed upon by the parties[84] and generally where the party seeking to rely on it has brought the said exclusion clause to the attention of the other party. Thus, in *Mercurius Motors v. Lopez*[85] the court held that a clause that could not reasonably be contemplated as forming part of the contract ought to be brought to the notice of the other contracting party.

B. Control of Exclusion clauses under the Consumer Protection Act 68 of 2008 (CPA) of the Republic of South Africa

This Act which has incorporated some common law principles applies to all transactions which take place in South Africa, unless otherwise expressly exempted.[86] It applies to all transactions involving the supply of goods and services and the promotion of such goods and services unless expressly excluded.[87]

1. Incorporation Exclusion Clauses in Contracts under the CPA

Per section 49 of the Act, a supplier who seeks to incorporate exclusion clauses in a contract must ensure that certain conditions are met as follows:

- The clause must be written in plain language.
- The customer must be made aware of the implications of the clause, that is the manner and form that is likely to draw the attention of the consumer under the circumstances and should be done before the contract is performed[88] and

[81] *Afrox Heathcare Bpk v Strydom*, n 74, above
[82] 2004 (5) SA 511 (SCA), 518-519.
[83] 2007 (92) SA 83 (CSA), 87E-G.
[84] *D & H Piping system (Pty) Ltd v. Trans Hex Group Ltd & Another* 2006 (3) SA 593 (SCA), paragraph 33.
[85] *Mercurius Motors v. Lopez*, n 76 above
[86] Section 5(1)(a)
[87] Section 5(1)(b)
[88] Section 49(4)

- The consumer should be given an adequate opportunity in the circumstances to fully understand the clause.[89]

The effect of section 49 of the Act is that a consumer would not be bound by an exclusion clause unless its nature and effect are specifically brought to his notice in a required manner and was given ample opportunity to comprehend it.[90] Also where an exclusion clause concerns activity in respect of which risk is not usually contemplated or could result in death or serious injury,[91] such exclusion clause must specifically be brought to the attention of the consumer, and its nature and potential effect explained to the consumer in a manner prescribed under section 49, and also to make the consumer initial it or act in a manner which is consistent with him being aware of such exclusion clause.[92]

It is pertinent to note that, even though section 49 of the Act codifies common law principles, it goes beyond the requirements under the common law, which requires just a signature as grounds for liability. Section 49 of the Act additionally requires the supplier or seller to bring the nature and effect of the exclusion clause to the attention of the consumer, as well as afford the consumer an ample opportunity to understand the clause. Without these additional requirements, the exclusion clause will not be enforced. It has therefore been noted that section 49, has equipped the courts in South Africa with additional weapons, which enable them to refuse to enforce an exclusion clause if the duty to draw the other party's attention to the nature and effect of the clause has not been met.[93]

2. Exclusion Clauses Forbidden Under the CPA

Section 51 of the Act proscribes some types of exclusion clauses. The effect of section 51 is that a contract that includes any such forbidden terms would be void and of no effect. For instance, section 51 of the Act proscribes a provision that misleads or deceives the consumer or which subjects the consumer to fraudulent conduct; a provision which directly or indirectly purports to (i) waive or deprive a consumer of a right in terms of the Act (ii) evade a supplier's obligation or duty under the Act; and a provision which requires the consumer to forfeit any money to the supplier (i) if the consumer exercises any rights in terms of the Act (ii) to which the supplier is not entitled in terms of the Act or any other law.

Regulations have also been passed under South African law in addition to the forbidden clauses under section 51 of the Act to introduce some flexibility in the application of the law. These clauses are presumed to be unfair unless otherwise proven by the party seeking to rely on them.[94] For instance, Regulation 44(3) introduces certain clauses which are deemed to be unfair.[95] Examples of those clauses include, excluding or limiting the liability of a supplier for the death of, or the

[89] Section 49(5)
[90] ibid.
[91] Section 49(2) (c)
[92] ibid.
[93] CJ Pretorius, "Exemption Clauses and Mistake: Mercurius Motors v. Lopez 2008 (3) SA 572 (SCA)", (2010) 73 *THRHR* 500
[94] JC Kanamugire & TV Chimuka, "The Current Status of Exemption clauses in the South African Law of Contract," (2014*)* Vol.5 no. 9*, Mediterranean Journal of Social Sciences*.
[95] Regulation 44(3) of the Consumer Protection Act 68 of 2008 Government Gazette No. 34180.

personal injury caused to a consumer through an act or omission of that supplier;[96] etc. The inclusion of these regulations in addition to the forbidden provisions under section 51 of the Act has been heralded as a major improvement of the common law position, where there are no specific terms to indicate unfair exclusion clauses, as well as an extension of the list to cater for situations which may occur at a later stage but not contemplated by the legislature at the time of drafting the Consumer Protection Act and the regulations.[97]

3. Adjudication of Exclusion Clauses under the CPA

Per section 52(4) of the Act, the courts have the power in any matter between the supplier and the consumer as to whether or not an exclusion clause is void within the meaning and intendment of the Act to make an order severing any part of the agreement or where possible modify the said provision to make it conform with the Act, where it is reasonable to do so.[98] The court also has the power to declare as invalid the whole agreement, provision, or notice from the date it takes effect;[99] as well as to make other orders reasonable under the circumstances of the agreement.[100] The Act also makes it mandatory for the courts to invalidate an exclusion clause that has not been properly incorporated into a contract.[101] Also under the Act, where a provision is ambiguous, the courts are enjoined to subscribe to a meaning which promotes the aim and spirit of the Act.[102]

4. Unfair, Unjust, and Unreasonable Terms and Transactions under the CPA

This is provided for under section 48 of the Act. Under this section, certain specific terms of contract and transactions are deemed unfair and unreasonable. For instance, a supplier must not offer to supply goods or services at a price that is unfair, unreasonable, or unjust; on terms which are unfair, unreasonable, or unjust, intends to supply goods materially different from those contracted for.[103] Closely connected to section 48 is section 52 of the Act, which empowers the court to ensure fair and unjust conduct, terms and conditions, and sets out guidelines the court must take into account in achieving that aim, such as the fair value of the goods or services in question; the conduct of the parties to the transaction; the nature of the parties, their relationship to each other and their relative capacity, education, experience, sophistication, and bargaining power, etc.

COMPARATIVE ANALYSES OF THE CONTROL OF EXCLUSION CLAUSES UNDER THE LAWS OF GHANA, THE UK, AND THE REPUBLIC OF SOUTH AFRICA.

This section of the paper will focus on the comparative study of the control of exclusion clauses under the laws of Ghana, the UK, and South Africa, by outlining the key similarities and differences between these jurisdictions. As earlier stated, the comparative analyses aim to identify some possible legal gaps under Ghanaian law, as well as draw on some useful lessons which can provide the basis for legal reforms under Ghanaian law.

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[96] Regulation 44(3) of the Consumer Protection Act 68 of 2008 Government Gazette No. 34180. This must be read together with section 61 of the Act.
[97] JC Kanamugire & TV Chimuka, n 94, above.
[98] Section 52(4)(a)(i)(aa)
[99] Section 52(4)(a)(i)(bb)
[100] Section 52(4)(b)
[101] Section 49
[102] Section 4(3)
[103] See section 48 for the detailed list.

A. Key Similarities on the Judicial and Legislative Controls of Exclusion Clauses Under the Laws of Ghana, the UK, and the Republic of South Africa.

1. A common feature is the adoption and application of common law rules by all three jurisdictions. Thus, in all the three jurisdictions the conditions precedent for the enforceability of exclusion clauses includes the proper incorporation of the said exclusion clause; the rule that construction of the exclusion clause must clearly establish that it covers the breach or loss which has transpired and its related principles of construction, such as the contra proferentum rule, etc.

2. Also, apart from reliance on the common law principles on the control of exclusion clauses, the three jurisdictions have all introduced some legislative interventions to fill in the gaps. The degree and extent of such legislative interventions will however form the basis of the subsequent discussion on the key differences between the three jurisdictions.

B. Key Differences on the Judicial and Legislative Controls of Exclusion Clauses under the laws in Ghana, the UK, and the Republic of South Africa.

1. Under the UK CRA, exclusion clauses are subjected to the 'fairness test', where the courts will look at the said exclusion clause to ascertain whether or not it is fair to the consumer, even if neither party raises fairness as an issue and a breach of the 'fairness test' will render the said notice unenforceable.[104] The fairness test, to an appreciable degree, also finds expression under Section 48 of the CPA of South Africa which enumerates terms and transactions deemed to be unfair, such as any transaction where a supplier offers to supply goods or services at a price or based on terms which are unfair and unreasonable, etc.[105] However while under UK CRA the fairness test applies to even terms not specifically provided for under the Act, under the South African CPA, it applies only to the specific transactions and terms stated in the Act. Also, although there is an exception to the fairness test under the UK CRA, the conditions of transparency and prominence of the term which must be satisfied before the exception becomes applicable also inure to the benefit of the consumer. Even though under Ghanaian law, some exclusion clauses deemed unfair are proscribed, such as those which purport to exclude liability to ensure that goods supplied are reasonably fit for the purpose for which they are required, [106]there is no statutory expression of the fairness test, which applies to even transactions or terms not expressly stated in the legislation.

2. Under both Part 1 Schedule 2 of the UK CRA and section 2 of UCTA, as well as section 51 and Regulations 44(3) of the South African CPA, certain terms have been expressly blacklisted. Examples are terms that purport to exclude or limit a trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader. Under the UK CRA, these non-exhaustive terms, have been couched in general terms to make them applicable to all manner of transactions. Under the South African CPA, these terms although they cover specific situations, touch on very crucial aspects of the relationship between the trader and

[104] Section 62(2)
[105] See section 48 of the Act for detailed provisions deemed unfair, unjust, and unreasonable.
[106] See section 13 of Act 137 of Ghana.

consumer and are intended to ensure that the consumer is not exploited by the trader under any circumstances. An attempt has also been made under Ghanaian law, albeit in a limited sense, to provide a list of conditions prohibited in every hire purchase agreement and contract for the sale of goods. For example, exclusion clauses that purport to exclude liability for merchantable quality are prohibited, unless the said clause has been brought to the attention of the customer.[107] Also, exclusion clauses that purport to exclude liability for failure to deliver specific goods agreed upon or to match description or sample are prohibited.[108]

3. Also, a key difference worth noting is the innovation under section 49 of the South African CPA, where a supplier who seeks to incorporate exclusion clauses in a contract must ensure that the clause is written in plain language, easily understood, with the customer informed of its implications and given adequate time to fully understand it before the contract is performed. As stated earlier, this provision goes beyond the common law principle which accepts signature as awareness of the exclusion clause. The UK CRA also contains a similar provision under section 68, which makes it compulsory for all exclusion clauses in consumer contracts to be transparent by being legible and in plain and easily understood language. Sections 49 of the South African CPA and section 68 of the UK CRA, provide the consumer with considerable protection to ensure that they are not exploited. A crucial provision of this ilk does not however find statutory expression under Ghanaian law.

4. Another pertinent difference is the wide adjudicatory powers given to the South African courts to make orders severing any part of the agreement or where possible modify the said provision to comply with section 52 of the Act in any matter between the supplier and the consumer as to whether an exclusion clause is void within the meaning and intendment of the Act. [109] The courts even have the power to invalidate an exclusion clause that has not been properly incorporated into a contract,[110] which is also a departure from the common law position, where such power is discretionary. Also, under the UK CRA, the courts can on their own raise an issue of the fairness of an exclusion clause, where it is justifiable to do so.[111] A provision of this nature, which is key in the fight against unfair and unconscionable exclusion clauses, cannot however be found under Ghanaian law.

5. The codification of the guidelines in assessing whether a term or transaction is reasonable under section 11(2) of the UK UCTA, as well as under section 52(2) of the South African CPA, which unfortunately cannot be found under Ghanaian law is also worth pointing out.

CONCLUSION AND RECOMMENDATIONS

Concerns have been raised over the use of exclusion clauses in consumer contracts, especially in respect of transactions involving parties with unequal bargaining power due to their exploitative effects. The situation is compounded by the fact that everyone is a consumer one way or the other, and therefore susceptible to the exploitative consequences associated with the usage of exclusion clauses in consumer contracts. It is against this background that this paper has adopted a comparative research methodology in an attempt to evaluate both the judicial and

[107] Section 14 of NRCD 292.
[108] Section 8 of Act 137.
[109] Section 52(4)(a)(i) (aa) of CPA
[110] Section 49 of CPA
[111] Section 72(2) & (3)

legislative controls of exclusion clauses in consumer contracts under Ghanaian law, as well as those of the United Kingdom (UK) and the Republic of South Africa to identify the similarities and differences between the control of exclusion clauses under Ghanaian law and those two countries aimed at identifying some possible legal gaps under Ghanaian law, as well as drawing on some useful lessons which can provide the basis for legal reforms under Ghanaian law. The paper reveals that even though certain measures have been put in place under Ghanaian law to protect the consumer against the use of exclusion clauses, the said protection afforded under Ghanaian law compared with the situations under the laws in the UK and the Republic of South Africa is not robust for effective consumer protection. From the foregoing, the paper makes the following legislative recommendations to bolster the legal regime for the control of exclusion clauses in Ghana for effective consumer protection.

First, there is the need for a codification of the common law principles on the control of exclusion clauses. This codification process has been defined as the systematic collection or formulation of the law, by reducing it from a disparate mass into an accessible statement that is given legislative rather than merely judicial or academic authority.[112] Codification of the law has several advantages. For instance, it helps in the simplification of the law by making it more accessible and manageable, which has been noted to assist in overcoming the complexities associated with the examination of 'tons of verbal pulp… to obtain an ounce of pure judicial law.'[113] Furthermore, it helps in clarifying grey areas of the law in the form of gap-filling or reform, with associated benefits such as clearer, more certain, and more predictable law.[114] Finally, codification assists in the elimination of the exercise of unnecessary discretionary powers by judges owing to the certainty and predictability qualities associated with it.

Second, a consolidation of all the scattered pieces of statutes on the control of exclusion clauses in contracts in Ghana is necessary. Such consolidation will provide for consistency, better reference, and enforcement of the law.

Third, there is the need to strengthen legislative regulation of the use of exclusion clauses in consumer contracts by providing for a blacklist of unconscionable exclusion clauses which cut across various facets of transactions between consumers and sellers or manufacturers, and not the very few specific terms currently provided for under Ghanaian law.

Fourth, the introduction of a statutory provision that compulsorily subjects all exclusion clauses to the 'fairness test', would also go a long way in filling the huge lacuna under Ghanaian law by ensuring that prohibited exclusion clauses not specifically mentioned under the law would also be subjected to the 'fairness test' to ascertain whether they meet the interests and aspirations of the consumer.

Fifth, there is the need for the introduction of a statutory provision under Ghanaian law that will make it mandatory for sellers or suppliers to ensure that exclusion clauses are written in plain language customers can understand and their implications brought to the customers' attention as is the case under the UK CRA and South African CPA. The introduction of such statutory provision is necessary, especially considering the high illiteracy level in Ghana.

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[112] B Donald, "Codification in Common Law Systems", (1973) 47, *The Australian Law Journal* 160, 161.
[113] A L Diamond, "Codification of the Law of Contract", (1968) 31 *Modern Law Review*, 361, 362.
[114] D Svantesson, "Codifying Australia's Contract Law-Time for a Stocktake in the Common Law Factory", (2008) *volume* 20 *Bond Law Review*, Issue 2, Article 5.

Finally, there is also the need for legislative intervention vesting the courts in Ghana with broad adjudicatory powers to deal with exclusion clauses and to even depart from the discretionary position under the common law by making it compulsory for them to invalidate exclusion clauses not properly incorporated. This law can also empower the courts to raise the issue of fairness of an exclusion clause *suo motu*, where it is justifiable to do so as is the case under sections 72(2) and (3) of the UK CRA.

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APPRAISING THE VEXED QUESTION OF ABSOLUTE IMMUNITY ON STATE EXECUTIVES UNDER NIGERIAN LAW

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ABSTRACT

Absolute immunity conferred on State Executives is covered by section 308 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides immunity from trials in civil and criminal matters, except in electoral matters on the President and his Vice, the Governors of the States and their Deputies. The sole justification for this is that these State Executives should enjoy absolute immunity to enable them to perform official duties without distractions. However, recent conducts of some State Executives have rekindled the need to amend section 308 by depriving them immunity from criminal prosecution as practiced in the United States while still in office. In the long run, the author concludes by supporting this view absolutely.

Keywords: Absolute Immunity, Court proceedings, State Executives, Amendment

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INTRODUCTION

Absolute immunity conferred on State Executives is vexed question that keeps reverberating, heating the Nigerian polity and greatly interfacing legal issues in politics based on the provision of section 308 of the Constitution[2] of the Federal Republic of Nigeria (as amended) which provides immunity for court proceedings in civil and criminal for the President, Vice-President, the Governors of the States and their Deputies.

The concept of immunity began with Sovereign immunity or Crown immunity. It is a legal doctrine that prevents the Sovereign or State from committing a legal mistake and is immune from civil action or prosecution. This doctrine is commonly expressed in the legal maxim "*rex non potest peccare"* meaning "the king can't do wrong".[3] This concept had existed in the earliest recorded histories[4] of human society such as Babylon from about 2,000 BC, in ancient Egyptian dynasties and in Athens around 430 BC.

Further, immunity which is from the Latin language "*immunitas*"[5] was used by the ancient Romans when describing an individual's exemption from service or obligation from the State. Immunity can also be traced to the ancient feudal structure[6] roots in England which later became a principle of common law. The idea flourished at the time of absolute monarchies[7] in medieval England, when it was the norm that the individual on the throne of England was personified by Sovereignty and regulatory powers. The individual who occupied the English Crown was at the top of the feudal ladder and was not subject to the Court within the realm. It was thought at that time that the King as a result of the status of his office and position in society as the Sovereign[8] could not do any wrong. The idea remained in place in England until democratic thoughts[9] and institutions made the idea to lose its moral strength. The idea of immunity however came hand in hand with the English when they

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[2] Hereinafter simply 'CFRN' in this article.

[3] CG Cooper 'Act of State and Sovereign Immunity: A Further Inquiry' <lawecommons.luc.edu/cgi/view content cgi?article=2105^ context=luclj> accessed 19 May 2021. This should not be confused with the principle of public international law on state immunity that the government of a state is normally not amenable before the courts of another State. As the King enjoyed absolute immunity, he could neither be impeded in his own courts nor subject to any foreign jurisdiction. Hence Louis XIV of France once declared 'I am the State'.

[4] A Silverstein 'The History of Immunology' in Paul, W.E. (ed.) *Fundamental Immunology* (Lippincott-Raven Publishers, 1999) 55.

[5] *Ibid* 19.

[6] E Malemi *The Nigerian Constitutional Law* (Princeton Publishing Co 2006) 446-458.

[7] See F Falana 'Official Corruption and Immunity in Nigeria' *THIS DAY* <https:www.thisday.com/index.php/2016 /07/19/official-corruption-and-immunity/>accessed 11 June 2021. Even though the Crown Proceedings Act was abolished in England in 1947, its ghost continued to haunt Nigeria several decades after independence. For instance, the law was invoked to cover up the atrocities perpetrated by the armed soldiers who destroyed the Ransome-Kuti family house at Idi Oro, Lagos on February 18, 1977. In *Chief (Mrs) Olunfunmilayo Ransome Kuti v Attorney-General of the Federation [1985] 2* NWLR (Pt 6) 211 at 236-237, the Supreme Court held that the federal government was not vicariously liable for the arson and willful damage to property carried out by its armed agents. But the apex court took advantage of the case to declare that section 6 of the Constitution has abolished the anachronism of State immunity.

[8] P Oluyede *Constituional Law in Nigeria (*Evans. 1992) 465. He states: "Under feudal system no lord could be sued in the court which he held to try the cases of his tenants. It is simply not that the King could do no wrong, but that no action could be brought against him in his Court without his consent. Ironically however, the often cited expression that 'the King can do no wrong' has been completely misunderstood. Another reason for the development is that the true meaning of the King can do no wrong is that the King has no legal power to do wrong. The King's legal position, the powers and prerogatives which distinguish him from an ordinary citizen is given to him by law and the law gives him no authority to commit wrong. Much too often it was not appreciated that the King as a human being had a personal as well as a political capacity. In his personal capacity he was just as capable of acting illegally as was anyone else."

[9] *Ibid.* Civil actions by and against public authorities and officials in connection with acts or omissions which normally give rise to cause of action between two citizens are now on the same footing. There is no difference in procedure adopted.

conquered new lands and the new territories acquired the idea of the English legal system of immunity.[10]

Given allegations of corruption against some of these office holders who enjoy absolute immunity, such as the President, Vice President, Governor and Deputy Governor, there have been calls in Nigeria to remove their constitutional immunity, making such State Executives liable for prosecution in court while in office. Others have contended that the immunity provision also known as the immunity clause should be preserved.

This paper in lieu of the above deals with seven interrelated parts beginning with the introductory part. Part 2 highlights absolute and restrictive immunity. It mentions cases such as *Mighell v Sultan of Jahore, 1 Congress Del Parside* and conventions such as the 1919 and 1920 Paris Peace Treaties which denied any defeated States rights, privileges or immunities in foreign trade which have correlation with the doctrine. Succinctly, part 3 examines the applicable law and judicial authorities on absolute immunity in Nigeria. It states that cases such as *Colonel Rotimi and others v. Mac Gregor, Tinubu v. IMB securities PLC* have given credence to section 308 CFRN which confers absolute immunity on State Executives. Under part 4, abuse of absolute immunity was discussed. Two instances of these abuses were given concerning the alleged misappropriation of funds by two States Executives. Vital leads that would be lost which would have led to a proper prosecution of the alleged infractions committed by these State Executives after the end of their tenure, occasioned by the protection of section 308. Pointedly, part 5 discusses limitation of immunity under international law and states that the only one cognizable Sovereign Head in Nigeria as at that time which enjoys Sovereign immunity is the President and not the Governor and this is what still persists till now. Part 6 examines the concept of absolute immunity in the United States. It posits that the United States practices qualified absolute immunity. The President is only immune from civil liability for acts performed in the discharge of his official responsibilities. Finally, part 7 concludes by stating that section 308 CFRN should be amended so that State Executives become answerable for criminal acts committed while in office.

ABSOLUTE AND RESTRICTIVE IMMUNITY

One of the salient issues pertaining to the doctrine of absolute immunity is whether it embraces all state acts or only some of them. In time past when government restricted themselves purely to governmental functions, it was easier to concede them immunity. A Head of State travelling abroad has the right to absolute immunity. If he travels incognito, his immunity commences as soon as he declares his identity. In *Mighell v Sultan of Jahore*[11] under the assumed name of Albert Baker, the Sultan while in Britain contracted to marry Miss Mighell. On failing to do so, she sued for a breach of promise. The Sultan's claim of immunity was upheld on his revealing his true identity. In the *Arantzazu Mendi Case,*[12] the statement from the British foreign office recognized *defacto* the government of General Franco and conferred immunity on the ship which was held on the orders of that government, as against the *dejure* claim of the Republican Government.

There is no consistent practice[13] with respect to which organ of a foreign State or sub division such as a province or region should be entitled to immunity. Certain municipal systems grant immunity to

[10] GO Arishe 'Reconsidering Executive Immunity under the Nigerian Constitution' <www.nials-nigeriaorg /journals/NCLR10.pdf > accessed 29 April 2021.
[11] (1894) QB 149.
[12] (1939) AC 256.
[13] S Fabamise 'Constitutional Immunity Clause and the Fight Against Corruption in Nigeria <https://www.ajol.info/

political sub divisions while others do not. France denies such immunity. Britain recognized the Sultan's immunity of Jahore. The European Convention on State Immunity 1972 does not recognize the immunity of political sub division by providing that contracting States may declare that constituent parts may invoke their provision and bear the corresponding obligations. Government in commercial activities led to an increasing number of States differentiating between purely governmental functions *acta jure imperil* and commercial activities *acta jure gestonis* and restricting immunity to the former. Lord Wilberforce in *1 Congress Del Parside*[14] puts the rationale succinctly thus:

> ….. It is necessary in the interest of justice for individuals having transactions with State to allow them bring each transaction before the courts. To require a state to answer a claim based upon each transaction does not involve a challenge to the governmental act of that State. It is unaccepted phrases, neither a threat to [the] dignity of that state, nor any interference with its sovereign function…….

This distinction has led to absolute immunity and restrictive immunity's doctrine. This distinction has been adopted in a number of multilateral treaties. The 1919 and 1920 Paris Peace Treaties denied and defeated States rights, privileges or immunities in foreign trade. The Brussels Convention on the Unification of Certain Rules on States' Vessels Immunity 1926 and the Additional Protocol 1934 also made the distinction. The same principle applies to the General Convention of the High Seas 1958, the Convention on Territorial and Contagious Zone 1958, the Convention on the Settlement of Investment Disputes between States and Nationals of the other States 1965, the Convention on Civil Liability for Oil Pollution Damage 1969 and the United Nations Convention on the Law of the Sea 1982.

The European Convention on State Immunity with its Additional Protocol 1972 adopts the distinction as does the Convention of Immunity of States in respect of Commercial and Other Transactions of a Private Character 1960, the Convention on Jurisdictional Immunity of States of OAS 1983, the Harvard Draft 1932, the German Society of International Law 1968 and the Montreal Draft Convention on State Immunity of the International Law Association 1982. Britain too adopted the distinction in 1978.[15]

Under absolute immunity doctrine, in all instances the Sovereign is immune from foreign jurisdiction irrespective of the circumstance. However, the flurries of activities of States have led to the modification of the absolute immunity rule which has culminated to the adoption of the restrictive immunity's doctrine. In the *Parliament Belge case*[16], the Court of Appeal emphasized that:

> The principle to be deduced from all the relevant preceding cases was that every State declines to exercise, through its courts, any of its territorial jurisdictions over the person of any Sovereign or Ambassador or other State or over the public property of any State intended for public use even though such Sovereign Ambassador or property be written its jurisdiction.

The doctrine was equally applied in the case of Porto *Alexandre.*[17] The extension of the doctrine to an agent was established in *Krasina v Tass Agency*[18] where the Court of Appeal held that the Agency

index.php/jsdlp/article/download/163328/152815> accessed 20 June 2021.

[14] (1981) 3 WCR 329.

[15] State Immunity Act 1978.

[16] (1880) 5 PD 19).

[17] Full text of 'The Photo Alexandre' < https://archive.org/stream/jstor-2187856/2187856_djvu.txt> accessed 20 April 2021.

[18] (1949)2 ALL ER 274.

was a State organ of the USSR and was thus entitled to immunity from local jurisdiction.[19] However, in *Dralle v Republic of Czechoslovakia,*[20] the Australian's Supreme Court declared that in the light of the increased commercial activity of nations, the classic doctrine of absolute immunity was no longer a rule in international law.[21]

The doctrine of restrictive immunity was accepted in Nigeria in *Trendtex Trading Co. Ltd v Central Bank of Nigeria*[22] where the Court of Appeal accepted the validity of the restrictive immunity as being in consonant with justice and international practice. The court held that the Central Bank of Nigeria was a governmental department but a "legal" entity of its own right and therefore not entitled to jurisdictional immunity.[23] Several States have reflected the doctrine of restrictive immunity in their domestic legislations.[24]

THE APPLICABLE LAW AND JUDICIAL AUTHORITIES ON ABSOLUTE IMMUNITY IN NIGERIA

Section 5 of the CFRN[25] confers executive powers on the President at the Federal level and on the Governor at the State level respectively. Section 308 of the CFRN[26] confers absolute immunity on certain categories of State Executives. Succinctly, it provides immunity from proceedings of court, that is, proceedings that will compel the attendance of the President and his Vice and the Governors of the States and their Deputies. This immunity applies to actions carried out in their official capacity[27] so they are not liable for acts carried out on behalf of the State[28]. This immunity shall not apply to acts committed in abuse of the powers of their office for which they are responsible when their tenure expire.

The rationale for immunity is that Heads of government should enjoy absolute immunity to enable them to perform official duties without unnecessary interferences. They should be free from distractions and harassments while carrying out their duties from fear of civil or criminal litigation or prosecution. However, the justifiability of this assertion is questionable and doubtful as recent events have proved otherwise regarding this. In *Colonel Rotimi and others v. Mac Gregor,*[29] a civil action was commenced against the 1st appellant in his personal capacity. The suit continued after he became the Military Governor of the former Western State. In compliance with section 161 of the 1963 Constitution, the Supreme Court ordered the suit to be discontinued because the immunity clause afforded protection to the 1st appellant by virtue of his current position as a military Governor.

Contrariwise, in *Chief Onabanjo v. Concord Press of Nigeria,*[30] the plaintiff, Governor of Ogun State, the defendant, publishers of Concord Newspapers was sued by the plaintiff in his personal capacity

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[19] See the case of *Duff Development Co. Ltd v Kelantan Government* (1924) 17 AC 797.
[20] (1950) 17 ILR 155.
[21] See *Alfred Dunhil of London* v. *Republic of Cuba* 15 ILM 1976.
[22] (1977) QB 529 CA.
[23] Several other cases have reaffirmed this decision. See for example, *I Congresso del Parside supra note 13.*
[24] See for example, the United State Foreign Sovereign Immunities Act 1976, the South African Foreign States Immunities Act 1981 and the United Kingdom Immunity Act, 1978.
[25] Constitution of the Federal Republic of Nigeria 1999 as amended.
[26] In the 1963 Constitution of Nigeria, provisions for immunity for the President, Vice-President, Governor and Deputy-Governor of a region existed under section 161 subsection 1 (a-c) and sub section 2. Under the 1979 Constitution, they existed under section 267 subsections 1 (a-c), and subsections 2 and 3. Under the 1989 Constitution, they were codified under section 320 subsections 1 (a-c), 2 and 3.
[27] CN Okeke *The Theory and Practice of International Law in Nigeria (Fourth Dimension Publishers, 1986)* 103.
[28] UO Umorzurike *Introduction to International Law* (Spectrum Law Publishing, 1993)56.
[29] (1974) 11 SC 133.SC
[30] (1981) 2 N.C.L.R. 399.

for libel. Kolawole J held that since no provision of the constitution expressly incapacitated the Governor, he could sue in his private and personal capacity.

Pointedly, the court took the same view as it had earlier taken in *Rotimi's*[31] when in *Tinubu v. IMB Securities PLC*,[32] the court adjourned the appellant's appeal before it *sine die* until the appellant vacates office as Governor of Lagos State as the provision of section 308 was invoked. While upholding the decision of the Court of Appeal to discontinue the proceedings by virtue of section 308, the Supreme Court held that the proper order was to strike out the case. The *ratio* in this case according to the Court is that the immunity conferred by section 308 is for public policy and so cannot be waived either by the Court or the office holder concerned.

On the above issue, Falana[33] submits that if those included in the immunity clause can institute libel suits or enforce their rights, it is unjust to prevent other persons form suing them while in office. He continues that given that there is equality before the law, it is grossly unfair to allow government officials covered by the immunity clause to bring civil suits when their opponents are prevented from suing them by issuing or serving proceedings against them. The injustice in this discriminatory practice becomes apparent when it becomes clear that the defendant cannot appeal the cases if they are decided in favour of government officials.

We concur with the above position[34] but add that justice must be seen to be manifestly done judiciously and judicially practically and proactively in the temple of justice in all matters brought before it for adjudication. Aggrieved persons should also enjoy reciprocal rights to sue elected officials covered by immunity.

The case of *Alamieyeseigha v. Yeiwa*[35] is worth illustrating and falls on the principle enunciated in *Tinubu's* case.[36] The plaintiff sued to secure an injunction for criminal indictment against a sitting Governor. The appellant, then Governor of Bayelsa State, challenged the leave granted by the Federal High Court to the 1st to 3rd respondent to apply for an order compelling the 4th respondent, the Chief of Air Staff, to dismiss him from the service of the Nigerian Air Force or refer him to a court martial to be tried for the offence of cheating in 1991 at the College of Command and Staff while he was still in service. The Court granted an order of mandamus to the 1st to 3rd respondent compelling the 4th respondent to act. The application of the appellant at the Federal High Court to set aside both the leave and the order of mandamus was refused by the Court on the ground that the Court was *functus officio* and that the appellant could not sue or be sued under the Constitution, which immunity could not be waived. On appeal, the Court of Appeal held that section 308 bars any proceedings, civil or criminal which will have the effect of interfering with the running of the office to which he was elected. To be entitled to the immunity under section 308 of the Constitution it would not matter whether any of the office holders was a party to the suit or not, as in the present case. It is the interference and the effect of the order sought against him from the court that the Constitution prohibits.

Fawehinmi v. Inspector General of Police[37] was a milestone decision on absolute immunity. In this case, the appellant sought an order of mandamus to compel the respondents to investigate the then Governor of Lagos State Bola Tinubu on criminal allegations of forgery and perjury. Though, the order of mandamus was refused on lack of *locus standi* by the appellant, the Supreme Court held that the

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31 *Colonel Rotimi and others v. Mac Gregor supra note 28*

32 [2001] 16 NWLR (Pt. 740) 670.

33 F Falana 'Official Corruption and Immunity in Nigeria' *THIS DAY supra note 6.*

34 What is good for the goose is good for the gender.

35 [2002] 7 NWLR (Pt. 767) 581.

36 *Tinubu v. IMB Securities PLC supra note 31.*

37 [2002] 7 NWLR (Pt. 767) 606. See also I*nspector –General of Police v. Fayose* (2007) 9 NWLR (Pt 1039) 263.

Governor and those enjoying the provisions of section 308 can be investigated by the police for an alleged crime or offence. This interpretation notwithstanding, the immunity from criminal prosecution for office holders under section 308 is absolute during their period of office.

In *FRN* v *Dariye,*[38] at the material time, the Court of Appeal dismissed the charges against appellant the sitting Governor on the ground that he had become the main party to the criminal case. According to Tur JCA, the appellant's learned counsel should have seen the impracticability, futility and absurdity of initiating criminal proceedings against Chief Dariye as the Governor of Plateau State, or in his name since he is not a nominal party pursuant to section 308 (2) of the Constitution but the main offender alleged to have conspired with the other co-accused persons to commit the offences.

It is trite law that section 308 of the CFRN bars the instituting of civil suits and criminal proceedings against a sitting Governor. It is deducible from the plethora of cases examined that there was an advancement of the principles of law on immunity when the court stated in *Fawehinmi's*[39] case that States Executives covered under section 308 of the CFRN can be investigated over criminal misconducts alleged to be committed during pendency in office. This was laudable and a great contribution to legal jurisprudence in this area of law thereby eliciting an elixir for the clamour for the removal of the immunity clause on criminal proceedings conferred on State Executives pertaining to election petitions. Thus, in *Obihv Mbakwe*[40]*,* the 1st respondent who was Governor of Imo State from 1979 contested for a second term in an election held in 1983 and was declared duly elected. The appellant, another contestant challenged the election of the 1st respondent. While the petitioner/appellant's appeal was pending at the Supreme Court on a different ground, the 1st respondent raised the issue whether a Governor who is a candidate in an election to the office of Governor is immune from legal proceedings against him in an election petition by virtue of section 267 of the 1979 Constitution. It was held by the Supreme Court that section 267 of the 1979 Constitution did not protect a Governor from legal proceedings against him in an election petition in respect of an election to the office of Governor when he as a contestant has been declared elected.

This position was amplified further in *Turaki v. Dalhaltu*[41] when the Court of Appeal per Oguntade JCA held that if a Governor were to be regarded as immune for court trials, that would generate a situation where a sitting Governor could flout electoral laws and regulations to the detriment of another individual contesting with him. This will render the election process absurd and run counter to our national Constitution which offer for free and fair elections in its tenor.

The same principle of law was reiterated by the court in *Alliance for Democracy v. Ayodele Fayose.*[42] The respondent challenged the issue of a subpoena on him on the ground that as a Governor section 308 gave him immunity. In rejecting the objection, the court of Appeal ruled that the immunity granted to a State Governor by section 308 is suspended when his election is challenged before an Election Tribunal in order to enable him to be obliged by a summons to tender papers or to provide proof before the Election Tribunal. A commendable decision by the court removing the veil of injustice often sought under absolute immunity by State Executives.

[38] [2011] 13 N.W.L.R (Pt 1265) 521.
[39] *Fawehinmi v. Inspector General of Police supra note 36.*
[40] (1984) SCNLR 192.
[41] (2003) 38 WRN 54 at 168.
[42] (No 1) (2004) 26 WRN 34.

ABUSE OF ABSOLUTE IMMUNITY

Alleged abuses committed by State Executives while in office have made it imperative for removal of the immunity clause. Some of these abuses are epitomed by the following instances. The first issues pertains to the alleged claim by the Economic Financial Crimes Commission (EFCC) to have traced[43] a huge sum of ₦1.2 billion transferred from the National Security Adviser's office to Zenith's bank account belonging to the former Ekiti State Governor Mr. Fayose. The EFCC froze it to stop the Governor from transferring the fund and subsequently obtained an *ex parte* seizure order. In challenging the claim of the EFCC, the Governor said that his immunity had been violated. The second issue is the allegation by the EFCC that Governor Yari[44] of Zamfara State stole $3m from London-Paris Club loan refund to Nigeria States. The Governor who is the chairman of the Governor's forum is alleged to have diverted 19 billion naira reportedly meant for Consultants from the Paris club loan refund.

Further, hitherto to this, the effectiveness of the continued retention of the absolute immunity in the Nigeria Constitution had been condemned when in line with his policy of aero tolerance for corruption, Yar' Adua[45] declared his support for the removal of the immunity clause from the Constitution.[46] He was reported as saying that the immunity clause which shields some group of elected State officers from being prosecuted for any act of corruption while in office has become a cover for non-performance, ineptitude and corrupt practices.

The National Judicial Commission (NJC) made a recommendation to the National Assembly Committee on the Review of the 1999 Constitution that the clause be amended to confer immunity on concerned political office-holders on civil matters only and not on criminal matters as a way of mitigating its negative outcomes. Momoh believes[47] that the clause is inconsistent with the ideal of democracy and should therefore be removed from the Constitution. He advances three reasons for this view thus:

> First, he argues that the provision constitutes a rude and reckless assault on and a violation of the independence and powers of the judiciary…. He noted that the immunity clause was not provided for under "The Executive" (Chapter VI), suggesting that it was only mentioned only as an after-thought under "Miscellaneous" and therefore is untenable. Second, he argues that equity holds sway between two equally formidable and contending provisions and positions. He submits that: The ouster clause in section 308 is a matter of criminality, immorality and jurisprudence is yet to record a case where criminality supercedes innocence and piety…..equity ought never to support criminality over civility, morality, culturedness and civilization.[48] Third, he noted further that: If a Governor commits a crime during his period

[43] Banker Links Fayose to ₦1.2 billion Allegedly Collected from Dasuki'.< https://punching.com/banker-links-fayose-to-n1-2bn-allegedly-collected-from-dasuki/> accessed 29 July 2021.

[44] This allegation was vehemently denied by the Governor. See Vanguard "Leave Gov Yari Alone, NGF tells EFCC <https://ww.vanguardngr,com/2017/07/06/leave-gov-Yari-alone.ngf-tells-efcc > accessed 31 July 2021.

[45] He was President of Nigeria from 2007 to 2010.

[46] At the Partnership against Corruption Initiative which held Davos, Switzerland in January 2008. Later in the year, President Yar' Adua reiterated his call that the immunity be expunged from the Constitution by the National Assembly at the launch of Anti-Corruption revolution (ANCOR) campaign of the EFCC in December 2008.

[47] CS Momoh 'The Self Nullification of the Immunity Provision', Paper presented at the Workshop on 'An Agenda for a New Nigeria' Organized by the Department of Political Science, University of Lagos and the Ford Foundation, Excellence Hotels. Ogba, Lagos on 29 and 30 June 2005.

[48] *Ibid at 4.*

> of office, he is not performing the functions of his office, and so he is not covered under section 308 (3). Indeed such an action will be contrary to the oath that he swore to find and the code of conduct contained in the Fifth schedule to the Constitution. He concluded[49] that since 'section 308 excuses and immunises damnable and criminal executive conduct and behaviour;… it is a constitutional vagabond and bastard, lawless area boy and legal miscreant, without any abode and without a home.

Furthermore, in tandem to the above, we submit that the under-mentioned salient points have also made the clamour for the removal of absolute immunity clause in the Constitution imperative.

When State Executives commit alleged acts of criminal infractions against the States, relevant security agencies[50] are authorized only to investigate such infractions and thereafter keep such investigation reports until their tenure expire. They cannot prosecute a sitting Governor as the provisions of section 308 bars them from doing so. The first major pitfall discernable on the continued retention of absolute immunity clause is that when eventually the tenure of the Governor comes to an end, he may defect to the new government in power and begins to share same political ideology or political affiliation with that government. In this situation, the new government may decide not to persecute him; it may direct the relevant investigation body to carry out a fresh investigation in other to exonerate him or it may even prosecute him but it may not be done diligently because of the lack of interest on her part. The second is that vital leads that would have led to a proper prosecution of the alleged infractions would have been lost or goes into obscurity. Some witnesses would have died while those alive would have lost total impression of vital facts of the case because of time lapse as a result occasioned by the protection of section 308 on the State Executives. Some witnesses would have relocated outside the jurisdiction of the court but within Nigeria or overseas. Therefore, procuring such witnesses to testify against such State Executive maybe very difficult as they may not be able to be traced to their new locations. Likewise, some of the exhibits procured during investigation would have changed radically in nature or texture because of time lapse.[51] Some would have been tampered with or occasion outright lost.

Therefore, the enabling provision of the Constitution should be amended pertaining to absolute immunity on the institution of criminal proceedings enjoyed by State Executives. Those who inspire to public offices and who are at the echelon of leadership in government should strive to live above board as the confidence and trust reposed on them in the discharge of their duties during the pendency of their tenure is sacrosanct.

Issues bordering on allegation of criminal breach of trust on those covered under section 308 should be urgently investigated and if found culpable, such State Executives be made to face trial while still in office. This will augur well for a corrupt free society, good governance, ethical conducts and standards in the political space which invariably will translate to other strata of the society. We therefore frown at and condemn the non-instituting of criminal proceedings on the President, Governor *etcetera* because they enjoy absolute immunity. It has lost its relevance in the polity.

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[49] *Ibid* at 10.

[50] Notably, the Economic Financial Crimes Commission (EFCC) and Independent Corrupt Practices Commission (ICPC).

[51] See *Federal Republic of Nigeria v Attahiru and ors* SS/33C/2019*, Federal Republic of Nigeria v Chimaroke Nnamani and ors* FHC/09C/2007*, Federal Republic of Nigeria v Rasheed Ladoja* FHC/L/336C/2008 *and Federal Republic of Nigeria v Saminu Turaki* FHC/ABJ/CR/86/2007. These are on-going cases in courts involving some former Chief Executives. Only three Governors namely Lucky Igbinedion, Joshua Dariye and Jolly Nyame have been convicted at the end of trial by Nigerian Courts after they left office. Dariye and Nyame have gone to the Court of Appeal to challenge their conviction.

LIMITATION OF IMMUNITY UNDER INTERNATIONAL LAW

In September 2005, Diepreye Alamieyeseigha, the then Governor of Bayelsa State, one of the 36 constituent States that make up the Federal Republic of Nigerian was arrested, detained and charged[52] for the criminal offence of money laundering in the United Kingdom. He challenged his arrest and detention on the grounds that as the Governor of Bayelsa State, he enjoyed Sovereign immunity in international law. The question before the British Court was whether a Governor and Chief Executive of a State that is part of the Federal Republic of Nigeria had the right to immunity in criminal trials? Counsel to the claimant had brought a claim by judicial review to quash the decision to prosecute the claimant on the basis that he was entitled to Sovereign immunity as Governor and Chief Executive of Bayelsa State of the Federal Republic of Nigeria. The Court ruled that Bayelsa State was not entitled to State immunity and that the applicant was also not entitled to State immunity.

In reaching its decision, the Court took into consideration reports of experts from both the claimant and the defendant. The Court reached its decision on the following grounds:

a) Bayelsa State does not have the legal authority to conduct foreign relations on its own behalf because "external affairs" are reserved solely to the Federal government.
b) The Secretary of State for the Foreign and Commonwealth Office had issued a certificate under Section 21 of the 1978 Act dated 26 September 2005, which records that: The Federal Republic of Nigeria is a State for the purposes of Part 1 of the Act, Bayelsa is a constituent territory of the Federal Republic of Nigeria, a Federal State for the purposes of Part 1 of the Act.

The claimant is the Governor and Chief Executive of the State of Bayelsa and shall not be considered as Head of State of the Federal Republic of Nigeria for the purposes of Part 1 of the Act. (c) The Nigerian Constitution demonstrates that a State such as Bayelsa has no authority on a number of issues usually connected with a Sovereign State. (d) That there are provisions in the Nigeria Constitution which show limited powers in relation to federal sub-states like Bayelsa State to the Federal Republic of Nigeria. The Court considered the judgment of the Supreme Court case of *Attorney-General of the Federation of Nigeria v. Attorney-General of Abia State*[53] where Uwais CJN said that the 36 constituent states of Nigeria are not members of the comity of Nations and so the provisions of international law do not directly apply to them but the Federation. Several jurists took positions on the decision of the Court. Oditah, a counsel to the Governor was of the opinion that the Governor was entitled to absolute immunity in Britain.[54] He posited that like the Federal Government, Bayelsa State has three arms of government, the executive, legislature and judiciary. Accordingly, as the Head of Bayelsa State, the Governor had immunity from criminal jurisdiction under all applicable

[52] The Governor was eventually charged by the Crown Prosecution Service with three count offences as follows: In the first charge, the claimant allegedly received £420,000 on or about 14 December 2001 in a bank account kept at HSBC in London contrary to section 93C (1)(A) of the Criminal Justice Act 1988 as amended. The cash, it was claimed, was the proceeds of a corrupt payment received from a Nigerian oil and property merchant. In the second charge, the claimant was alleged to have laundered the sum of £475,724 in contravention of section 93C(1)(A) of the Criminal Justice Act 1988 as amended by paying on or about 22 March 2003 to the account of the firm of Solicitors (Nedd & Co) for use at 68-70 Regent Park Road, London, N3 for the purchase of the property. The third charge concerns a cash sum £920,000, which was discovered on September 15, 2005 at the claimant's home. Again, the CPS claimed that this amount was the proceeds of criminal conduct contrary to section 327 (1) of the 2002 proceeds of criminal conduct contrary to section 327 (1) of the 2002 Proceeds of Crime Act.

[53] (No. 2) (2002) 6 NWLR 728 – 729.

[54] See 'Alamieyeseigha's Detention and Arraignment Violate International Law' *The Guardian* (4 October 2005) 69.

laws including the laws of Nigeria, England and International Law. Fawehinmi in his contribution opined that:

> no immunity would avail the embattled Governor, According to him, 'under International Law, immunity is enjoyed by the head of a Sovereign State. State here means nation State and not a geographical or political division within the nation State like Bayelsa State. The Customary International law recognizes nation division within a nation State as deserving immunity for the head of that nation State. In Nigeria, the head of the nation was President Obasanjo. According to the political division in Nigeria, there were 36 geographical States with 36 Governors but none of them is the head of the nation state of Nigeria. None of the 36 Governors enjoys immunity under the Customary International law, consequently, the Bayelsa State Governor; Chief Alamieyeseigha does not enjoy immunity outside Nigeria.[55]

On his part, Ijalaye held an opinion that coincided with Fawehinmi. He stated that Sovereignty belonged to the Head of President of a nation-State. He further declared that ".....Foreign heads of State, whether Monarchs or Presidents embody in their persons the Sovereignty of their States and when they visit or pass through the territory of another Sovereign and Independent Country, they are wholly exempted from the local jurisdiction, both civil and criminal.[56] He concluded that no Sovereign immunity would avail Alamieyeseigha".

We submit that the judgment delivered by the British Court is laudable and apt with the principles of public international law in this area of legal jurisprudence. The judgment is at par with the views elucidated by Gani and Ijalaye. There is only one cognizable Sovereign Head in Nigeria as at that time which enjoys Sovereign immunity and it is the President. This is what still persists till this moment.

IMMUNITY CLAUSE IN UNITED STATES

The immunity clause is not enshrined in the United States Constitution as in the case with Nigeria's Constitution. Candidly, as a common law principle, the Courts have recognized certain types of immunity.[57]

The President has complete civil liability immunity for his formal acts. The leading case on this is *Nixon v. Fitzgerald.*[58] In November 1968, Ernest Fitzgerald, an Air Force Management Analyst testified before congressional sub-committee that aerospace developmental projects would necessitate an increase in cost of over US$2 billion. In January 1970, the Pentagon fired him in a cost-saving re-organization. Fitzgerald, who believed he was, fired from his defense department job in retaliation for testimony in which he had criticized military cost overruns sued President Nixon and some of his administrative officials for violating the first amendment and statutory rights. The Supreme Court of the United States in its lead judgment held that the President has absolute immunity to civil harm actions for all acts within the 'outer perimeter' of his authority. The Court held that since the President has authority to prescribe how the business of the Armed Forces will be performed, including the authority to dismiss personnel, Nixon was immune from liability for firing Fitzgerald even if he caused

[55] See Sovereign Immunity *The Punch*, 4 October 2005, 46.
[56] 'Sovereign Immunity and Governor DSP Alamieyeseigha". *The Guardian* (11 October 2005) 67.
[57] SL Emmanuel *Constitutional Law* (Emmanuel Publishing Corp., 1992)36.
[58] 457 US 31 (1982).

it maliciously or in an illegal manner. However, the President does not have immunity at all for acts that are completely unconnected with his official duties.

In *Clinton v. Jones,*[59] Paula Jones brought a suit for private damages against President Bill Clinton while he was in office. Jones claimed that while Clinton was Governor of Arkansas, he made sexual advances to her. Clinton contended that as President of the United States, he should have temporary immunity to last while he is in office against virtually all civil litigations that happened before he took the oath of office. The Court unanimously rejecting the contention held that no immunity of any kind is expressed in the Constitution and that by the decision in the *Fitzgerald's* case, unofficial acts such as the one in this case was based on, are not within the perimeter, not even the outer perimeter of the President's official responsibility.

The American President is also not immune from court processes. The President could be subpoenaed to produce relevant documents in criminal matters. In *United States v Nixon*,[60] a federal grand jury indicted seven Nixon's aides on charges of conspiracy to obstruct justice and other Watergate-related offences. The President was named as an un-indicted co-conspirator.

The Watergate Special Prosecutor convinced the Federal trial Court to issue a *subpoena duces tecum* to the President requiring him to create multiple recordings and records related to the President's conferences. During the indictment trial, these papers and tapes where to be used. The President published some of the recordings, but declined to produce the recordings himself and moved to quash the *subpoena.* The trial Court rejected the President's claim of privilege. On appeal, it was held that the President is amenable to a *subpoena* to produce evidence for use in a criminal case despite the general immunity. The Court noted that under all conditions, neither the doctrine of the separation of powers nor the need for high-level communications, confidentiality without more could maintain an absolute, unqualified Presidential privilege of immunity from legal proceedings. From the foregoing, the United States practices qualified absolute immunity; the President is only immune from civil liability for acts performed in the discharge of his official responsibilities.

CONCLUSION

So far, we have looked at a variety of judicial authorities and academic viewpoints to capture the reasons against keeping the executive immunity clause in the Nigerian Constitution. Their viewpoints rightly have the potential to bring about openness, accountability and probity in Nigeria's polity on the part of State Executives in the country's governance.

Candidly, the deliberate venturing into judicial cases delivered by Courts in United States is that the Nigerian State can learn from this. Immunity from criminal proceedings is not absolute in United States as compared to the Nigeria situation.

Amending the absolute immunity clause provision in the Constitution in respect of criminal proceedings on State Executives in accordance with 308 is long overdue in the Nigeria State. This can be achieved through amendment[61] by removing the words 'criminal proceedings' in section 308 of the CFRN as amended so that State Executives in Nigeria can become liable and be prosecuted for criminal acts committed while still in office.

[59] 65 USLW. 437 2 (27 May 1997).
[60] 418 US.683 (1974).
[61] This could be through a legislative or executive sponsored bill.

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AN ANALYSIS OF REGULATORY AND INSTITUTIONAL CHALLENGES IN THE GOLD MINING SECTOR OF GHANA AND THE WAY FORWARD

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ABSTRACT

The gold mining sector in Ghana predates independence and has over the years contributed significantly to Ghana's socio-economic development through revenue generation, employment creation and an increase in foreign direct investments. Ghana has the necessary laws, policies and available institutions to effectively supervise and monitor gold mining activities to ensure development and to minimize environmental degradation. However, some of these mining laws and policies which have direct or indirect impact on development and the environment are not adequately complied with due to lack of effective implementation and monitoring to ensure compliance. The regulatory institutions in the gold mining sector are faced with significant challenges. They include lack of adequate human and institutional capacity; dealing with multiple regulations and inter-institutional conflicts; lack of proper coordination between the institutions and political interference in the permit processing among other challenges. For the institutions to be able to perform their roles of effective monitoring and supervision to ensure effective compliance of mining laws and policies, it would require coordination between the relevant regulatory institutions, addressing the issue of multiple regulations and inter-agency conflicts and provision of sufficient staffing and resources for monitoring, regulatory enforcement and community inter-action. The aim of this article is to highlight the significant challenges facing regulatory bodies in the gold mining sector of Ghana, and suggest some solutions to these challenges.

Keywords: Regulatory Institutions, Challenges, Gold Mining, Capacity, Ghana

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INTRODUCTION

Ghana is endowed with substantial mineral resources and has a well-established mining sector, particularly gold. For the past three decades, gold mining has contributed significantly to Ghana's socio-economic development through revenue generation, employment creation, and an increase in foreign direct investment.[2] Gold production increased from 59 per cent in 2018 to 65 per cent in 2019.[3] Mining contributions to government revenue increased from 4.9 per cent in 2018 to 7.6 per cent in 2019.[4] However, gold mining has also exacerbated incidences of environmental degradation, including: health and ecological impacts of mercury contamination; environmental impacts of mining on land, water quality, and air quality; effects of noise and vibration on mining communities; depletion of forests; displacement of communities; illegal small-scale mining; pollution of rivers and lakes;[5] and compulsory acquisition of land from indigenous people by Government and awarded as concessions to multilateral mining companies, with little or no compensation to the original land-owners.[6]

Ghana has enacted the Minerals and Mining Act, 2006,[7] as amended in 2010, 2015 and 2019 as the main law that regulates mining; and supported by the Environmental Protection Agency Act, 1994[8] and the Environmental Assessment Regulations, 1999.[9] However, these laws are not being adequately implemented by the regulatory institutions nor complied with by stakeholders. The regulatory institutions and implementing agencies lack adequate logistical, technological and human resource capacity to effectively implement and to ensure compliance by stakeholders of mining laws and policies. This is due mainly to lack of requisite number of personnel, modern equipment and technology to ensure effective supervision and monitoring, resulting in loss of motivation and enthusiasm by the few remaining personnel in those agencies. In addition, they are saddled with poor remuneration and working conditions, and capable personnel being poached by the private and Non-Governmental Organizations (NGOs).[10]

Against this background, the purpose of this article is to find out whether the institutional and regulatory bodies in the mining sector have adequate capacity to ensure implementation and compliance with mining laws and policies. Particularly, this article discusses the challenges facing the regulatory bodies, examines the extent to which these bodies can build capacity to ensure effective implementation and compliance with mining laws, and make suggestions aimed at better implementing and filling gaps which characterise mining law and policy in the mining sector in Ghana.

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[2] FXD Tuokuu and others, 'Challenges and Opportunities of Environmental Policy Implementation. Empirical Evidence from Ghana's Gold Mining Sector' (2018) 59 Resources Policy 435-445.

[3]The Ghana Chamber of Mines, 2019 *Annual Report* (Accra 2019) >http://www.ghanachamber ofminies.org/wp-content/uploads/2020/05/2019-Annual-Report_Complete.pdf> accessed on 17 February 2022.

[4] Ibid.

[5] T Akabzaa, 'Mining in Ghana: Implications for National Economic Development and Poverty Reduction in B Campbell (ed.), *Mining in Africa: Regulation and Development* (Canada 2009) 25-65.

[6] T Akabzaa and A Darimani, 'Impact of Mining Sector Investment in Ghana: A Study of the Tarkwa Mining Region' *Draft Report* for SAPRIN (Washington DC 2000) <http://www.saprin.org/ghana/research/gha_mining.pdf>accessed on 17 February 2022.

[7] Minerals and Mining Act, 2006 (Act 703).

[8] Environmental Protection Agency Act, 1994 (Act 490).

[9] Environmental Assessment Regulations, 1999 (LI 1652).

[10]World Bank, 'Report on Ghana Country Environmental Analysis' (April 2020) < http://www.documents1.worldbank.org/> accessed 22 February 2022.

REGULATORY INSTITUTIONS IN THE GOLD MINING SECTOR

Ghana has built institutional frameworks and organisations to regulate, monitor and ensure compliance in the mining industry. The two main institutions with direct supervisory and oversight responsibilities over the mining sector are the Ministry of Lands and Natural Resources (MLNR) and the Minerals Commission (MC).[11] The MLNR was established under Civil Service Law 1993 (PNDCL 327)[12] and is mandated to ensure the sustainable management and utilization of the nation's lands, forests and wildlife resources, as well as the efficient management of the mineral resources for socio-economic development.[13] The MLNR provides leadership and guidance in the management of the nation's natural resources through effective policy formulation, market regulation and asset management. It is responsible for effective exploration and management of mineral resources, and oversees implementation of mining laws and policy through its sector departments in Ghana. It formulates policies and grants licences for mining and mineral exploration. The Ministry consists of three sub-sectors: Lands, Forestry and Mining.[14] The MC, established under Article 269[15] and the Minerals Commission Act, 1993,[16] is the principal institution for providing regulatory framework for mining in the country. The MC is responsible for the regulation, management and development of mineral resources of Ghana; and the coordination and implementation of policies related to mining. The MC serves as the technical advisory agency to Government.[17] The MC administers the Minerals and Mining Act, 2006[18] making mineral policy and recommendations, promoting mineral development in the country and advising government on mineral related issues. The MC also ensures compliance with the mining and mineral law and regulations. In addition to the broad supervisory role of the MC, the Inspectorate Division of the MC is given the responsibility for enforcing mining laws and regulations.[19] The MC operates under the purview of the MLNR.[20]

Other relevant institutions include the Geological Survey Department (GSD) responsible for geological studies including map production and maintenance of geological records; Environmental Protection Agency (EPA) has overall responsibility for environmental issues related to mining; Land Commission (LC) is responsible for keeping legal records of licences and legal examination of new applications; and the Inspectorate Division of the Minerals Commission (IDMC), responsible for health and safety inspections and maintenance of mining records.[21]

Despite the challenges facing the institutions, particularly, the MLNR and the MC, they have made some notable gains. The MLNR and MC have rolled out a number of programmes to sanitise and streamline the Small Scale Mining (SSM) sector. They include: introduction of technology (MCAS, drones, tracking systems etc.) to regulate SSM activities; training programmes to upscale the skills of small scale miners and; Community Mining Scheme (CMS), among others.[22] The CMS is a policy that has been developed to tackle illegal mining by encouraging locals living in mining communities to undertake responsible, viable and sustainable SSM under the Minerals and Mining Act, 2006 (Act

[11] AK Mensah and others, 'Environmental Impacts of Mining: A Study of Mining Communities in Ghana' (2015) 3 Applied Ecology and Environmental Sciences 81-94.
[12] Civil Service Law 1993 (PNDCL 327) s 11.
[13] Ministry of Lands and Natural Resources <http://www.mlnr.gov.gh> accessed16 May 2022.
[14] Ibid.
[15] Constitution of Ghana 1992.
[16] Minerals Commission Act, 1993 (Act 450).
[17] Ibid s 2.
[18] Minerals and Mining Act, 2006 (Act 703).
[19] Ibid s 102.
[20] Mensah (n 11).
[21] Ibid.
[22] Minerals Commission <http://www.mincom.gov.gh> accessed 22 May 2022.

703),[23] and local participation in SSM. The CSM is aimed at creating jobs, improving livelihoods in mining communities; improving the working condition of mine operators and minimizing environmental degradation that has been associated with SSM for decades.[24]

In addition, the MLNR and the MC in collaboration with the Attorney General's Department have enacted the Minerals and Mining (Amendment) Act, 2019 (Act 995) to administer stiffer penalties to foreigners who engage in SSM[25] and Ghanaians who encourage or assist foreigners to engage in SSM.[26] Further, the MC has successfully established a nationally digitized mineral cadastre system that enables applicants to apply for mineral licences online, thereby improving efficiency and transparency.

KEY REGULATORY CHALLENGES

There are number of regulatory challenges and bottlenecks that need to be addressed if Ghana is to achieve the full benefits of minerals extraction. The four most prominent challenges facing the mining sector are: lack of adequate human and institutional capacity, multiple regulations and inter-institutional conflicts, political will and interference, and, the balancing act of dealing with large-scale and small-scale mining sectors.

Lack of Adequate Human and Institutional Capacity

After over a century of mining, Ghana has relatively good institutions for the training of mining professionals. This is evident in the establishment of several distinguished academic mining and engineering training institutions, namely the University of Mines at Tarkwa (UMaT), University of Ghana (UG), Kwame Nkrumah University of Science and Technology (KNUST) and University of Development Studies (UDS).[27] Ghana can be said to have relatively good-quality human resources in the area of mining.

At the institutional level, Ghana undoubtedly has the requisite institutions to ensure the minerals and mining policies promote and strategically develop a knowledge-driven competitive minerals sector. The MC, GSD, EPA, Centre for Scientific and Industrial Research (CSIR), National Development Planning Commission (NDPC), Forestry Commission (FC), Ghana Revenue Authority (GRA), CSOs, are all strategic institutions mandated or positioned to work to ensure that Ghana remains a knowledge bastion in the minerals economy.[28]

The mining industry, however, appears to suffer from weak absorptive capacity because most of the mining companies in the country undertake surface mining operations which are capital-intensive with relatively low labour requirements. As a result, finding entry level opportunities in the industry has become an uphill task for most graduates. This has contributed to the creation of an accumulating pool of disillusioned work force that eventually becomes unemployable after years of unemployment.[29]

Weak technical capacity in creating environmental policies has diminished the Ministry of Environment Science and Innovation's (MESTI's) ability to provide effective direction on environmental

[23] Ibid.
[24] Ibid.
[25] Minerals and Mining (Amendment) Act, 2019 (Act 995) s 3.
[26] Ibid s 5.
[27] UNDP 'Review of Alignment between the Africa Mining Vision (AMV) and Ghana's Policy/Legal Frameworks for Solid Minerals' (2015) <http//www.undp.org> accessed16 February 2022.
[28] Ibid.
[29] Ibid.

management issues.[30] The Ministry gives disproportionate attention to science and technology issues to the neglect of environmental aspects. The Ministry's coordination function is also underutilized, with poor alignment of environmental sector stakeholders, partly because the framework delineating stakeholder roles and responsibilities lacks clarity.[31]

Information and knowledge management both within MESTI and with stakeholders is poor and most departments operate in "compartmentalized" units without sharing information. The low level of knowledge and public awareness of environmental issues can be attributed to lack of a coordinated environment program, and often policies are not properly disseminated or communicated to inform decisions at the local level. MESTI suffers from budgetary issues that adversely affect program implementation. Monitoring and evaluation of environmental indicators, both internal and externally, is weak with no comprehensive database available to track inputs, outputs, outcomes, and impacts.[32]

The EPA suffers from institutional weaknesses, which include: a weak policy environment; weak enforcement and compliance system; declining budget and resources for program implementation; limited decentralization and low budget allocations to local levels, as well as poor accountability of resources by departments and field offices in terms of performance (results, outputs, and outcomes); poor staff remuneration and performance management, inadequate planning, monitoring and evaluation, and knowledge management systems; suboptimal coordination with partner organizations; and poor client service orientation.[33] The 2008 Ghana Environmental Sector Study concluded that these weaknesses led to inadequate service delivery, underperformance of the permitting and certification system, low levels of mainstreaming environment across sectors, low staff morale and high turnover, among others.[34] To address these issues, the EPA's Five-Year Strategic Plan (2011-2015) proposed a number of activities covering policies, institutions, legal reforms, and environmental assessment and legal compliance, all of which helped to reduce the magnitude of the challenges but did not fully alleviate them. A few of the more pressing institutional challenges encountered by the EPA are: non-compliance with EIAs, lack of coordination, and poor knowledge management.[35]

Multiple Regulations and Inter-Institutional Conflicts

The mining sector is arguably the most regulated sector in Ghana, and has the largest number of regulatory institutions. The main institution mandated to regulate and manage the utilization of Ghana's mineral resources, including the coordination of policies in the mining sector is the MC.[36] There are currently at least six other institutions - namely, EPA, FC, GRA, Water Resources Commission (WRC), Ministry of Finance (MoF), and the Bank of Ghana (BoG), which exercise additional strong and direct regulatory authority over the mining sector. The numerous regulatory institutions have resulted in the creation of complex regulations and interpretation, and conflicts among institutions. This has in turn resulted in undue delays and bureaucracy in the processing of permits.[37] An example of the institutional conflict is the claim by both the MC (the Inspectorate Division)

[30] Ghana Country Environmental Analysis (n 10).
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Minerals Commissions Act 1993, (Act 450) s 2(1); Constitution of Ghana 1992.
[37] T. Aubynn, 'Regulatory Structures and Challenges to Developmental Extractives: Some Practical Observations from Ghana' (2017) <http:www.wider.unu.edu> accessed 22 February 2022.

and the EPA to have ultimate authority to regulate tailings dam construction. The EPA insist on the plastic lining of all tailings, the MC argues for the use of clay lining in lining tailings dams.[38]

These multiple regulations and their attendant inter-institutional conflicts do not only defeat the purpose for which the MC was established - to be a one-stop shop for investment in the mining sector - but they also create needless layers of bureaucracy and institutional tensions. The merger of the former Mines Department, whose duty is largely one of inspection, with the MC as its Inspectorate Division and the subsequent relocation to the same office premises has clearly improved regulatory efficiency and effectiveness. Thus, the original idea of a one-stop shop Commission modelled on the Australian Department of Minerals and Mining is not only achievable, but also relevant today if regulatory efficiency and the effectiveness of the MC are to be enhanced.[39]

Lack of Coordination and collaboration

The absence of coordination and collaboration mechanisms is a significant handicap. The MC allocates mining concessions without regard to current land use, settlements pay compensation and relocation of communities. The situation applies to other commissions established under the Constitution which act without prior regard to the environmental implications of their actions. At the establishment of the EPA, programs were carried out through committees. With implementation of NEAP, however, it was done through inter-sectoral networks that were institutionalized in the EPA's organizational structure. This consultative mechanism between EPA and the sector agencies was discontinued due to the high cost of supporting participation by stakeholders. EPA has realized the value of the networks and intends to reinstate them according to a revised organogram. Such interactions led to establishment of the WRC.[40]

The lack of coordination and collaboration of policies among the institutions, due to complexity of regulations and interpretation, and conflicts among regulators, in many cases has led to functional overlap and undue delays and bureaucracy in permit processing. The consultative mechanisms between the EPA and sector agencies has been discontinued due to high cost of supporting stakeholder participation.[41]

Political Will and Interference

The law gives the minister responsible for mining the ultimate power to grant or terminate any mining title. Yet, the same law ensures that the power is not capriciously exercised. The regulations enjoin the minister to seek the advice of the MC, and the minister's decisions are largely based on this advice.[42] This principle has largely held in Ghana. However, the minister's powers, if exercised capriciously, can result in some instances in which a minister can instruct that specific concessions be processed by the MC for some companies, contrary to the advice offered. Similarly, it becomes an institutional problem where some politicians are unchecked and allowed to use their influence, for example, to intervene in the seizure of equipment used by illegal miners in their operations and processing of mining titles.[43] Even though such practices may not be rampant, it needs to be checked to maintain the integrity of mining laws, regulations and their implementation.

[38] Ibid.
[39] Ibid.
[40] Ibid 125.
[41] Ibid.
[42] Minerals and Mining Act 2006, (Act 703) s 6.
[43] Aubynn (n 35).

The Balancing Act of Dealing with Large-Scale and Small - Scale Mining Sectors

Ghana has two broad categories of mining operations: the large-scale, operated largely by multinational mining companies and a mass of small-scale miners, including many unlicensed operators locally known as *galamseys*. [44]

Regulation of large-scale mining operations has been largely formal and relatively simple.[45] However, the same cannot be said of small-scale mining. The majority of small-scale mining operators are dominated by the *galamseys*, which has been associated with the devastation of the physical environment. The *galamseys* operate substantially in utter defiance of the law.

While large-scale miners are held to strict regulatory standards, the same cannot currently be said of small-scale miners.[46] Reasons for this include: the long and complex application process; lack of finance in an activity that has increasingly become capital intensive; lack of knowledge about the licence acquisition process; and the lack of capacity to fully enforce the law due to the sheer numbers of people (estimated at 1.5 million) involved in small-scale mining in the country vis-à-vis the available resources for policing.[47]

The major challenge, in my view, is the lack of political will by successive governments to resolutely address the challenges posed by illegal small-scale miners. Successive governments have considered enforcing the small-scale mining regulations potentially too costly to their electoral fortunes in view of their numbers as a potential source of significant electoral votes and the lack of alternative employment opportunities.[48] This lack of political will to enforce the laws and regulations on small-scale mining has not only strengthened the hands of these unregistered operators, but has also emboldened them to invade the concessions of some large-scale mining companies and allowed foreigners to engage in SSM with impunity.[49] For instance, on 7th June, 2021, myjoyonline.com reported that four Chinese and their Ghanaian collaborators were arrested whilst mining gold on a disputed site in Obuasi, under the protection of armed guards on land ear marked for a school. The High Court ordered their remand and subsequent deportation on 3rd June, 2021.[50]

HOW TO OVERCOME THE CHALLENGES

To be able to build human and institutional capacity, the following challenges must be addressed: weak linkage between academia and industry for which reason training of personnel does not always take into account technological advancement and contemporary needs of industry; absence of support programmes for young graduates who want to go into small-scale mining. Such support can come in the form of venture capital fund, tax incentives, and subsidized access to plants and equipment, and business advisory services; and, absence of obligation on companies to institute internship programme for young graduates.[51] This could offer the graduates practical experience and increase their competitiveness internationally; EITI audit reports have also revealed that in some instances customs officials stationed at the mines to observe the smelting of the gold ores and to authenticate

[44] Ibid 22.
[45] Ibid.
[46] Ibid.
[47] Ibid 23.
[48] This becomes more pronounced during the national elections year as major political parties compete in their tacit or overt declaration of support for *galamsey* and their assurance of assistance to them once they win power.
[49] Aubynn (n 35).
[50] O Tawiah, 'Court Orders 4 Chinese Involved in Illegal Mining' *myjoyonline* (Accra 7 June 2021) <http://www.myjoyonline> accessed 17 May 2022.
[51] Ibid 30.

the production certificates have been at post for close to a decade, a situation that can compromise the integrity of the monitoring function of these officials; and, women are more than 50% of the workforce in Ghana but less than 5% are in the mainstream mining industry. Gender affirmative action and encouraging females to seek positions in the industry would help address the current imbalance, would facilitate a process of inclusiveness in the sector.[52]

Multiple regulations and inter-institutional conflicts should be addressed to ensure the Minerals Commission fulfils its purpose of being a one-stop shop, and to avoid creating needless layers of bureaucracy and institutional tensions. This would greatly enhance the regulatory efficiency and effectiveness of the MC.[53]

Coordination between the key agencies and various institutions in mining regulation should be strengthened and ensured to improve natural resource and environmental management between them. A coordination mechanism may be set up at the ministerial and district levels to deal with the types of cross-sectoral issues that individual agencies alone cannot provide, e.g., galamsey. At the agency level, EPA can help re-establish inter-sectoral networks that facilitate dialogues on issues of cross-cutting importance.[54]

To overcome the temptation of political interference and to deepen transparency, as well as to reduce other human intervention in the minerals titling (granting of concession) processes, the establishment by the MC of a digitized mineral cadastre system at both the national and district levels that allows applications for mineral titles to be done online, combined with an open tender system, will hopefully reduce to the barest minimum the incidence of interference and human intervention in the granting of minerals titles and improve efficiency and transparency of the system.[55]

It is important that a common approach is found regardless of the political party in power to ensure the enforcement of Mineral and Mining Law, in order to avoid the devastating environmental consequences of illegal mining. All attempts should be made to fight Illegal mining totally while encouraging and supporting regularized small-scale mining.[56] The establishment of the CMS and enactment of the Minerals and Mining (Amendment) Act, 2019 (Act 995) is a very welcome development, and if properly implemented and enforced, illegal mining will be significantly reduced if not totally eradicated.[57]

CONCLUSION

This article has discussed some significant challenges confronting regulatory institutions in the gold mining sector of Ghana. Even though Ghana has enacted adequate laws, formulated numerous policies and set up the requisite institutions, to implement these laws, the regulatory institutions have significant challenges which hinder proper implementation and proper compliance by stakeholders. The lack of compliance of the prevailing laws is mainly due to lack of effective monitoring by regulatory institutions to ensure compliance and lack of effective and proper supervision or commitment by stakeholders in ensuring compliance with the laws. The regulatory institutions and implementing agencies do not have adequate human and institutional capacity to ensure that mining laws are effectively implemented and monitored, because they suffer from inadequate logistical, technological

[52] Ibid.
[53] Aubynn (n 35).
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid.

and human resource constraints, poor working conditions and remuneration for workers, poaching of their personnel by the private and Non-Governmental Organizations (NGOs). Most of the regulatory institutions lack the requisite number of personnel and modern equipment to ensure effective supervision, resulting in loss of motivation and enthusiasm by the few remaining personnel in those agencies.

Despite the efforts of government and sector ministries to deal with some of the challenges, there is the need to increase funding for the key regulatory institutions to be able to build better human and institutional capacity, modernise their electronic systems to promote efficiency, ensure proper coordination by the relevant institutions to avoid institutional and inter-agency conflicts.

THE WAY FORWARD

The article has highlighted the challenges that confront regulatory institutions in the gold mining sector. These challenges are not exhaustive. There are more challenges apart from those that have been highlighted already. These challenges were chosen because they are short term challenges that need to be addressed, and are very relevant to ensuring effective implementation and compliance of mining law and policy; hence, sustainable mining and environmental protection. Some solutions are suggested below.

There is the need to strengthen coordination between the key agencies and various institutions in mining law and regulation to ensure and improve natural resource and environmental management between them. A coordination mechanism may be set up at the ministerial level to deal with the types of cross-sectoral issues that individual agencies alone cannot provide, e.g., galamsey. At the agency level, EPA can help re-establish inter-sectoral networks that facilitate dialogues on issues of cross-cutting importance.[58] Multiple regulations and inter-institutional conflicts should be addressed to ensure the Minerals Commission fulfils its purpose of being a one-stop shop, and to avoid creating needless layers of bureaucracy and institutional tensions. This would greatly enhance the regulatory efficiency and effectiveness of the MC.[59] Sufficient staffing and resources should be provided for monitoring, regulatory enforcement, and community inter-action.[60] Agencies should be trained in use of technologies (e.g. drones, remote sensing) to identify, screen, and target ASGM interventions.[61] EPA and domestic capacity should be strengthened. Continuous professional development programs can be developed for different levels of EPA technical staff in addition to capacity building for other stakeholders. Environmental management skills of EPA staff can be improved through internships by forging links with external agencies such as the Netherlands EIA Commission and the UK Environment Agency, which currently assist the EPA. The human resource capacity of the MC and allied institutions in the mining sector at both the regional and district levels should be built. More staff should be recruited, especially at the district level. Equipment and other resources that technicians need for their work to be effective should be adequately provided. This would ensure sufficient inspection and monitoring of the operating mines. Political influence and interference with the mining licence application and mineral acquisition process; and intervention in seizure of equipment used by illegal miners in their operations, among others should be checked. To overcome the temptation of political interference and to deepen transparency, as well as to reduce other human intervention in the minerals tilting (granting of concessions) processes, the MC should strengthen its digitized mineral cadastre system that allows applications for mineral titles to be done via the internet.[62]

[58] Ghana Country Environmental Analysis (n 10).
[59] Aubynn (n 35).
[60] Ghana Country Environmental Analysis (n 10) 95.
[61] Ibid.
[62] Aubynn (n 35) 21.

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THE POSSIBLE IMPACT OF THE 2019 HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS ON THE GROUNDS OF INTERNATIONAL COMPETENCE IN GHANA

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ABSTRACT

The 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters is a product of the Judgments Project of the Hague Conference on Private International Law. The Hague Judgment Convention has the advantage of providing business partners with a simple, efficient, and predictable structure with regards to the recognition and enforcement regime; as well as reducing related cost. More specifically, the convention fosters predictability and certainty in international commercial relations by enabling international commercial partners to be precisely informed of the grounds on which the decision of the court of one contracting state will be recognised or enforced in the territory of another contracting state. The Convention offers a wide range of jurisdictional filters for the purposes of recognition and enforcement of judgments from Contracting States. This article discusses the modern and innovative grounds of international competence introduced by the Hague Convention and its potential impact on the grounds of international competence for Ghana if Ghana ratifies the convention. The article recommends the ratification of the 2019 Hague Judgment Convention as it would be of enormous benefit to Ghana whose grounds of international competence when it comes to recognition and enforcement of foreign judgments seems antiquated and confined only to residence, submission and more controversially, the presence of the judgment debtor in the jurisdiction of the foreign court.

Keywords: Recognition, Enforcement, Foreign Judgment, International Competence, Hague Judgments Convention

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INTRODUCTION

In recent times, there is an astronomical increase in international transaction and commerce.[2] This has brought about a corresponding increase in transnational litigation.[3] However, the effectiveness of a court's judgment is territorially constrained.[4] Judgments from a State do not have direct impact outside its jurisdiction due to territorial sovereignty.[5] Such a judgment must get the approval of the courts within the State of enforcement.[6] In addition to the territorial principle,[7] legal systems that recognise foreign judgments do so based on principles such as reciprocity, comity, the doctrine of obligation and the theory of vested rights.[8] There are even some countries that do not respect foreign judgments.[9] However, due to worldwide economic integration and globalisation, there is the need for international judicial cooperation.[10] The facilitation of international commerce,[11] enhancement of international relations and enlightened social values necessitate that a foreign judgment is recognised and enforced.[12]

To facilitate this process, there are national, bilateral,[13] and regional[14] regimes to govern it.[15] Internationally, earlier attempts[16] were made in the 20th century to have a worldwide enforcement convention, but they were without success.[17] The premier example of success at the global level

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[2] See generally W Friedman, *The Changing Structure of International Law* (Stevens and Sons, London 1978).

[3] C McLachlan, 'International Litigation and the Reworking of the Conflict of Laws' (2004) 120 LQR 580, 580–582.

[4] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, Cambridge 2013) 313.

[5] C Schulze, *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments* (University of South Africa Press, Pretoria 2005) 16; JR Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, Oxford 2019) 289.

[6] Ibid (n 3) 313.

[7] See the case of *Companie Naviera Vascongado v S.S.Cristina* 1938 AC 485 para 496-497 where Lord Macmillan describes the territorial principle as an important attribute of State sovereignty.

[8] Ibid (n 3) 316; C Roodt,'Recognition and enforcement of foreign judgments: still a Hobson's choice among competing theories?' (2005) 38 CILSA 15, 17.

[9] M Martinek, 'The principle of reciprocity in the recognition and enforcement of foreign judgments — history, presence and ... no future' (2017) 1 TSAR 36.

[10] B Fagbayibo, 'Towards the harmonization of laws in Africa: is OHADA the way to go?' (2009) 42 CILSA 309, 310.

[11] JL Neels, 'Preliminary remarks on the Draft Model Law on the Recognition and Enforcement of Judgments in the Commonwealth' (2017) 1 TSAR 1, 2.

[12] CF Forsyth, *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (Juta and Co Pty Ltd, Cape Town 2012) 417.

[13] Example is the Australia-New Zealand Treaty on Trans-Tasman Court Proceedings and Regulatory Enforcement, 2008 between New Zealand and Australia; and Canada-United Kingdom Civil and Commercial Judgments Convention Act, R.S.C. 1985 between Canada and UK.

[14] Europe: Regulation (EU) No 1215/2012 of The European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [the Brussels Recast] replaced the Brussels Convention and Lugano Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters; Organization of American States (OAS): the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (Montevideo Convention); and Middle East: the 1952 Agreement as to the Execution of Judgments (Arab League Judgments Convention); 1983 Arab Convention on Judicial Co-operation (Riyadh Convention); and 1995 Protocol on the Enforcement of Judgments Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council ('GCC Protocol').

[15] Overview of the Judgments Project <https://www.hcch.net/en/projects/legislative-projects/judgments> accessed on 5 February, 2022.

[16] Examples are the Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (1958) followed by 1965 Convention on the Choice of Court.

[17] R Michaels, 'Recognition and enforcement of foreign judgments' in *Max Plank Encyclopaedia of Public International Law* (Oxford University Press, Oxford 2009) 4.

is the New York Convention,[18] but it deals with the enforcement of foreign arbitral awards.[19] Despite the earlier failures in relation to an enforcement of foreign judgments convention, significant breakthrough was made with the entering into force of the 1971 Hague Convention on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters.[20] However, only five States[21] signed and ratified it, and it never became operational.[22]

In recent times, there has been a revival of this vision of having a worldwide legal instrument for recognition and enforcement of foreign judgement. The Commonwealth Secretariat has embarked on a project for a Commonwealth Model Law on the Recognition and Enforcement of Judgments.[23] Also, the Hague Conference has been relentless in its effort to enact a convention for the recognition and enforcement of foreign judgments.[24] This perseverance has culminated into the 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments (2019 Hague Convention), adopted recently on 2 July, 2019.[25] Since its adoption, six countries have become signatory states, namely: Costa Rica, Israel, Russian Federation, Ukraine, Uruguay and more recently USA.[26] There is also an European Council decision for the EU to accede to the Convention.[27] The Convention is, however, not yet in force.[28] The adoption of this Convention represent an effort to reach an optimum level of international judicial cooperation especially in commercial related transactions. This is very important for a country like Ghana which attracts a lot of foreign investment and is deemed to be the "gateway to Africa".

LEGAL AND ECONOMIC CONTEXT

The economic development of Africa in recent decades has not gone unremarked upon with intra Africa trade, and trade between African countries and other major trading blocs, such as the European Union, Asia, and especially China and the United States of America.[29] Involvement in

[18] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards, 30 June 1958 <http://www.newyorkconvention.org/> accessed on 5 February, 2022.

[19] AVP Mumba, *The Recognition and Enforcement of Foreign Judgments in Malawi* (Master's dissertation, University of Johannesburg, 2014).

[20] Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1 February 1971 (1971) 1144 UNTS 249.

[21] Kuwait, The Netherlands, Albania, Portugal and Cyprus.

[22] Y Zeynalova, 'The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?' (2013) 31 Berkeley Journal of International Law 150, 182.

[23] Commonwealth Secretariat 'Improving the recognition of foreign judgments: model law on the recognition and enforcement of foreign judgments' (2017) 43 Commonwealth Law Bulletin 545, 545-546; and Neels (n 10) 2.

[24] RA Brand, 'The circulation of judgments under the draft Hague Judgments convention' *University of Pittsburgh School of Law legal Studies Research Paper Series No 2019-02* (2019).

[25] It's done: the 2019 HCCH Judgments Convention has been adopted! <https://www.hcch.net> accessed on 5 February, 2022.

[26] <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> accessed on 5 February, 2022.

[27] <https://ec.europa.eu/info/sites/default/files/proposal_eu_accession_judgments_convention_and_annex_en.pdf > accessed 5-02-2022.

[28] Article 28(1) of the Convention provides the condition precedent for the convention to enter into force: *"This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24."*

[29] AJ Moran QC, and AJ Kennedy, *Commercial Litigation in Anglophone Africa: the law relating to civil jurisdiction, enforcement of foreign judgments and interim remedies* (Juta and Co (Pty) Ltd, Cape Town 2018) vii.

international trade impacts positively on the economic growth rates of developing countries, which in turn has a multiplier effect, including rising incomes, poverty level reduction and closing the gap with more advanced countries.[30] According to the 2019 West African Economic Outlook,[31] in 2018, estimated real GDP growth for West Africa was 3.3 percent, up from 2.7 percent in 2017 and the main drivers for this growth were positive net exports, investments, government consumption and household consumption.[32] It was estimated that by 2020, the continent's GDP will reach US$2.6 trillion, and consumer spending is projected to reach US$1.4 trillion.[33] However, in 2020, economic activity in Africa, and in the world as a whole, was greatly affected by the global pandemic caused by COVID–19. As a result, Real GDP in Africa contracted by 2.1 percent in 2020.[34]

Be that as it may, with increased in intra- and extra-continental trade, as well as increase in consumption in Ghana, it is inevitable that commercial disputes will increase, and a number of these disputes will possess cross-border characteristics. In respect of the commercial transactions between foreign trade partners and their counterparts from Ghana, litigation or arbitration of disputes takes place in a forum in a developed country.[35] Eventually, judgments obtained in these developed countries may have to be enforced in Ghana. Currently, the legal regime for recognising and enforcing foreign judgments in Ghana is largely premised on the English common law, which defines the foreign court's international competence in a narrow way. This does not meet the expectation of the modern commercial world.[36]

It is in this regard that this paper seeks to analyse the possible impact of the 2019 Hague Convention on the grounds of international competence of foreign courts recognised in Ghana if Ghana becomes a Contracting State to the convention. To achieve this purpose, the paper begins with an introduction that showcase the efforts of the international community in enacting a global enactment to regulate recognition and enforcement of foreign judgment. It is followed by the legal and economic context of the article highlighting the rationale behind the paper. Further, key concepts that relate to recognition and enforcement of foreign judgment are defined and explained. Also, the Hague Judgments Project that gave birth to the convention is discussed. After delineating the grounds for international competence in the Hague Convention, the paper will move on to discuss the current legal framework for recognition and enforcement of foreign judgment in Ghana. The paper will then move on to illustrate the potential impact that the grounds for international competence, as spelt out in the Hague Convention, would have on the grounds for international competence of Ghana if Ghana becomes a contracting state to the convention. In the dying embers of the article, concluding remarks and suggestions are made.

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[30] See generally D Dollar, and A Kraay, *Trade, Growth, and Poverty* (The World Bank, Washington DC 2001).

[31] This was before the advent of the COVID-19 pandemic which whittled down most economic gains of countries all over the world.

[32] African Development Bank *West Africa economic outlook 2019* (African Development Bank Group, Cote Divoire 2019) 9.

[33] African Development Bank *Africa Economic Outlook 2012* (African Development Bank Group, Cote Divoire 2012).

[34] African Development Bank *African Economic Outlook 2021* (African Development Bank Group, Cote Divoire 2021) 2.

[35] CN Fondufe, and S Mansuri, 'Doing Deals in Africa – Reflections on What Is Different and What Is Not' (2013) 14 Business Law International 163, 176–82.

[36] A Arzandeh, 'Reformulating the common law rules on the recognition and enforcement of foreign judgments' (2019) 39 Legal Studies 56, 58.

DEFINITION OF KEY CONCEPTS

Foreign judgment refers to a judicial verdict given by a competent adjudicating body outside the geographical boundaries of a State.[37] Recognition and enforcement of foreign judgments are related terms, although different.[38]

Recognition implies the enforcing court accepts that the foreign judgment has the same legal effect anticipated by the original court.[39] According to Dickinson and Lein, recognition is the process by which the effectiveness and authority of a judgment are permitted to be relied upon in the legal order of a country other than the original country where the judgment was rendered.[40]

Enforcement of foreign judgment means that the domestic court will compel the judgment debtor to comply with the foreign judgment which the domestic court has recognised.[41] The enforcement process is often left to municipal law and it differs vastly among countries.[42] While recognition is always indispensable for enforcement,[43] however, judgments such as a declaratory order would be recognised but won't be enforced.[44]

PRINCIPLE OF INTERNATIONAL COMPETENCE

At common law, it is an essential prerequisite for the enforcement of foreign judgments that the foreign court should have been capable to adjudicate the case from the perspective of the private international law rules of the requested State.[45] This is often referred to as "international competence".[46]

[37] M Rossouw, *The Harmonisation of Rules on the Recognition and Enforcement of Foreign judgments in the Southern African Customs Union* (Pretoria University Law Press, Pretoria 2016) 10.
[38] C Platto, and W Horton, (eds) *Enforcements of Judgments Worldwide* (Graham and Trotman, London 1993) 155; and Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, London 2012) para 14-002-14-006.
[39] Ibid (n 4) 17.
[40] A Dickinson, and E Lein, *The Brussels I Regulation Recast* (Oxford University Press, Oxford 2015) 375.
[41] Ibid (n 4) 17.
[42] Ibid (n 16) 2. This is the same position per art 15 of the 2019 Hague Convention which provides that: "subject to article 6, this Convention does not prevent the recognition or enforcement of judgments under national law".
[43] C Schulze, 'Practical problems regarding the Enforcement of Foreign Money Judgments' (2005) 17 SA Merc LJ 125, 126.
[44] H Silberberg, *The Recognition and Enforcement of Foreign Judgments in South Africa* (Institute of Foreign and Comparative Law UNISA, Pretoria 1977) 6.
[45] Ibid (n 3) 322
[46] Ibid (n 36) para 14R-020; A Briggs, *Civil Jurisdiction and Judgments* (Informa Law from Routledge, UK 2015) 691; J Hill, and ASL Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Hart Publishing, Oxford 2010) para 12.2.1.

Currently, submission, residence, and more controversially, presence[47] in the foreign court's jurisdiction are the accepted bases of international competence in Commonwealth Africa.[48] Even though the common-law grounds continue to dominate the determination of the international competence of the foreign courts, statutory provisions[49] have been made in several jurisdictions to provide the grounds for determining the international competence of the foreign court.[50] Solely relying on residence, submission and, perhaps, mere presence of the defendant in the jurisdiction of the foreign court, as bases of international competence is seen as restrictive in nature,[51] thus the need for new grounds to be added. This is very crucial in the light of the current upsurge in international trade, transnational relationships and movement of persons.[52]

Some countries have debated the necessity of accepting other bases of international competence such as attachment of property, domicile, doing business in the foreign country, and nationality.[53] Canadian courts have adopted a "real and substantial connection"[54] as an additional basis of international competence.[55] In the Canadian case of *Chevron Corporation v Yaiguaje*,[56] the Supreme Court of Canada held that to recognise and enforce a foreign judgment in Ontario, the foreign court must have had a "real and substantial connection"[57] with the subject matter or parties to the dispute.[58] Ghanaian courts need to follow this example and expand its basis of international

[47] According to Forsyth, in the current world where international travel is widespread, presence is almost an arbitrary ground of jurisdiction and does not ensure any link between the judgment debtor and the court or the court and the dispute, thus not guaranteeing effectiveness. See Ibid (n 11) 430. Overall, writers have been critical of "mere presence" being considered as a ground of international competence. See GMN Xaba, 'Presence as a basis for the recognition and enforcement of foreign judgment sounding in money: The "real and substantial connection" test considered' (2015) 36 Obiter 121-135; A Briggs, 'Recognition of foreign judgments: A matter of Obligation' (2013) 129 LQR 87, 91; RF Oppong, 'Mere Presence and International Competence in Private International Law' (2007) 3 JPIL 321; C Schulze, 'International Jurisdiction in Claims Sounding in Money: Is *Richman v Ben-Tovim* the Last Word?' (2008) 20 SA Merc LJ 61.

[48] RF Oppong, 'Recognition and Enforcement of Foreign Judgments in Commonwealth African countries' (2014) XV Yearbook of Private International Law 365, 373; Briggs (n 44) 692; *Adams v Cape Industries* CA [1990] Ch 433; [1990] 2 WLR 657; *Richman v Ben-Tovim* [2006] SCA 148; 2007 (2) S.A.L.R [SA] 283.

[49] which generally overlaps with, rather than replacing the common law.

[50] Ibid (n 11) 420.

[51] Arzandeh (n 34) 58; A Briggs, 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments' (2004) 8 Singapore YearBook of International Law 1.

[52] Oppong (n 46) 374.

[53] M Tilbury, G Davis, and B Opeskin, *Conflict of Laws in Australia* (Oxford University Press, Oxford 2002) 209–210; J Fawcett, J Carruthers, and P North, *Cheshire, North and Fawcett's Private International Law* (Oxford University Press, Oxford 2008) 527–531.

[54] The test of "real and substantial connection" was enunciated in the case of *Morguard Investments Ltd v De Savoye* [1990] 3.

[55] *Club Resorts Ltd v Van Breda* 2012 S.C.C 17; *Beals v Saldanha* [2003] 3 S.C.R. 416; *Haaretz.com v Goldhar* 2018 SCC 28; *Morguard Investments Ltd v De Savoye* [1990] 3 S.C.R. 1077. See generally V Black, 'Simplifying court jurisdiction in Canada' (2012) 8 *JPIL* 411; J Blom, and E Edinger, 'The Chimera of the Real and Substantial Connection Test' (2005) 38 University of British Columbia Law Review 373.

[56] 2015 SCC 42.

[57] Fawcett, Carruthers and North have opined that "there is much to be said for adopting the real and substantial connection test": Fawcett, Carruthers & North (n 51) 531.

[58] Ibid (n 54) para 85. See also the case of *Barer v Knight Brothers LLC* 2019 SCC 13. However, in South Africa, an attempt to invoke the 'real and substantial connection' test in the case of *Supercat Incorporated v Two Oceans Marine* 2001 (4) S.A. 27 was an exercise in futility. Forsyth has argued that in South Africa, such a test "devoid of precise meaning, simply provides a veil for judicial discretion", and "is not therefore supported as a ground for international competence". See ibid (n 11) 408. In *Supercat Incorporated v Two Oceans Marine* case, the plaintiff sought enforcement of a Florida judgment against the defendant South African company. The Florida court assumed jurisdiction on the basis that the tort involved fraud, and had been committed within its jurisdiction. At the time of the action the defendant was neither resident nor domiciled in Florida.

competence.[59] An expansion of the recognised grounds of international competence has the benefit of bringing within the scope many foreign judgments which at the moment do not meet the existing threshold of international competence.[60]

THE HAGUE JUDGMENTS PROJECT

The Hague Conference on Private International Law (the Hague Conference) is an inter-governmental organization[61] established *inter alia* to progressively unify private international law rules.[62] The "Judgments Project" is one of the most significant projects of the Hague Conference.[63] It deals with the task of the Hague Conference in harmonizing the rules on the international jurisdiction of the courts as well as enforcement and recognition of foreign judgments in transnational commercial and civil cases.[64] The Hague Conference concluded its first multilateral international judgments convention in 1971, but this Convention was not widely accepted,[65] thus it did not enter into force. A reason proffered for the debacle of the 1971 Hague Convention was its inability to tackle the issue of jurisdiction.[66] The Convention sought only to regulate recognition and enforcement, without first regulating when the courts giving the judgment would have jurisdiction.[67] Also, the Convention required that each of the Contracting States[68] had to negotiate a supplementary agreement with the other contracting State.[69] This "method of

However, appearance had been entered and the jurisdiction of the court denied. It was held that the Florida court was not internationally competent under South African law. Counsel for the plaintiff referred to Canadian cases relating to the "real and substantial connection test". Counsel argued that the traditional approach to the recognition of foreign judgments has been rendered obsolete by the exigencies of international trade and called for a new approach. The judge found the Canadian cases "informative" but felt "not inclined or, sitting as a single judge, entitled to ignore the considerable weight of judicial authority in this country".

[59] It was stated in *Richman v Ben-Tovim* 2007 (2) S.A.L.R [SA] 283 at para 9: "there are compelling reasons why . . . in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen. In addition, it is now well established that the exigencies of international trade and commerce require that final foreign judgments be recognised as far as is reasonably possible in our courts and effect be given thereto."

[60] Oppong (n 46) 374.

[61] It is made up of 90 members comprising one regional economic organisation and 89 countries. See Hague Conference Parties <https://www.hcch.net/index_en.php?act=states.listing> accessed on 5 February, 2022.

[62] Statute of the Hague Conference on Private International Law, Oct. 31, 1951 (1951) 220 U.N.T.S. 121; Hague Conference on Private International Law "Overview of the Judgments Project" <https://www.hcch.net/en/projects/legislative-projects/judgments> accessed on 5 February, 2022; S Khanderia, 'The Hague judgments project: assessing its plausible benefits for the development of the Indian private international law' (2019) 44 Commonwealth Law Bulletin 1, 1-2; and H van Lith, *International Jurisdiction and Commercial Litigation: uniform rules for contract disputes* (T.M.C ASSER Press, The Netherlands 2009) 14.

[63] Rossouw (n 35) 47.

[64] AF Garcimatin, and G Saumier, *Judgments Convention: Revised Draft Explanatory Report Preliminary Document No. 1* (Hague Conference, The Hague 2018) para 2; J Regan, 'Recognition and Enforcement of Foreign Judgments – A Second Attempt in the Hague' (2015) 14 Richmond Journal of Global Law and Business 63, 64; Khanderia (n 62) 3.

[65] Rossouw (n 35) 48.

[66] Y Oestreicher, 'We're on a road to nowhere – Reasons for the continuing failure to regulate recognition and enforcement of foreign judgments' (2008) 42 The International Lawyer 59, 70; C Kessedjian, '*The Permanent Bureau, Hague Conference on Private International Law: Preliminary Document No 7 – International Jurisdiction and Foreign Judgments in Civil and Commercial Matters'* (1997) 8 <https://www.assets.hcch.net/docs/76852ce3-a967-42e4-94f5-24be4289d1e5.pdf> accessed on 5 February, 2022.

[67] Rossouw (n 35) 141.

[68] Kuwait, The Netherlands, Albania, Portugal and Cyprus.

[69] Article 21 of the 1971 Hague Convention which provides that: "Decisions rendered in a Contracting State shall not be recognised or enforced in another Contracting State in accordance with the provisions of the preceding articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect."

bilateralisation"[70] is regarded as a major obstacle that prevented States from ratifying and signing the 1971 Hague Convention.[71]

In 1992, there was a renewed interest in negotiating an international judgments Convention, which was largely due to the initiative of United States of America (USA).[72] At the beginning of 1993, negotiations started at the Hague Conference in a quest to enact a treaty on jurisdiction and the recognition and enforcement of judgments.[73] Negotiations that were conducted from 1996 to 2001 led to the 1999 Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,[74] and the 2001 Interim Text.[75] However, as a result of dissensus on both instruments,[76] the Hague Conference decided in 2003 to narrow it to matters of jurisdiction dealing with choice of court agreements and the recognition and enforcement of judgments given by the chosen court.[77] This resulted in the conclusion of the Hague Convention on Choice of Court Agreements in 2005.[78]

After the adoption of the Hague Convention on Choice of Court Agreements, a Working Group was established *inter alia* to prepare proposals for enforcement and recognition of foreign judgment.[79] The Working Group completed its work in 2016, and a Special Commission was created to draft the Convention.[80] The Special Commission held its final Meeting from 24th to 28th May 2018 and came up with the 2018 draft Convention.[81] The Special Commission deemed that the draft Convention had reached the stage where a Diplomatic Session can be held.[82] Thus, the 22nd Diplomatic Session was held at the Peace Palace from 18th June to 2nd July, 2019 to adopt the Convention.

OVERVIEW: 2019 HAGUE CONVENTION

The Convention is applicable to the recognition and enforcement of foreign judgments of a commercial or civil nature among Contracting Parties.[83] The Convention excludes matters of

[70] Rossouw (n 35) 140.
[71] Kessedjian (n 65).
[72] C Schulze, 'The 2005 Hague Choice of Court Agreements' (2007) 19 *SA Merc LJ* 140; KM Clermont, 'An introduction to the Hague Convention' in JJ Barcelo III and KM Clermont, (eds) *A Global Law of Jurisdiction and Judgments: Lessons from the Hague* (Kluwer Law International, The Netherlands 2002) 3, 5.
[73] Schulze (n 71) 140.
[74] see P Nygh, and F Pocar, 'Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial matters' *Preliminary Document No 11 of August 2000* <https://www.hcch.net/index_en.php?act=publications.details&pid=3497&dtid=35> accessed on 5 February, 2022; and Rossouw (n 35) 50.
[75] Hague Conference "Interim text – Summary of the outcome of the discussion in Commission II of the first part of the diplomatic conference 6-20 June 2001" <https://www.hcch.net/upload/wop/jdgm2001draft_e.pdf> accessed on 5 February, 2022.
[76] Khanderia (n 62) 4.
[77] van Lith (n 62) 16; Rossouw (n 35) 51; RA Brand, 'Introductory Note to the 2005 Hague Convention on Choice of Court Agreements' (2005) 44 International Legal Materials 1291; Schulze (n 71) 150.
[78] Hague Conference on Private International Law Convention on Choice of Court Agreements, 30 June 2005, 44 ILM 1294; Khanderia (n 62) 4.
[79] The Judgments Project (n 62).
[80] Ibid
[81] Ibid
[82] Ibid
[83] 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial matters, art 1.

revenue, customs, or other administrative nature. It also excludes arbitration, status and legal capacity, wills and succession.[84] Further, it offers some fundamental precepts concerning the working of the Convention: among Contracting States, foreign judgments from other Contracting States shall not be reviewed on its merits;[85] it provides the basis for recognition and enforcement and the basis for refusal of foreign judgment;[86] and the Convention allows the recognition or enforcement of judgments pursuant to municipal law, subject to article 6.[87] To end with, the Convention sets out general and final clauses, per articles 18 to 26 and also 27 to 34.

The Convention introduces the terms "court of origin" and a "requested court".[88] The "court of origin" is the court in a Contracting State (State of origin) that renders the original judgment. The "requested court" is the court in the other Contracting State (requested State) that is being asked to enforce the judgment given by the "court of origin". Of great importance to this work is the grounds for international incompetence delineated by the Convention.

Grounds for international competence under the 2019 Hague Convention

An essential provision of the 2019 Hague Convention is article 5,[89] as it enumerates the jurisdictional filters for the purposes of recognition and enforcement of judgments from Contracting States.[90] The grounds or jurisdictional filters provided for in Article 5 are exhaustive for the purpose of recognition and enforcement of foreign judgment under the Convention.[91]

Per article 5, the court of origin will be regarded to be internationally competent "if one of the following requirements is met –

a. the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;
b. the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;
c. the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;
d. the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
e. the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

[84] Ibid art 2.
[85] Ibid art 4.
[86] Ibid art 5-7.
[87] Ibid art 15.
[88] Ibid art 4.
[89] Garcimatin and Saumier (n 64) para 143.
[90] Ibid para 143; Khanderia (n 62) 9.
[91] Garcimatin and Saumier (n 64) para 143.

f. the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;
g. the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with
   (i) the agreement of the parties, or
   (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;
h. the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated;
i. the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;
j. the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;
k. the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
   (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
   (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

   This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;
l. the judgment ruled on a counterclaim –
   (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or
   (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;
m. the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement".[92]

[92] "exclusive choice of agreement" means "an agreement concluded by two or more parties that designates, for the purposes of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts."

Per article 6, a judgment which concerns rights *in rem* in immovable property which is situated in the State of origin[93] shall be entitled to be recognised and enforced under the Convention.[94]
The jurisdictional filters of residence and submission found in the 2019 Hague Convention are fully accepted under the legal regime of Ghana. However, the remaining grounds, which "generally reflect an international consensus",[95] are nevertheless novel to Ghana. Notwithstanding the lofty benefits of the convention, it is not without flaws.

Critique of the 2019 Hague Convention

Ronald A. Brand asserts that the merits of the exhaustive nature of article 5(1) also bring corresponding disadvantages.[96] He explains that the jurisdictional filters delineated in article 5 are premised on present occurrences. However, due to the dynamic nature of international trade, as well as rapid advancement in technology, very soon many grounds of international competence may be adopted which are not present in the convention at the moment and some of the grounds may also become obsolete.[97] He also adds that with time, predictability which is seen as a hallmark of the Convention will wane through the interpretational role afforded to national courts and its associated "homeward trend," which is apparent in other conventions which stipulate "uniform rules".[98] Nevertheless, David Goddard has argued, in response, that the method of the 2019 Hague Convention with respect to article 5 is the most efficient as it enhances predictability, accessibility and transparency in the application of the Convention.[99]

LEGAL FRAMEWORK FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OF GHANA

Legal regime for recognition and enforcement in Ghana

There are two regimes that regulate the enforcement and recognition of foreign judgment in Ghana: the common-law and statutory regimes.[100]

Common-law regime

Under this regime, the foreign judgment creates an obligation so the judgment creditor has to institute a fresh suit on the decision.[101] In view of this, the judgment creditor must serve the writ of summons on the defendant.[102] Alternatively, the judgment creditor may institute an action for summary judgment premised on the ground that the judgment debtor has no defence to the suit.[103]

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[93] 2019 Hague Judgment Convention, art 6; Garcimatin and Saumier (n 64) para 256.
[94] Khanderia (n 62) 10.
[95] Ibid (n 10) 6.
[96] Brand (n 23) 19.
[97] Ibid.
[98] Ibid 20. see also HM Flechtner, 'Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations' (1995) 14 Journal of Law and Commerce 127.
[99] D Goddard, 'The Judgments Convention – the current state of play' (2019) 29 D*uke Journal of Comparative* & I*nternational* L*aw* 473, 483-484.
[100] RF Oppong, *Private International Law in Ghana* (Kluwer Law International, The Netherlands 2017) 99; Moran & Kennedy (n 27) 77.
[101] RF Oppong, 'Recognition and enforcement of foreign judgments in Ghana: A second look at a colonial inheritance' (2005) 31 Commonwealth Law Bulletin 19, 22.
[102] *Perry v Zissis* [1977] 1 Lloyd's Rep. 607.
[103] High Court (Civil Procedure) Rules, CI 47 of 2004, Order 14.

Under this regime, for the foreign judgment to be enforced or recognised, it ought to be a fixed amount of money, final and conclusive[104] and the foreign court must be internationally competent.[105] It has been observed that the common law regime appears less used or not known about in the profession of Ghana.[106]

The statutory regime for enforcement

Under the statutory regime, enforcement is by means of registration;[107] and it is based on reciprocity.[108] The Foreign Judgments and Maintenance Order (Reciprocal Enforcement) Instrument 1993 (L.I. 1575),[109] Courts Act,[110] and High Court (Civil Procedure) Rules,[111] are the laws which regulate this regime.[112] The specific country and court needs to be designated under the Foreign Judgments and Maintenance Order (Reciprocal Enforcement) Instrument 1993.[113]
Under the statutory regime, for the foreign judgment to be recognised and enforced or recognised, it ought to involve a definite amount of money which is not a penalty or a tax; must be conclusive and final; and the foreign court should be internationally competent.[114] A foreign judgment which is registered is considered as a decision rendered by the High Court.[115]

GROUNDS FOR INTERNATIONAL COMPETENCE

With respect to international competence, the common-law regime acknowledges submission,[116] residence and presence[117] to be the grounds of international competence.[118]
The statutory regime further lays down the basis for which the foreign court would be deemed to possess international competence. Per section 83(2)(a) of the Courts Act,[119] the foreign court will be deemed to be internationally competent "in the case of a judgment given in an action *in personam* –

i. if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or

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[104] Oppong (n 99) 102.
[105] Oppong (n 100) 22.
[106] Moran and Kennedy (n 27) 78. For example, in the case of *Republic v Mallet ex parte Braun* [1975] 1 GLR 68 which had to do with an unsuccessful application to enforce a judgment given in West Germany pursuant to 1993 Act. The court held that the statute does not extend to Germany. However, surprisingly the court did not even consider the common-law approach.
[107] Oppong (n 99) 110.
[108] Oppong (n 3) 362.
[109] Ibid.
[110] 1993 (Act 459).
[111] 2004 (C.I. 47).
[112] Oppong (n 3) 362. Section 85 of Act 459 provides that "No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Sub-Part applies other than proceedings by way of registration of the judgment, shall be entertained by any court in Ghana." See the case of *Yankson v Mensah* [1976] 1 G.L.R. 355
[113] In the instrument, the following countries are designated: Italy, United Kingdom, Spain, Lebanon, Brazil, France, Israel, Japan, Senegal, and United Arab Republic.
[114] Act 459 s 81(2).
[115] Act 459 s 82(5).
[116] See the cases of *John Holt Co. Ltd v Nutsugah* (1929–1931) Div. Ct. 75; *Crisp v Renner* (1931–7) Div. Ct. 107.
[117] Moran and Kennedy (n 27) 79.
[118] Oppong (n 99) 102.
[119] Courts Act, 1993.

threatened with seizure, in the proceedings or of contesting the jurisdiction of that court; or

ii. if the judgment debtor was the plaintiff in, or counterclaimed in, the proceedings in the original court; or

iii. if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or the courts of the country of that court; or

iv. if the judgment debtor, being a defendant in the original court, was at the time when proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

v. if the judgment debtor, being a defendant in the original court, had an office or a place of business in the country or that court and the proceedings in that court were in respect of a transaction effected through or at that office or place."

Section 83(2)(b) of the Courts Act concerns property and provides that the original court will possess international competence in an action concerning immovable or movable property if the property in question was located in the foreign country at the time when proceedings commenced.

OBSERVATION AND CRITIQUE OF THE COMMON-LAW GROUNDS OF INTERNATIONAL COMPETENCE

A critical look at both the common-law and the statutory regime of Ghana shows how the English legal system has largely influenced its legal system, including the grounds of international competence of the foreign court.[120] The grounds of international competence of the foreign courts in Ghana are residence, submission and presence of the judgment debtor in the foreign court's jurisdiction. Despite their clarity and straightforwardness, these grounds have been criticized by judges as well as scholars in the field of recognition and enforcement of foreign judgment.[121] Tan observes that the meaning of the concept of international competence itself is restricted[122] and that it is based on the presumption of a "very narrow, territorial notion of jurisdiction".[123]

Also, from a conceptual perspective, there is the problem of disparity in the definition of international competence. When it comes to the assertion of jurisdiction of the domestic court in an international commercial litigation, the grounds that it will consider to assert jurisdiction is wider than in enforcement and recognition matters.[124] The reason behind this disparity can be traced

[120] The grounds for international competence were notably espoused in the English cases of *Godard v Grey* (1870) LR 6 QB 139 and *Schibsby v Westenholz* (1870) LR 6 QB 155.
[121] Arzandeh (n 34) 61.
[122] YL Tan, 'Recognition and Enforcement of Foreign Judgments' in KS Teo et al (eds) *Current Legal Issues in International Commercial Litigation* (National University of Singapore Press, Singapore 1997) 290.
[123] D Kenny, 'Re Flightlease: The Real and Substantial Connection Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland' (2014) 63 International and Comparative Law Quarterly 197, 200.
[124] Arzandeh (n 34) 61.

from the era when the current principles were first enunciated.[125] Briggs is critical of the absence of consistency and has argued that "the case for reuniting the two areas is a strong one".[126]

Further, the narrow definition of the grounds of international competence at common law has exposed it to the allegation of lack of trust in the foreign court's civil litigation procedure.[127] It has thus been described as being "chauvinistic".[128] Also, the application of the current grounds of international competence tends to "overly protect" the interest of the judgment debtor.[129] This is due to the narrow definition of the grounds under common law,[130] and it makes it relatively easy for the judgment debtor to be free from the judgment of the foreign court.[131] Thus, despite the straightforward nature of the common law grounds of international competence which is commendable, it is narrow and as a result, new grounds need to be added.

THE POTENTIAL IMPACT OF THE HAGUE CONVENTION ON GROUNDS OF INTERNATIONAL COMPETENCE IN GHANA

The potential impact that the 2019 Hague Convention will have on recognition and enforcement of foreign judgment in Ghana if Ghana becomes a Contracting States is discussed under this section using specific provisions of the Hague Convention.

Article 5(1)(a): habitual residence of the judgment debtor

Article 5(1)(a) of the 2019 Hague Convention stipulates that, if the judgment debtor's habitual residence was in the State of origin, the foreign court will be deemed to be in possession of international competence. The 2019 Hague Convention employs "habitual residence" as a connecting factor against other alternatives recognised in municipal law and uniform law treaties,[132] which includes nationality or domicile and this is in sync with modern Hague instruments which also adopts habitual residence.[133] The benefit of habitual residence utilized as a connecting factor is that it is more accurate than the other connecting factors such as nationality

[125] Ibid. See J Hill, and M NíShúilleabháin, *Clarkson and Hill's Conflict of Laws* (Oxford University Press, Oxford 2016) at para 3.36: "the foundations of the common law rules relating to foreign judgments were laid in the second half of the nineteenth century when the primary bases of the English jurisdiction were presence and submission. At this time there was only a limited form of 'long-arm' jurisdiction, introduced by the Common Law Procedure Act 1854, and the doctrine of *forum non conveniens* was not even a glimmer in the eye of the House of Lords. It is hardly surprising that, when deciding whether or not to enforce a foreign judgment, the courts in the nineteenth century looked to see whether the defendant had been present in the country of origin or had submitted to the jurisdiction of its courts."

[126] A Briggs, 'Which Foreign Judgments Should We Recognise Today?' (1987) 36 International and Comparative Law Quarterly 240.

[127] Arzandeh (n 34) 62.

[128] Kenny (n 122) 197.

[129] Arzandeh (n 34) 62.

[130] That is, residence, presence and submission.

[131] Arzandeh (n 34) 63.

[132] Brussels 1 Recast; and Rome 1 Regulation.

[133] Garcimatin and Saumier (n 64) para 150. See the 1996 Hague Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental responsibility and measures for the protection of children; and the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

or domicile.[134] This is because it shows a close link between individuals and their socio-economic setting, and is unlikely to lead to inconsistent judgments by courts.[135] The use of "habitual residence" in the Hague Convention brings clarity and certainty as against "residence," as found under the common law and statutory regimes of Ghana. According to Forsyth,[136] "residence" is a difficult term which has different meanings in varied contexts. Thus, the use of the term "habitual residence" appropriately qualifies the vagueness of the term "residence" and brings clarity in its application as a jurisdictional filter. Although habitual residence for natural persons has not been defined[137] and this may lead to different interpretations by municipal courts, uniform interpretation should be encouraged in view of Article 20 of the Convention.[138]

Article 5(1)(a) and article 3(2): habitual residence of juristic persons

Under both the common-law and the statutory regime of Ghana, when it comes to residence of a body corporate, the foreign court will only be considered to be internationally competent if the company's principal place of business is in the foreign State. However, per the combined effect of articles 3(2) and 5 of the 2019 Hague Judgment Convention, new connecting factors such as place of incorporation, the place of the company's statutory seat and place of central administration of the company are added grounds considered as the habitual residence of the company and thus enabling the courts in the country of these places to be internationally competent.

Under the common-law system, the law of the place of incorporation is usually considered as essential for determining matters concerning the corporation's internal affairs.[139] In some States, it is impossible to depend on statutory seat as the connecting factor.[140] In such instance, the Convention uses the country under whose law the legal person was formed as an alternative. This criterion will usually indicate the place where the corporation is registered, where it has a registered office.[141] The place of the corporation's central management is vital in that it is the administrative centre of the company, the venue where very vital decisions are made.[142] The

[134] Domicile is regarded as a "normative concept" whereas habitual residence is a "factual concept." See P Mankowski, 'Article 5' in U Magnus, and P Mankowski, (eds) *European commentaries on Private International Law: Brussels 1 Regulation* (2007) 1, 177-178; Garcimatin and Saumier (n 64) para 150.

[135] Garcimatin and Saumier (n 64) para 150.

[136] Ibid (n 11) 422.

[137] According to Mankowski "Article 5" in U Magnus and P Mankowski, (eds) *European Commentaries on Private International Law: Brussels 1 Regulation* (Sellier European Law Publishers, Munich 2007) 1, 177-178: "habitual residence is defined as the factual centre of the individual's personal and social life."

[138] Article 20 provides: "In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application."

[139] T Hartley, and M Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements* (2013) para 120 <https://www.hcch.net/en/publications-and-studies/details4/?pid=3959&dtid=/> accessed on 5 February, 2022; Garcimatin and Saumier (n 64) para 92.

[140] Nygh and Pocar (n 74) 41.

[141] Ibid.

[142] Hartley and Dogauchi (n 139) para 120; Nygh and Pocar (n 74) 41. However, in the current world of commerce, modern techniques are used in decision-making for corporations which undertake business in many countries. There is the likelihood of decision making via videoconferencing or modern forms of electronic communication. This means decisions may be made in several places making it difficult to locate where the decision was made. As a result of this, there is some level of vagueness using this criterion. Thus, this criterion is inadequate in itself and can be on the list as one of the alternative jurisdictional filters. See generally Nygh and Focar (n 74).

corporation's statutory seat is regarded as the domicile of the corporation[143] as indicated by its bylaws or constituent documents.[144]

All these three additional connecting factors are essential under common law,[145] and the 2019 Hague Convention stipulates that a juristic person is considered as resident in all these three places too. The advantage of these additional connecting factors establishing habitual residence is that it expands the grounds and enables judgment from these other places which at the moment are not recognised under the legal framework of Ghana to be recognised and subsequently increasing the chances of them being enforced.

Article 5(1)(b): principal place of business of a natural person

Natural persons embarking on business endeavours are similar to juristic persons in terms of jurisdictional connections.[146] Allowing cases to be adjudicated in the country of the principal place of business is in sync with the legitimate expectations of parties.[147]

Per the statutory regime of Ghana, if the judgment debtor's office or place of business is in the State of origin and the action arose out of a transaction effected through or at that office or place, then the foreign court will be deemed to be internationally competent.[148] However, conspicuously missing from this provision is the relationship between the timing of the claim and establishing the principal place of business. The location of a person's principal place of business may change over time. This can be either happen during the course of proceedings before the verdict is given or even after the verdict has been given but before recognition or enforcement is sought or even after the cause of action have risen before the institution of the proceedings in court. To cater for this situation and avert controversies, the Hague convention requires a contemporaneity of the time of the claim and the founding of the principal place of business. In other words, the principal place of business is to be assessed at the time when the judgment debtor became a party to the proceedings in the foreign court.[149] It is not a prerequisite that the judgment debtor should have his principal place of business in the foreign country at the time that the requested State is determining the connection. It will be thus recommended that Ghana amends the existing provision in its statutes to incorporate the phrase "at the time that person became a party to the proceedings in the court of origin".

Further, the statutory provision of Ghana provides that the proceedings in the State of origin should relate to a transaction effected through or at that office or place. The presumption is that the transaction will be effected at a physical location. However, in the current world where transactions can be effected online by private businessmen, if a dispute is to arise out of a transaction that was effected online, it will be difficult establishing the place of transaction to aid in determining whether the foreign court was internationally competent. However, the provision in article 5(1)(b) of the 2019 Hague Judgment Convention, delineates the principal place of business of the natural person as the connecting factor at the time the proceedings were instituted. This

[143] Hartley and Dogauchi (n 139) para 120.
[144] Garcimatin and Saumier (n 64) para 92.
[145] Hartley and Dogauchi (n 139) par 120.
[146] Garcimatin and Saumier (n 64) para 156.
[147] Ibid.
[148] As highlighted above under the statutory regime of Ghana.
[149] Garcimatin and Saumier (n 64) para 159.

brings clarity and certainty because even if the transaction was done online, the principal place of business will be easily to identify.

Article 5(1)(d): agency, branch or other establishment

Article 5(1)(d) provides grounds of jurisdiction for secondary establishments.[150] This concerns situations where the claim emanated from the endeavours of a branch of a person whose habitual residence is in another country. Under that circumstance, the 2019 Hague Judgment Convention accepts the jurisdiction of the courts in the country where the branch is situated.[151] This "branch jurisdiction" or a branch establishing jurisdiction is found in other legislation.[152]

The ideation behind this provision is that an individual who creates an establishment in another country implicitly or explicitly approves of the jurisdiction of the courts of that country on claims regarding the activities of that entity because that individual regulates the entity.[153] This is in line with the legitimate expectations of parties and since this jurisdiction is restricted to matters that emanated from the activities of the branch, it is vindicated by the close link that exists between the court that adjudicated the matter and the dispute.[154] There is no such provision under the legal framework of Ghana.

Article 5(1)(e): express consent to the jurisdiction of the foreign court by the judgment debtor during proceedings

Article 5(1) provides for three types of consent: unilateral express consent during proceedings;[155] implied consent or submission;[156] and consent in an agreement by the parties.[157] Any of these types satisfies the jurisdictional prerequisite under Article 5(1).[158] Under article 5(1)(e), the jurisdictional filter prerequisite is met if the defendant explicitly agrees to the jurisdiction of the foreign court during the course of proceedings. It is a question of fact whether there is an express consent and this is determined by the enforcing court.[159] The express consent could be oral or in writing and it can also be addressed to the other party or to the court during the course of the proceedings.[160] This mode of consenting is not renowned or familiar in all legal systems,[161] however, it is not a hindrance to the assessing of such consent by the requested State. The requested State is not deciding whether the foreign court had jurisdiction according to its own rules of direct jurisdiction. Rather, the requested State is ascertaining whether any of the jurisdictional filters (grounds of indirect jurisdiction) have been met.[162] This is thus a novel ground for determining the international competence of the foreign courts.

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150 Ibid para 163.
151 Ibid para 163.
152 Ibid; Brussels I recast, art. 7(5); Nygh and Pocar (n 74) para 127; Civil Code of Québec, Art.3168(2).
153 Dickinson and Lein (n 38) 176; Garcimatin and Saumier (n 64) para 164.
154 Garcimatin and Saumier (n 64) para 164.
155 2019 Hague Judgment Convention, art 5(1)(e).
156 Ibid, art 5(1)(f).
157 Ibid, art 5(1)(m).
158 Garcimatin and Saumier (n 64) para 168.
159 Ibid para 170.
160 Ibid.
161 Ibid para 171.
162 Garcimatin and Saumier (n 64) para 171.

Article 5(1)(f): a challenge to the jurisdiction of the foreign court would not have been successful under that law

There are some States that procedurally have time frames within which the defendant can challenge the jurisdiction of a court.[163] The Hague Judgment Convention makes provision that if there is no challenge by the defendant to the jurisdiction in accordance with the time frame stipulated by the court of origin, it will be considered that the defendant have submitted to the foreign court. Such a provision is lacking in the statutes of Ghana.[164]

Further, there is submission if the defendant implicitly consents to the jurisdiction of the foreign court even though ordinarily the foreign court would not have had jurisdiction,[165] or there were even grounds for a challenge to that jurisdiction.[166] A key presumption of this principle is that procedurally the foreign court permits the defendant to contest jurisdiction and thus a failure to challenge the jurisdictions will be construed as implied consent.[167]

Article 5(1)(f) considers whether such a contest to jurisdiction would have been successful in the foreign court since it would otherwise be unfair to require the defendant a contest if it was going to be an exercise in futility.[168] Thus, if the defendant can prove that any effort to challenge the jurisdiction of the foreign court was bound to fail, then the failure of the defendant to raise such an objection before the foreign court will not be construed as consent or submission. In that case, the jurisdictional criterion will not have been satisfied.[169] For instance, the foreign court assumes jurisdiction on the ground that the defendant has property in the jurisdiction[170] although there is no link between the property and the claim. Moreover, prior case law authorities in the court of origin shows that objections to jurisdiction on this ground are always unsuccessful and, based on this, the defendant did not challenge the jurisdiction of the court of origin. In such scenario, the judgment that will be given by the foreign court will not be recognised and enforced by the Requesting State (enforcing court) even though the defendant did not challenge the jurisdiction of the court and argued on the merits of the case.[171]

Article 5(1)(f) also makes provision for a situation where a challenge to the foreign court's exercise of jurisdiction would have been unsuccessful. This is a possibility in countries that adhere to the doctrine of *forum non conveniens*.[172] In such a situation, if the defendant does not invoke the doctrine and can show that even if the doctrine had been invoked, it would have been

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[163] Ibid para 179.
[164] In Ghana, issues about jurisdiction can be raised at any stage of the case. See *Amoasi v Twintoh* [1987-88] 1 GLR 554.
[165] Ibid (n 11) 422-423.
[166] Garcimatin and Saumier (n 64) para 180.
[167] Ibid.
[168] Ibid para 181.
[169] Nevertheless, to avoid such strategic conduct by the defendant, the Convention requires a relatively high standard of proof. It ought to be "evident" that a challenge to the jurisdiction would have been unsuccessful under the law of the foreign country. see Garcimatin and Saumier (n 64) para 182.
[170] In South Africa for instance, if the defendant is a foreign peregrines and the cause of action did not occur in the area of jurisdiction of the court, the property of the foreign peregrine can be attached to found jurisdiction and the court will thus exercise jurisdiction. This is referred to as attachment ad fundandam jurisdictionem. In that case, it is not additionally required for the peregrine defendant to submit to found jurisdiction of the court. See JP Van Niekerk, and WG Schulze, *The South African Law of International Trade: Selected Topics* (SAGA Legal Publications, Pretoria 2016) 325; ibid (n 11) 223.
[171] Garcimatin and Saumier (n 64) para 183.
[172] Ibid para 184.

unsuccessful under the laws of the foreign country, such a judgment by the foreign court is unenforceable.[173] These provisions are very essential but are presently missing in the legal regimes of Ghana with respect to the recognition and enforcement of foreign judgment.

Article 5(1)(g): the place of performance of a contractual obligation

Presently, place of performance is not recognised as basis of international competence under the private international law of Ghana. However, from a developmental perspective, this jurisdictional filter deserves special attention.[174] Neels has argued that the place of characteristic performance could be considered as a ground for international competence and he espoused reasons to fortify his stand.[175]

First of all, the place of performance is accepted as a ground of domestic jurisdiction in many countries.[176] The Brussels I (recast) provides for inter alia the place of delivery, which is the characteristic performance as a ground for jurisdiction.[177] Since Ghana trades with the European community, the recognition and enforcement of foreign judgment emanating from the courts of trade partners are very essential as it will boost investor confidence, and as a multiplier effect, it will lead to the creation of jobs and poverty alleviation.[178] Secondly, the place of the characteristic performance is a connecting factor which provides a real and substantial connection with a court.[179]

Thirdly, the place of performance, particularly the characteristic performance plays an essential role in the private international law of Ghana as it aids to indicate the default legal system and constitutes the most important connecting factor in determining the objective proper law[180] in the absence of express or tacit choice by the parties.

Further, the Model Law on the Recognition and Enforcement of Judgments in the Commonwealth[181] also makes provision for the recognition of the place of performance as a ground of international competence in article 5(1)(g).[182] Thus, in principle, despite the adoption of the Hague Convention, if Ghana adopts the Model law on Recognition and Enforcement of Foreign Judgments which is applicable to commonwealth countries, the place of performance will

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[173] The courts of Ghana adheres to the doctrine of *forum non conveniens*. See generally Moran and Kennedy (n 27).
[174] Ibid (n 10) 6.
[175] Ibid (n 10) 6-8.
[176] Ibid (n 10) 7.
[177] Article 7 of Brussels I (recast) provides: "A person domiciled in a Member State may be sued in another Member State:
(1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purposes of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, or
– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
(c) if point (b) does not apply, then point (a) applies."
[178] Ibid (n 10) 7.
[179] Ibid (n 10) 8.
[180] Ibid (n 10).
[181] Model Law on the Recognition and Enforcement of Foreign Judgements (2015) <https://www.thecommonwealth.org/default/files/> accessed on 5 February, 2022.
[182] Article 5(1): "A court in the State of origin is deemed to have had jurisdiction if: -… (g) the proceedings related to a contractual obligation that was or should have been performed in the State of origin."

consequently become a ground for international competence in Ghana since Ghana is a member of the Commonwealth.[183] The significance of the place of performance has also been advanced by Okoli who proposes that the place of performance should be given principal significance as the connecting factor to be considered especially in terms of commercial contracts.[184]

However, Neels argues that there may be complexities in construing place of performance as a ground of international competence.[185] This is because it is unclear whether the place of performance refers only to the place of the "characteristic performance"[186] or it also includes the place of payment.[187] Another problem arises if the characteristic performance is carried out in more than one country.

Also, there is also the problem of determining the place of performance in the absence of an agreed place of performance by the parties. The Hague Judgment Convention provides that in the absence of an agreed place of performance by the parties, the law applicable to the contract will help to determine the place of performance.[188] Nevertheless, this provision is not going to work for countries like South Africa, traditional common law countries like Canada or Australia or States that use the Restatement Second.[189] This is because in such legal systems, in the absence of choice of law by the parties, the place of performance, especially the place of the characteristic performance, plays an important role in indicating the default applicable legal system or at least constitutes the most important connecting factor in determining the objective proper law of the contract.[190] Thus, the place of performance is needed to determine the proper law. However, the place of performance is not known, thus making it not feasible for such legal systems.[191] Nevertheless, some of these potential difficulties are assuaged by the decisions of the European court[192] in the context of supranational jurisdiction under the Brussels I (recast), and this may

[183] Member countries per <https://thecommonwealth.org/member countries/> accessed on 5 February, 2022.
[184] C Okoli, *Place of Performance: A Comparative Analysis* (Hart Publishing, London 2020) 62.
[185] Ibid (n 10) 8.
[186] For instance, the place of delivery of the goods under a contract of sale.
[187] For instance, in India, place of payment of money has been interpreted as a place of performance. See *ABC Laminart v A.P. Agencies* (1989) 2 SCC 163; KB Agrawal, and V Singh, *Private International Law in India* (Kluwer Law International, The Netherlands 2009) 231.
[188] 2019 Hague Judgments Convention, art 5(1)(g)(ii).
[189] Twenty-three (23) States in the United States of America (USA) follow the Restatement Second in contract conflicts namely: Alaska, Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, South Dakota, Texas, Utah, Vermont, Washington and West Virginia. See SC Symeonides, 'Choice of law in the American courts in 2012: twenty-sixth annual survey' (2013) 61 The American Journal of Comparative Law 217, 278-285.
[190] Ibid (n 10) 8. See also Ibid (n 11) 329-336; EA Fredericks, *Contractual Capacity in Private International Law* (Doctoral thesis, University of Leiden 2016) 13-16; EA Fredericks, and JL Neels, 'The proper law of a documentary letter of credit – Part 1' (2003) 15 SA Merc LJ 63, 69; JL Neels, and EA Fredericks, 'The music performance contract in European and Southern African Private International Law – Part 2' (2008) 71 THRHR 529, 535; E Schoeman, C Roodt, and M Wethmar-Lemmer, *Private International Law in South Africa* (Kluwer Law International, The Netherlands 2014) 53, 55-56.
[191] However, the situation will be different in Rome I countries. This is because per article 4 of Rome I, in the absence of choice of applicable law by the parties, per art.4 the default applicable law in a contract for the sale of goods is the law of the country where the seller has his habitual residence. Having identified the applicable law, that helps to determine the place of performance. Thus, it is not a problem for Rome I countries.
[192] In the case of Color Drake, the ECJ decided in the context of complex contracts (where delivery must place in different places or countries) that the "principal place of performance" provides the only jurisdictional connecting factor on the basis of "efficient organization of the proceedings." See Ibid (n 10) 8; U Grušic, 'Jurisdiction in complex contracts under the Brussels I Regulation' (2011) 7 JPIL 321, 321-338; ECJ *Color Drack GmbH v Lexx International Vertriebs GmbH* C386/05 (3 May 2007) [2007] ECR I3699.

guide the courts in Ghana.[193] It is thus recommended that Ghana recognises the place of performance of a contractual obligation, especially the place of characteristic performance,[194] as a ground of international competence.

Article 5(1)(j): non-contractual obligations

Article 5(1)(j) is one of the novel provisions in the 2019 Hague Convention. It concerns judgments in respect of a non-contractual obligation arising from physical injury, death, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin. The place where the harm eventually occurred is irrelevant. This provision marks a departure from the position of regional and municipal legal systems that recognise jurisdiction exercised by the court in the country where the harm occurred.[195] The importance of the limitation to a "single jurisdictional connection" and the placement of a ceiling on the types of harm covered by this provision is that it will help to minimise interpretive complexities that have shown up in other systems.[196] It also purges the quandary of whether long-lasting suffering and pain in the State of origin resultant of a physical injury that was sustained in another State is adequate to constitute jurisdiction in the State of origin.[197] The private international rules of Ghana is however bereft of such provision.

CONCLUDING REMARKS

The significance of cross-border commerce to the economic development of Ghana cannot be overemphasized.[198] As set out at the commencement of this work, the common- law grounds of international competence, which have further been codified in the statutes of Ghana is very narrow, restricting it to merely residence, presence and submission. However, the Hague Convention provides a broader scope for conferring international competence on the foreign courts and the subsequent possibility of recognising and enforcing judgments rendered by it. The Hague Convention has the advantage of providing business partners with a simple, efficient, and predictable structure with regards to the recognition and enforcement regime;[199] it will also reduce related cost.[200]

The Hague Convention is the latest legal framework on recognition and enforcement of foreign judgments. It encapsulates the modern accepted basis for recognising and enforcing foreign judgments across borders. This will help to accelerate economic engagement and development of Ghana and her trade partners, majority of which are member States of the Hague Conference, if they all become Contracting Parties to the Convention.

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[193] Ibid (n 10) 8.

[194] Per the Giuliano and Lagarde Report, the characteristic performance is the one that gives a contract its name and for which the payment is due. See M Giuliano and P Lagarde, 'The Report on the Convention on the Law Applicable to Contractual Obligations' [1980] 1QJ C-282/20.

[195] See the interpretation of Brussels I Recast, art. 7(2) by the ECJ in cases such as *Shevill v Presse Alliance SA* (Case C-68/93) [1995] ECR I-415 para 20; *Kronhofer v Marianne Maier* (Case C-168/02) [2004] ECR I-6009 para 16. see also Nygh & Pocar (n 74) para 135-149; Garcimatin and Saumier (n 64) para 203.

[196] Garcimatin and Saumier (n 64) para 204.

[197] Ibid para 205; *Club Resorts v Van Breda* (n 53) para 89.

[198] See generally N Verter, 'International Trade: The position of Africa in Global Merchandise Trade' in MJ Ibrahim, (ed) *Emerging issues in economics and development* (InTech Open, London 2017) 65-88.

[199] The Judgments Project (n 62); Khandeira (n 62) 9.

[200] The Judgments Project (n 62).

RECOMMENDATION

The material conditions in the life of a country at any stage influence the level of development of private international law.[201] These factors include growth in international trade and investment, and advancement in technology.[202] It is therefore recommended that Ghana signs and ratifies the Hague convention so that they become beneficiaries of the global developments in private international law, especially those on grounds of international competence of foreign court. Alternatively, it is suggested that in the event Ghana does not want to be a Contracting State to the Hague Convention, it can amend its existing legal framework on recognition and enforcement of foreign judgments and incorporate these novel grounds of international competence of foreign courts as provided for in article 5 of the 2019 Hague Convention.

[201] See generally P Kalensky, *Trends of Private International Law* (Springer, The Netherlands 1971).

[202] RF Oppong, 'Private International Law in Africa: The Past, Present, and Future' (2007) 55 The American Journal of Comparative Law 677, 678.

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CRIMINALITY IN THE MICROFINANCE SECTOR: A SYMPTOM OF "BROKEN WINDOW"

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ABSTRACT

The phenomenal rate of deviant acts in the microfinance sector of Ghana's economy has generated a great deal of debate about its ramifications for the future of the sector and financial inclusion efforts. The Sustainable Development Goals (SDGs) target 16:4 acknowledges the dangers syndicated crimes pose to the attainment of the goals and proposes a reduction in all forms of illicit financial flows and organized crime by 2030. In this paper, it is argued that one of the major effects of criminality in the microfinance sector is the deepening of financial exclusion of people who are already on the fringes of the financial inclusion bracket. Semi-structured and in-depth interview guides were used to collect data for the study. The Broken Window theory of criminology was adopted as the theoretical framework to guide the study. The study found that criminal and fraudulent activities in the microfinance sector are real issues that need attention. The study concludes that the laxity and delays on the part of state institutions mandated to regulate the sector and their inability to crack the whip on criminal elements in the sector have contributed to the festering of crimes in the sector and its resultant financial exclusion. The study recommends that regulatory agencies should develop and deploy stringent monitoring and surveillance regime in order to forestall the occurrence of criminal activities which have plagued the sector.

Keywords: Criminality, Double-up, Financial Inclusion, Fraud, Microfinance

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INTRODUCTION

The 2017 Global Findex indicated that about 1. 7 billion adults remain unbanked globally.[2] The situation is attributed to factors such as the lack of financial institutions, high cost of documentation, distance and distrust of the institutions among others. The concept of financial inclusion has become a major socio-developmental concern that governments especially those in Africa are grappling with. It has been observed that banking institutions in Africa are less inclusive.[3] In addition, where financial services exist in Africa, they are mostly concentrated in urban areas.[4] Thus the majority of the rural poor are excluded from financial services.[5] Financial inclusion has been defined to include one's ability to own an account in a formal financial institution, the ability of segments of society to access formal financial services, or the process that deny the poor and vulnerable from accessing formal financial institutions of their countries.[6] Being financially included comes with some economic benefits including ability to save and also borrow from financial institutions. Accordingly, financial inclusion can help the disadvantaged and economically marginalized to secure employment and improve on their incomes.[7] It has also been observed that financial inclusion can enhance women's empowerment.[8] Some advocates have opined that, financial inclusion is a sure way of improving financial stability of economies around the world.[9]

The purported benefits of financial inclusion have energized governments of African countries to promote and also institute measures to open up their economies in order to engender financial inclusion. In spite of these, many people in Africa are still excluded from key financial sectors mainly because their income levels are low and barely suffice to cater for their basic needs for them to consider saving a portion. Poverty in Africa is a major social problem that needs crucial attention in order to address it. This is because a sizeable number of people in Africa are financially marginalized either because they do not have money at all or they lack access to financial institutions. It is as a result of these challenges that all countries in the developing world and other stakeholders are working feverishly to ensure that more people have access to financial inclusion gateways such as thrift, credit unions, and microfinance and banking institutions in order to close the financial exclusion gap. These efforts are also geared towards achieving the 17 Sustainable Development Goals (SDGs) of peace and prosperity.

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[2] A Demirguc-Kunt; L Klapper; D Singer; S Ansar; J Hess, *The Global Findex Database 2017: Measuring Financial Inclusion and the Fintech Revolution* (Washington, DC: World Bank, 2018).

[3] See R Cull et al., 'A New Index of the Business Environment for Microfinance' (2015) 70 World Development, Elsevier 357-388.

[4] Mlachila, et al. *Banking in Sub-Saharan Africa: Challenges and Opportunties* (Pretoria: EIB, 2013).

[5] E. Littlefield and R. Rosenberg, *Breaking Down the Walls between Microfinance and Formal Financial System, Consultative Group to Assist the Poor* (Washington DC. World Bank Group, 2004).

[6] See Carbo et al., *Financial Exclusion* (UK: Palgrave Macmillan, 2005) 98-111; J Conroy, 'APEC and Financial Exclusion: Missed Opportunities for Collective Action?' (2005) 12 Asia-Pacific Development Journal 53; and Mohan, (2006) R Mohan "Economic growth, Financial Deepening and Financial Inclusion", Address at the Annual Bankers' Conference 2006, Hyderabad.

[7] See M Bruhn and I Love, 'The Real Impact of Improved Access to Finance: Evidence from Mexico' (2014) 3 The Journal of Finance 69.

[8] V Swamy, 'Financial inclusion, gender dimension, and economic impact on poor households' (2014) 56 World Dev 1-15.

[9] R. Han and M. Melecky *Financial Inclusion for Financial Stability. Access to Bank Deposits and the Growth of Deposits in the Global Financial Crisis (Policy Research Working Paper No. 6577)* (Washington, DC: The World Bank, 2013).

One cannot deny that Ghana stands to derive a number of benefits from having many of its citizens within the financial inclusion bracket. This includes helping families save for emergencies, help grow businesses and may also bring transparency to the informal sector[10]. According to some analysts, microfinance creates access to productive capital for the poor and enhance their sense of self-worth thus energising them to participate in the economy and society.[11]

HISTORY OF MICROFINANCE IN GHANA

Oral history of most local people in Ghana indicates that since time immemorial, they have had their own methods of mobilizing funds for local business and small retail business, farming and others. These methods include the "Susu"[12] or thrift schemes. Some documentary evidence indicates that the first credit union in Africa was established in Northern Ghana in 1955 by some Canadian Catholic missionaries. However, the Susu scheme is believed to have originated in Nigeria and spread to Ghana from the early 1900s.[13]

The operations of the Susu schemes were quite informal and expensive. Most of them operated without proper bookkeeping and were also not properly regulated by government agencies such as the Bank of Ghana, neither were their operations monitored. Worse of all, the safety of funds lodged or saved with these informal thrift schemes could not be guaranteed. Some of the collectors and operators of the thrift schemes often defrauded their customers or absconded with the funds they have collected from the customers. Others also have had difficulties accounting for the monies they have collected from customers especially when the customers needed the funds. It is in the face of this precarious situation which characterized the informal savings and thrift schemes that some observers thought that the formalization of the sector will help curb these problems.

Over the years, the Susu and other informal local savings schemes evolved into its current state. Thanks to various financial sector policies such as the liberalization of the financial sector and the promulgation of PNDC Law 328 of 1991, which opened the sector up for the establishment of different types of non-bank financial institutions, including savings and loans companies, finance houses, and credit unions.

Microfinance has been conceptualized as the provision of financial services to low-income and the poor, and other related financial services such as insurance and payment services.[14] Given the important services it renders to the poor, the emergence of the formal microfinance and thrift institutions was hailed as a blessing to especially those in the informal sector of Ghana's economy who were mostly the victims of the Susu operators' criminal schemes. The assumption was that, given the relatively formalized nature of the microfinance institutions and strict regulation of their

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[10] Centre for Financial Inclusion <https://www.centerforfinancialinclusion.org/> accessed on 10 February, 2022. Also see the work of Yin and Kofie (2022). These scholars explain the concept of informal economy which is useful in the context of this work.

[11] M Otero, 'Bringing Development Back, Into Microfinance' (1999) 1 Journal of Microfinance / ESR Review 1.

[12] 'Susu' refers to small savings collected daily from clients by individual collectors going door to door.

[13] JP Asiamah and P Osei, 'Microfinance in Ghana: An overview' <http://www.economicswebinstitute.org/essays/microfinanceghana.htm> accessed 10 February, 2022.

[14] See Otero (n 10); S.A. Brefo, Sustainability of microfinance institutions in Ghana; a case study of Opportunity International Savings and Loans Limited (MBA Thesis, Kwame Nkrumah University of Science and Technology, School of Business, 2009); J. Ledgerwood *Microinance Handbook. Sustainable Banking with the Poor. An Institutional and Financial Perspective* (Washington DC: The World Bank, 1999).

activities by the Central Bank of Ghana and its agencies, customers' deposits and funds will be secured and will not be mismanaged as was the case with the informal system. In addition, the emergence of the microfinance institutions was seen as a sure way of improving financial inclusion of the poor and low income groups.

MICROFINANCE AND POVERTY REDUCTION

For a very long time, the relevance of the operation of microfinance companies has been considered from mostly socio-economic point of view as a means of poverty reduction, and provision of financial resources.[15] The literature on microfinance is replete with materials on this development. Poverty alleviation among rural and urban poor has been one triumph cards of microfinance institutions in Ghana. The provision of financial backing or capital to the poor is a major effort aimed at helping to improve the economic fortunes of the poor. Otero did note that microfinance creates access to productive capital for the poor.[16] And in addition, when it is combined with the right human capital, it enables people to move out of poverty. The presence of microfinance in rural communities makes it easy for the poor to access credit at ease than from the traditional financial institutions. One can also not ignore other equally relevant services such as training which empowers the poor to venture into other economic activities.[17] In all, microfinance stimulates entrepreneurship, empower women socially and economically and as consequence, ensures that financial inclusion goals of SDG is attained.

THE PROBLEM

This hope of experiencing improved and secure service seems to have been dashed because of the extent of criminality in the sector and the pain customers have had to endure as a result. Some fraudulent and syndicated groups have taken advantage of the liberalization of the sector by courtesy of PNDC Law 328 of 1991 to set up financial entities to dupe unsuspecting customers especially those operating in the informal sectors of the economy. Ghana is not destitute of financial institutions. For example, the Bank of Ghana recorded that at the end of 2018, that there were 484 licensed microfinance institutions with more than 64.4% percent being in Accra, the capital city of Ghana.[18] There were about 70 licensed microcredit companies with over 74 % located once again in Accra, the capital city alone. The least of these institutions were mostly fund in the three Northern regions of the country which coincidentally lead the poverty league of the country. In spite of the abundance of these financial institutions in the country, figures also show that quite a number have been collapsing of late due to insolvency, fraud, inability to recapitalise and mismanagement.[19]

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[15] See A.A. Khamidov, 'Peculiarities and Factors of Microfinance' (2015) 9 Journal of Politics and Society 1128.

[16] Otero (n 10).

[17] See OA Ihugba, B Bankong, and NC Ebomuche, 'The Impact of Nigeria Microfinance Banks on Poverty Reduction: Imo State Experience' (2014) 16 International Letters of Social and Humanistic Sciences 92; NK Bishnoi, 'Comparative analysis of corporate governance practices between IT and Real estate sector of India' (2015) 3 International Journal of Advance Research in Computer Science and Management Studies 1; SD Muhammad, 'Microfinance challenges and opportunities in Pakistan' (2010) 14 European Journal of Social Sciences 94-97.

[18] Bank of Ghana, Banking Sector Report. <https://www.bog.gov.gh/w p-content /uploads/2019/08/Banking_Sector_R eport_May_2018-1.pdf>accessed on 10 February, 2022.

[19] See Agyenim-Boateng et al., 'Credit rating, banks' capital structure and speed of adjustment: a cross-country analysis' (2020) 69 Journal of International Financial Markets, Institutions and Money 1; Bank of Ghana, Banking Sector Report.

The Bank of Ghana is reported to have revoked the licences of over 347 microfinance companies and some 23 savings and loans entities in 2019 due to insolvency, mismanagement and fraud.[20] Others collapsed or folded up due to inability to sustain their operations. Others were said to have duped their customers and folded up or bolted with the funds they collected from the customers.[21] These negative reports in the sector give much cause for concern given the checkered history of the financial sector of the country. The financial sector in Ghana which has seen so much erratic regulations especially under the military regimes in the 1980s should not be glossed over. The frequent changes in currency and sometimes the unorthodox confiscation of some currency denominations did not help either. For example, the 1982 demonetisation of the 50-Cedis note did create further mistrust for the banking sector,[22] until recently when Ghana was ushered once again into democratic constitutional governance in 1992. In the 1990s, the economic policy of the country changed towards liberalisations. The governmental control which was experienced in the 1980s and especially during the military regimes also ceased. It has been argued that in the 2000s, Ghana experienced "financial deepening" which refers to the extent to which the use of money and financial services are embedded in domestic economy and contribute to development".[23]

It was envisaged by many that the springing up of microfinance institutions will help the country attain its financial inclusion goals and to improve access to the financial resources for the poor and the marginalized who often lack financial muscle to support their businesses. It is in view of these developments that this paper asserts that the criminal activities in the financial sector can further dim the interest of the citizens in savings and having anything to do with these institutions. This comes at the backdrop of the fact that most rural people are already skeptical about saving money with these institutions. Therefore, the fraudulent activities by some of the operators who are taking advantage of the renewed interests in savings could dent interest in savings and further deepen financial exclusion. The study explored some of the stratagems the charlatan microfinance institutions use to attract customers, why people continue to fall prey to these scams, the treatment that is meted out to those who defraud their customers, and finally, the effects of criminality on financial inclusion and what can be done to sanitize the sector. This area of microfinance studies has not attracted much attention although, much has been done in the area of fraud within microfinance firms-management and insider fraud.[24]

THEORETICAL FRAMEWORK

The Fraud Triangle

A search through the literature did not yield any definitive academic material on the setting up of microfinance institutions with the criminal intent of defrauding customs although some literature

<https://www.bog.gov.gh/w p-content/uploads/2019/08/Banking_Sector_Report_May_2018-1.pdf> accessed on 10 February, 2022.

[20] Bank of Ghana, *Banking Sector Report 2019* <https://www.bog.gov.gh/wp-content/uploads/2019/08/Banking_Sector_Report_July_2019-1.pdf> accessed on 10 February, 2022.

[21] See Bank of Ghana *State of the financial sector* <https://www.bog.gov.gh/wp-content/uploads/2019/07/State-of-the-Banking-System.pdf> accessed 10 February, 2022.

[22] T Killick, *Development Economics in Action: a study of economic policies in Ghana* (London, UK: Routledge, 2010).

[23] Ibid (n 18) 442.

[24] See Asmah,A. E. et al.

on fraud in the banking sector in general and insider fraud were unearthed[25]. In addition, most of the literature and works on financial/banking fraud relied on Cressey's fraud triangle model in their analysis.[26] In general the model asserts that, three elements are important in understanding fraud in the financial sector. These are pressure, opportunity and rationalization. The assumption is that individuals who have been entrusted with positions may be pressured or motivated by personal circumstances such the need for money to resolve a domestic problem or life-style problem such as gambling to commit fraud. Others may commit fraud because of "opportunity" that been availed to them such as having found some weakness in the monitoring systems or lack of effective control and regulatory systems in an organistaion. The last element according to Cressey, is rationalization. This is where the individual find reasons to justify the act of fraud.[27] For instance, an individual may rationalize fraud by that asserting that the company has been involved in fraudulent deals so he/she is also justified in defrauding the firm. The fraud triangle has some advantage when it comes explaining insider fraud and is also useful in preventing fraud, but it does not offer much when it comes explaining 'outsider' fraud and the situation where the firm has been set up solely to defraud customers. It is as a result of this deficiency that the study relied on the broken theory. The concept of opportunity is the only variable that sits well with the current study.

The Broken Window Theory

The broken window theory of crime was adopted for the study. The theory was developed by Wilson and Kelling in 1982.[28] The concept "broken window" is a metaphor for small social disorder in society which is sometimes ignored at the inception stage until it becomes a full-blown social problem. According to the progenitors of the theory, if such small disorders are not checked, it can generate into more serious social problems. In their influential article, they argued that signs of disorder such as a broken window in society may send a signal to some potential criminals that the people do not care what happens in their society or that they are not concerned thereby making crime more likely to happen. The key thrust of the theory is that crime becomes more pronounced when criminals detect that they will not be punished for the crimes they commit. In applying this theory to the study, the current assumption is that because most fraudsters who defrauded customers over years have not been handled according to law, it has emboldened other people to commit similar acts of criminality because they know that they will not be caught and even if they are arrested, they will not be punished. It cannot be denied that most offenders in the past have been left off the hook. This has made some of the aggrieved customers to think that when people engage in such crimes, they will go scot free.

The position of the paper is that crimes in the microfinance sector continue to persist because in the past offenders were left off the hook. This is a form of a "broken window" which is signaling to other criminals that society does not care and is not ready to deal with these little infractions thereby wrongly creating the impression that crime can be committed without consequences. This encourages others to do same and that until state agencies act proactively to remove smallest

[25] Asamah, A. E., W. A, Atuilik, and D. Ofori. Antecedents and consequence of staff related fraud in the Ghanaian Banking industry (2019) (*Journal of Money Laundry Control*,

[26] See Homer, E. M. Testing the fraud triangle model (2019), in *Journal of Financial Crime*

[27] See Donald Cressey 1953

[28] GL Kelling and J.Q. Wilson, 'Broken windows: The police and neighbourhood safety' (1982) 249 The Atlantic Monthly 1.

acts of deviancy or criminality in the microfinance sector, such crimes will continue to plague the sector.

METHODOLOGY

The study was qualitative and exploratory in nature. It basically explored the modus operandi of some of the fraudulent microfinance institutions. The New Stone Microfinance (NSM) started its operation in the Akuapem North and South Districts of Ghana in the year 2012. The Company attracted over 300 customers from some towns including Aburi, Mampong, Kitase and Tutu. After taking deposits for about six months and promising to double and triple the deposits as loans in some cases, the company managers bolted with the funds of customers and all efforts to get the managers apprehended proved futile. While this is not unique is respect of criminality in Ghana's microfinance in particular and the financial sector in general, such act of criminality has serious ramifications for the financial inclusions and is grit for the criminological mill.

The study adopted a qualitative approach because of the nature of the subject (criminality) and the number of customers who were willing to participate in the study. After obtaining the list of some of customers, calls were placed to them for their consent to participate in the study. Most of them indicated that they were only willing to talk on condition that their locked-up funds will be paid to them after the interviews. Others did not see the need to participate because they felt it was unnecessary to reopen discussions on the matter. To some the participants, the sheer mentioning of the incidences cause them stress and pain. After identifying the first 2 customers, who willingly decided to participate, I asked them to recommend other customers which led to a couple others deciding to take part in the study. In all 17 participants were interviewed for the study, 13 females and 4 males. Thirteen of the participants were customers of the company, two were administrators and cashier and two community leaders. In-depth interviewing was conducted with an interview guide. The interview guide had both descriptive and structured questions.

However, the structured questions were very few. The descriptive questions allowed for fluid interactions and gave the participants more room to express themselves and also reduce tension and apprehension. Given the low educational background of some the participants, the interviews were more fitting and also allow the researcher to engage the participants and probe for clarity where there were inconsistencies in the information provided. The interviews were conducted mostly in the respondent's homes and work places so that they will be comfortable.[29] The interviews were both digitally and manually recorded with the participants consent. The data was analysed based on relevant themes in line with the study objectives. Table 1. Captures some details about the respondents' background. To avoid breached of confidentiality and to ensure anonymity, the names (not their real names) of the participants have been omitted including the local administrators and the community leaders. The community leaders were particularly concerned about potential future prosecution if their names were put in the study.

[29] See PB Kraska and WL *Nueman Criminal Justice and Criminology research methods* (Boston: Pearson/ Allyn & Bacon, 2008).

Table 1: Respondents Background Information

ID Number	Name	Sex	Age	Amount Deposited GHS	Sources information about the company
1	Max	Male	36	250	Church/Friends
2	Gina	Female	43	370	Friend
3	Obrapa	Female	38	120	Friend
4	Mansah	Female	38	150	Church
5	Shaka	Female	39	180	Friend
6	Bishop	Male	47	-	Someone
7	Sunkwa	Female	-	80	Church
8	Padei	Female	46	220	Someone
9	Adnega	Male	55	120	Someone
10	Beefos	Female	35	210	Someone
11	Dodi	Female	37	200	Someone
12	Marggie	Female	30	210	Someone
13	Manu	Female	34	80	Someone
14	KK	Male	33	330	Someone
15	Morda	Female	28	150	Church
16	Abi	Female	30	100	Someone
17	OPK	Female	40	170	Someone

Source: Field Report, 2020

Profile of the Participation

From Table 1, it is obvious that the dominant group who were victims of the microfinance company were women-mostly traders from the informal sector. This is often the case because of their poor educational status. The gender dimension of the victimization cannot be wished away without further interrogation. It has been noted that 85 percent of microfinance clients are women.[30] As has been succinctly noted, microcredit plays a critical role in empowering women. It helps deliver newfound respect, independence, and participation for women in their communities and in their households.[31] This might be one of the reasons why women are quick do business with some questionable microfinance companies or firms. Based on the data in the Table, it can be observed that the minimum contribution was 80 Ghana Cedis and the maximum being 370 Cedis. According to one of the participants, some of the customers had as much as 1,300 Cedis in their accounts as at the time the firm collapsed. Women are a major contributors to the economic wellbeing of their families and the communities in which they live. It has been observed that the reasons that make women resort to seeking help from microfinance are the same for men, and that is inaccessibility to capital from the banks and lack of collateral.[32].

[30] See S Daley-Harris *Microcredit Summit Campaign Report* (USA: Microcredit Campaign, 2007).

[31] See Juan Somavia, ILO Director-General <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/former-directors-general/WCMS_192716/lang--en/index.htm> accessed on 10 February, 2022.

[32] CE Lott, 'Why Women Matter: The Story of Microcredit' (2009) 27 Journal of Law and Commerce 219.

RESULTS AND DISCUSSION

The key objective set for the study was the exploration of the strategies employed by the microfinance company to defraud the customers and the effect such fraudulent acts have on social inclusion efforts.

Community Entry Strategy of Managers

The New Stone Microfinance was very strategic in its community entry. First and foremost, before the company set up its branch in Aburi, it contacted some important community leaders and informed them about the intention to setup the company. These individuals started canvassing for customers for the company long before the company started its operations. As a result, the company had very little work to do in terms of getting customers. Their "contacts" in the persons of the assemblyman, some opinion leaders and others went ahead of them to advertise their coming. In fact, they were those who prepared the way for the company and made things easy for them. Secondly, the company got the assistance of these individuals at no cost to advertise their company in at least three of the big orthodox churches in the towns. This was partly due to the fact the one of their "frontmen" was a respected reverend minister. It may sound as if these individuals had fore knowledge that the company was not credible because of the level of their involvement.

In fact as the administrator puts it:

> All the people who canvassed for costumers for the company were themselves victims of the criminal acts of the people [managers of the company] because they had no idea what the true intentions of the owners were.

I gathered through the interviews that some of the local canvassers also lost funds they disbursed on behalf of the company with the hope that it will be refunded. The manager further stressed that the canvassers were mostly driven by the job opportunities that would have come to the community. This was also confirmed by one of the key local leaders. When he was questioned about why he did not check the background of the company before supporting their operations. He opined that his involvement with the company has thought him a great lesson. He observed that:

> The mere fact that it [the company] was going to provide jobs to some community members and financial resource to especially those in petty trading businesses aroused my interest and blurred my judgment.

A number of the participants later hinted that they heard about the company from an announcements made on one Sunday mornings at three of the prominent orthodox churches in community. The cashier also said that her aunty who attends one of the churches was the person who came to inform her about the microfinance company which employed her later. From all

indications, these people saw a 'broken window' that indicated to that they have their way or an "opportunity".[33]

Relevance of Local Involvement

The involvement of the prominent individuals in the community was a strategic act by the owners of the microfinance company says one of the participants. She observed that because of the position of these individuals in the community, their involvement gave the company credibility and made locals believed that they were in good hands. By that single act, the owners also succeeded in implicating the local leaders in the implicit criminal act. As a result, when the owners bolted with customers' deposits, some of the community leaders and locally employed staff of the firm were apprehended by the police. Some were even physically attacked and assaulted and harassed by the customers especially the assemblyman. Because some of the customer felt the local leaders were culpable, they demanded that they pay their deposit to them. While probing could not established the culpability of these local leaders in this fraud, I do share the view that most of them were just victims rather than perpetrators of the crime.

In addition, the company needed goodwill to enter the community and begin its operations which they did not have especially coming at the wake of so many companies bolting away with customers' money. They could not have earned the trust of the locals without the involvement of the assemblyman and the others. Almost all the participants opined that they subscribed to the company's operations because of the reputation of local people who publicized the inception of the company. These were very influential and highly respected individuals. A participant highlighted:

> I vowed not to have anything to do with these companies and Susu collectors because of the way they often bolt with customers' money. Yet, when I heard the announcement at church about company (sic) and the fact that it was Rev…[she mentions the reverend minister's name] was one of the people vouching for them, I felt they were credible…not knowing they are all the same. I was really disappointed in Rev… [Mentions the reverend's name again] because I never expected him to be part of such a scam. That's why I have not been talking him since then.

When the interviewer inquired from the assemblyman, he did not do due diligence with this company, he hinted that the owners took him to their heard office and branches in Madina and Ashiaman all in the greater Accra Region. He felt that was enough evidence and did not bother to verify the documentary evidence they presented to him. Ask why he did not check from the Bank of Ghana he said he had no idea about that. It seems some level of ignorance and taken for granted assumptions play a role in the persistence of the criminal activities in the microfinance sector. Most of the customers have no idea about how to cross check the genuineness or otherwise of the companies and have to rely on other people accounts or report. This was probably the case because they were not highly educated to appreciate the need for double checking and due diligence.

[33] See Donald Cressey, 1953

For those who were educated and could have easily ascertained the credibility of the company were also blinded by their whimsical thoughts about the benefits that will have accrued to them either directly or indirectly and took things for granted. The saying "buyer must be aware" was probably lost on them. Unfortunately for them, it was not well as in less than seven months, the owners bolted with their deposits.

The Love Bombing Strategy

From interactions with the participants, one of the key strategies that was found to have been used to entice people to the scheme was "love bombing"[34] Love bombing is an attempt to influence a person by demonstrations of attention and affection. It can be used in different ways and can be used for either a positive or negative purpose.[35]. It is also used by cult groups to entice or lure and retain new members to the cult. This involves showering gifts on potential members and promising to do more if they join the group. Whiles the community leaders denied ever benefiting from the company, most of the participant were of the opinion that they were given gifts and some concessions. A participant even hinted that the community leaders were promised shares in the company. This was also denied by the community leaders. On the part of the customers, they were promised loans and support for their businesses after six months of saving with the company. The usual promise of having their deposits doubled or tripled as loans was key a factor that motivated the customers to save with the company. One customer indicated, they find it difficult to secure loans to support their businesses from the traditional banks. That is why they seek help form the microfinance companies.

As some researchers have observed, there are two primary problems that face institutions wanting to lend money to the poor and these are lack of information about the borrowers and lack of collateral. The authors assert that microfinance institutions have programmes for such groups that are designed to extenuate these problems.[36] These offers promised the firm were indeed attractive or juicy in the face of the difficulties they have with securing loans from the formal banks and their terms and conditions. Once again such bureaucratic tendencies creates "opportunity" for fraudster to come up with schemes that is less cumbersome in order to attract unsuspecting customers .[37]

Preying Factors

This is the one-million-dollar question-why people continue to fall prey to the Ponzi schemes and other fraudulent activities in the financial sector remains a puzzle to be unraveled. When we asked why they still fell victims in spite of the numerous case of such fraudulent activities reported in the media, the participants gave very interesting views. The very first reason in the case of the New Stone Global Microfinance was the goodwill of the local leaders who canvass for customers. As indicated earlier, most of the local leaders who got involved were respected by the locals. Thus they were of the opinion that once those individual were involved, then the company was credible. As one participant highlighted:

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[34] S. Hassan, *Combatting Cult Mind Control* (Rochester VT: Park Street Press, 1988).

[35] SP Pretorius, 'The 'love' that religious cults offer and its effects on members' (2013) 49 Tydskrif Vir Christelike Wetenskap | Journal for Christian Scholarship 181-201.

[36] B Armendáriz de Aghion and J Morduch *The Economics of Microfinance* (Cambridge, Massachusetts: The MIT Press, 2005).

[37] See Donald Cressey, 1953

> Who would have ever doubted a person like… (She mentions a Rev, minister's name)? We all trusted him because of his past record and his good intentions to assist the weak and the vulnerable in this society. I have known him for a long time and there is no way I would never have ever (sic) thought that the company he was recommending to me was one of the 'azaa' [fraudulent] ones.

In a response to these concerns, another person said that:

> The main attraction was the double-up beat… where customers were promised a double or even more of their deposits as loans within six months. This offer was very attractive since most of the petty traders found it difficult securing loans from the traditional banks.

Another participant also reiterated similar sentiments. For her, she puts all the blame on the neglect by the traditional banks for neglecting traders in the informal sector especially petty traders. She said:

> The microfinance people (referring to the agents of the microfinance) were very friendly, they made it easy for us to save and also get loans for our business. The banks are not like that. Especially to those of us who have not been to school, they make you feel less human by the way they talk to you. I felt more comfortable dealing with officials of the microfinance than the banks … they are something [referring to the staff of the traditional banks.

Apart from the "double-up" attraction, most of the participants who have had interaction with traditional banks complained about the bureaucratic processes one has to go through in order to secure loans and the attitude of bank officials towards customers which they said was poor, unfriendly and unprofessional. The attraction was that, the microfinance officials go the clients to collect whatever funds they want to deposition. This according to some of the customers, makes it easy for them to save since without that, they could not accumulate funds on their own. One of the community leaders, also asserted that if the traditional banks will vary their operations a bit and make it friendlier to those in the informal sector, it will make the microfinance companies less attractive. He further stressed that sometimes the customer service officers' attitude towards those in the informal sector and especially the less educated are very intimidating. It is because of some of these reasons that make the petty traders prefer dealing with the microfinance companies than the traditional banks.

One of the customers bluntly put it this way:

> They are not too rigid like the banks. They make you feel important and respected. Look! My house is just opposite the Commercial Bank (she points in the direction of the bank) but they will not walk to this shop to collect our deposits because either they are not interested in our funds

> or they feel we do not matter, but the microfinance people will locate you and take your deposit and also show respect to you.

Finally, word-of-mouth marketing strategy adopted by the company did work perfectly for the company. This involve an instance where customers share information about a product with others directly or via face-to-face interaction. Almost all the participants joined the firm through this medium. Given the close-knitted nature of the community, most of the people who heard about the company from their churches also informed their relatives and relations about the company. The cashier of the company opined that it was her aunty who heard about the company and asked her to apply for a position because they were recruiting people. As condition of employment, they were asked to opened accounts with the company so that the can also benefit from the "double-up" cliché.

Indeed, the use of the local leaders helped attracted about 70 percent of the customers to the operation of the microfinance. They relied heavily on the recommendations of the opinion leaders instead of verifying the authenticity of the company by themselves. After all, the basic rule when it comes to commerce and other business transactions is *caveat emptor.* This is Latin concept which means that let the buyer beware-the buyer assumes the risk in a transaction and should therefore take all the steps to ensure that he or she is not shortchange. While it cannot be denied the customers might have been careless in their quest to join the company, although some did doubt the credibility of the company and made efforts to verify its authenticity. One of them told me that she asked a couple of knowledgeable people to counsel her and all of them cautioned her to be careful because they could not get information on the internet about the company. So why then did she sign up? This takes us to the next important factor.

The Fear of Missing Out (FOMO)

Some of the customers who harboured doubts about the credibility of the company and still went ahead to join because they were virtually afraid of missing out on the goodies the company had promised to offer their customers. They thought that this was an opportunity to get loans to support their businesses. One of the participants indicated that:

> I felt there was something wrong with the company because of the aggressive way they were marketing the company coupled with all the recommendations from other people. Yet, something also told me if I do not take the risk, I may also not again anything. I was just not willing to lose out on their "double-up promise". It was a gamble.

Treatments of Suspects by the Police

One key concern of almost all the participants was how the managers and some of the persons who were connected to the company were handled by the security agents after the customers helped apprehended some of them. In the case of New Stone, two of the perpetrators were apprehended by the police, however they were all not prosecuted as the customers were anticipating. According to the participants, the local manager of the company was arrested by divisional police command, yet he is still walking a free man. He was not even sent to court for prosecution. A participant indicated that:

> The police arrested two of the criminals yet they did not do anything to them and our monies were also not paid to us"… as usual, they (referring to the police) took money and left them.

Unfortunately, none of the participants could explain why the manager was not sent to court. All efforts to contact the manager and police for their side of the story proved futile as they kept postponing the appointment. Police informed me that all the officers who were involved in the case have been transferred to other places. My interaction with the participants also revealed that they had a strong suspicion that the manager bribed his way out of the prosecution. Asked why they did not report the conduct of the officials at the divisional police to their boss at the regional headquarters, they had varied opinions. The most common theme was that there is corruption in all the institutions, therefore if he could bribe the divisional police, he will equally bride any other official. While this assertion is obtuse in terms of its logic, one cannot fault the customers for holding such views. This is because, there is a common belief in Ghana that people who work in government bureaucracies are corrupt especially the police. A participant shared his experience with the police that:

> I spent almost two months going up and down just to follow up on the case. I spent money and my precious time and yet nothing came out of all my efforts. Frustration, and threats were my rewards. The officers kept tossing me up and down, always giving different excuses till I noticed that I could not go on wasting my time and energy on a matter that is going nowhere.

He said whiles he was following on the case, the suspect-the local manager had been released and was enjoying his booty. The interesting twist to this fraud and criminality was that some of the participants alleged that the same local manager, was also working for a Ponzi scheme that has also collapsed recently in Ghana.

Regina opined that:

> Because they did not punish them, this same rascal [referring to one of the local mangers] is also involved in another fraudulent business [another fraudulent financial institution that has duped thousands of Ghanaians in recent times] .He was working for them [mention a company's name] and introduced some people to … [mentions the name of a company] They [the police] are now after him once again but I know nothing will happen to him and criminal [sic] gangs. Even if they arrest them, they [local manager and his cohorts] will pay a bribe and g their freedom.

Teacher said:

> The criminals are walking free…our time was just wasted by going to the police station for months. They were not even sent to court for us to say they were freed by a court.

This is where we see the broken window concept at play, because these alleged fraudsters have escaped punishment in one fraudulent case, it has emboldened them to get involved in even a greater criminality.

Fraud and Financial Inclusion

The effects criminal acts have on the microfinance sector of Ghana's economy and financial inclusion is ominous. First almost, all the respondents interviewed said their experiences with New Stone Global Microfinance have affected their perceptions about micro finance companies. When inquired about their current attitude towards financial institutions and whether they have accounts with any financial institutions, 6 of the participants said, they have bank accounts with rural and commercial banks. They added that they use the accounts only for their salaries and official transactions and not for savings or investment. One of the participants emphasized:

> I have a bank account but it is not meant for savings or investment purposes. I maintained that accounts because of my monthly salary, else I would have closed it long ago… You can check my balance…look they [referring to financial institutions] are all the same and I don't want to fall a victim twice.

About 5 of the participants indicated that they have closed their accounts with other financial institutions because of the bad experiences they had with the company. Ask where and how they save their monies all of them said they save their monies themselves at home. Despite the high risk (such as criminals stealing the monies or fire outbreaks burning the home and the monies), associated with keeping monies at home these customers said they preferred keeping their monies themselves than to save with other institution.

A Participant said:

> Since I moved to Madina (a suburb of Accra), I joined another one microfinance finance thinking that it will be better because it was in Accra, that was even worse. They also bolted with the money. I was later told that it is even more common here than Aburi. Since then, I have decided to be my own bank. I do not save with any bank or microfinance company. Women's Bank (one of the insolvent banks) did ask me to open accounts with them so that they will give me loans to expand my business but I told them no…not at all… "Nea owo aka no suro osunson" to wit (once bitten, twice shy"). I will never make that mistake again. Look, all of them are criminals they are only interested in the monies not their customers.

The resolve of these customers not to save their monies with financial institutions is so strong that I wonder what can make them change their minds. Another participant said:

> I prefer to save my money in cement and blocks than to put it in some criminals' bank for them to 'chop it' [embezzle], I'm wiser now. I will not put myself in such a mess again. Because of the way these people (the managers of the company) bolted with our deposits, I have vowed not deal with any such institutions again and to be sincere with you I'm determined to keep my word.

While most of the literature do not talk about criminal activities in the microfinance financial sector as a disincentive to financial inclusion, the data gathered so far seems to support the notion that when customer get defrauded by financial institutions it undermine the willingness of the victims to do business with other financial institutions. This is because such acts undermine trust which is an essential ingredient in the survival of financial institution and especially, microfinance companies. No individual will like to put his or her money in the hands of people who are not trustworthy. While 6 of the participants claimed they have Mobile Money accounts.

As has been noted by Littlefield and Rosenberg[38], the micro-finance institutions have emerged to address this market failures by addressing this gab in the market in a financially sustainable manner[39]. Some researchers have underscored the important role microcredit can play in achieving the Millennium Development Goals[40]. I believe the same can be said of the role it can play in the attainment of the Sustainable Development Goals which seek even more expanded global development goals such as eradications of poverty and all forms of inequality. The achievement of such lofty goals stands in great perils if people lose trust in the very institutions that are supposed to be conduits for the realization of these goals.

CONCLUSION

The paper did explore the issue of criminality in the microfinance sector-fraudulent setting up of microfinance schemes with the sole aim of defrauding unsuspecting customers and their implication for financial inclusion. Microfinance institutions have gained popularity in Ghana because of the opening up of the economy in the 1990s and the need to engender financial inclusion of the poor and those operating small businesses who were not covered by the traditional banks. However the mushrooming of these institutions have also brought in its wake some serious challenges notable among them defrauding of customers by some of the firms. The study in particular assessed how such firms attract customers-their modus operandi, the effects of these crime on financial inclusion efforts among others. The study has so far established that criminality in the microfinance sector of Ghana's economy is a reality. Most people have fallen victims due to number a of factors including the shrewd community-entry stratagem, fear of losing out on an opportunity to receive financial support or acquire loan.

From the discussions, it is obvious that the microfinance sector is populated with some charlatan firms who have been defrauding customers. This is borne out of the fact that there is lack of proactive monitoring of the sector by the agencies mandated to regulate it. This gives such criminals who want to defraud customer a field day. The prospective criminal have assessed the sector and noticed that criminal opportunities do exist. Moreover, almost all previous crimes were not punished and thereby incentivizes the perpetrators. The happenings in the sector affirm the broken window of crime. That is, because past signs of lack of care and proactivity are still inherent in the sector, it will still continue to send signals to criminals that the sector is not protected.

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[38] See Littlefield and Rosenberg, 2003.

[39] Littlefield and Rosenberg (n 4).

[40] E. Littlefield, et al, 'Is Microfinance an Effective Strategy to Reach the Millennium Development Goals?' Focus Note Series No. 24. CGAP-Consultative Group to Assist the Poor, (Washington DC, 2003), A. Simanowitz, and A. Brody, 'Realizing the Potential of Microfinance' 51 Insights 1-2.

As a preventive measure, the study proffers that, the solution to this problem lies in the fixing the "broken windows", engaging in proactive monitoring and education, reducing opportunities for such crimes and making it expensive to commit such crimes. Fixing the broken windows connotes efforts aimed at taking away all signs of disorder and lack of care in the sector. In the minds of some the participants, these crimes are not treated seriously by state agencies including the police because it affects mostly the poor, the weak and the socially excluded segments of the population. This is not wholly correct as recent events have shown that all category of people can fall prey to such crimes. The belief seem to be global among the victims that is they did not get attention of the security agencies because of their poor socio-economic status. The lack of prosecution on the part of the police for whatever reasons, and the non-involvement of the regulatory agencies when the fraud was detected seem to make the case of the participants very strong. Officialdom have the tendency to put the blame on the victims for their lack of due diligence and gullibility or ignorance. However, the panacea to this problem does not lie in the blame game but rather, in a proactive monitoring and continuous education of the populace who are prone to falling victims to these crimes.

Proactive monitoring and continuous education in this context means that state institutions and agencies should not wait for these crimes to occur and fester before they take action. The agencies setup to superintend the sector should develop and deploy stringent monitoring and surveillance regime in order to forestall the occurrence of criminal activities which have plagued the sector. Developing strong partnership with other intuitions such the National Bureau of Investigations, who have their presence in all their districts and have intelligence gathering skills to detect these crime at the inception stage and nib it in the bud is a more proactive measure. Education about these crimes should be a continuous engagement and not once awhile venture because of the creativity and sophistication that criminal are resorting to committing these crimes. This can reduce opportunity for these crime and help protect the vulnerable in society.

Finally, crime prevention efforts in the sector should be swift and punitive enough to deter will-be offenders. Regulatory agencies should be able crack the whip on those who falter without fear or favour. If the laxity and ineptitude on the part of state institutions and agents continues, it cannot be guaranteed that the socially excluded will be part of the financial inclusion agenda and the attainment of the SGDs will be materialized. The more these crimes are allowed to persist, the more the citizens will lose interest in formalizing their financial transactions.

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Bank of Ghana *Banking Sector Report 2018* <https://www.bog.gov.gh/w p-content /uploads/2019/08/Banking_Sector_R eport_May_2018-1.pdf> accessed 10 February, 2022.

Bank of Ghana *Banking Sector Report 2019* <https://www.bog.gov.gh/wp-content/uploads/2019/08/Banking_Sector_Report _July_2019-1.pdf> accessed on 10 February, 2022.

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ANALYSIS OF GHANA'S SMEs INDUSTRIAL POLICY APPROACH: CALL FOR A NEW BEGINNING

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ABSTRACT

Since the launch of Ghana's Industrial Policy (GIP) in 2011, it has not received the needed backing for implementation. This has created a challenge for industrial efficiency for the economy of Ghana. Based on the implementation gaps identified in the policy, it is argued that Ghana can absolve itself from neoliberal economic dictates if it focuses on a new industrial policy approach that galvanises the Small and Medium-sized Enterprises (SMEs) sector. The objective of this paper is to review the GIP and to identify the gaps in its implementation and implications for SMEs' growth in Ghana. Using the doctrinal research method, secondary data sources were analysed. The study revealed that the GIP comes in as a key development paradigm with private sector collaborations, yet its potentials have not been harnessed as expected. The paper concludes that, for a paradigm shift, it is rewarding to give greater attention to the manufacturing department of the SMEs with the view of developing a useful industrial policy regime.

Keywords: Development, Industrial policy, Public policy, Manufacturing, SMEs

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INTRODUCTION

International and domestic interests in the dispensation of the wealth of Ghana have been a long-standing phenomenon dating back to pre-colonial imperialism. The vast wealth of Ghana is seen in its human, minerals, agricultural, cultural, religious and artistic endowments; most of which are untapped.[3] However, the very few tapped resources do not equitably benefit the citizenry. Among the reasons that account for this, includes the lack of effective policy guidelines to allocate these resources equitably.[4] Ghana has the wherewithal to absolve itself from neoliberal politics and aid conditionalities if the rightful policies are adopted to seek the solutions suitable for its socio-economic challenges. Industrial Policy (IP) comes as the key development mechanism to this end when the needed political will coupled with effective private sector linkages are harnessed. The conduit for this drive is Small and Medium Enterprises (SMEs).[5] The paper analysis the current IP of Ghana and argues for a new focus on the manufacturing department of industry-led by SMEs towards a new paradigm.

In the Finance and Development report of the International Monetary Fund (2020), it is projected that once the COVID-19 crisis is over, the world's economic order would be immeasurably shifted from not just volumes of trade in goods and services but also an appetite for the consumption of products of innovation, science and technology; a production-based economy underpinned by high investment in the industry with manufacturing as the steer to this movement. The new economic direction will not be just dictated by the pace of stock markets and volumes of financial trading, as usual, rather, projections and happenings point to a capital hoarding frenzy and freeze on stock trading.[6]

Moreover, there is a real danger of market and economic recession if the prevalence trajectory of the disease persists beyond 2020.[7] The hope for developing economies is to move from conventional economic thinking and management to robust theoretical and practical economic decisions and policy orientations. Lip service by governments has characterised the development of SMEs in policy undertakings thereby making fragile economies susceptible to the ramifications of global misfortunes such as the current raging coronavirus pandemic. The objective of the paper is to do a pure literature review of existing legal and policy frameworks, especially of the GIP, to identify the gaps in the implementation of the policies and implications for SMEs' growth in Ghana and proffer policy recommendations. It is against this backdrop that this paper took the approach to analyse existing economic data, legal literature and policy approaches to the economic management of Ghana since independence to the current industrial strategy launched in 2011.

This paper is presented in sections. The first section serves as the introduction with the background and rationale to study, conceptualises industrial policy (industrial strategy) and

[3] Central Intelligence Agency, *The World Factbook,* <https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html> accessed 17 April 2021.

[4] Aiginger, K., & Rodrik, D. 'Rebirth of Industrial Policy and an Agenda for the Twenty-First Century' (2020). Journal of Industry, Competition and Trade, 20.

[5] Korankye-Sakyi, F. K. '*Factoring as Means of Promoting Small and Medium Scale Enterprises: The Case for a Legal Framework for Credit Factoring in Ghana* (LLM Thesis: University of Pretoria, South Africa 2019).

[6] Economic Times 'Covid-19 and the US Economy: On the Economic Impact and Policy Response' (2020) <https://www.brookings.edu/blog/up-front/2020/03/23/covid-19-and-the-u-s-economy-faq-on-the-economic-impact-policy-response/> accessed 29 April 2021.

[7]Korankye-Sakyi, F.K. *Over 95 percent of Industries in Ghana are SME's (2020)* <https://mynewsghana.net/over-95-percent-of-industries-in-ghana-are-smes-francis-kofi-korankye-sakyi/> accessed 19 April 2020.

discusses the theory of institutionalism. It also presents the methodological approach adopted for the study. Section two delves into the trajectory of industrial policy in Ghana and the ideological motivations behind the shift. In section three, the paper looks at the narrative on SMEs in Ghana and identifies why it must propel Ghana's industrial policy. Section four discusses the status, challenges and pillars of the industrial sector with an emphasis on manufacturing in Ghana and its contribution to the economy over the years. Section five focuses on discussing the Industrial Policy of 2011 and the success or otherwise of its implementation. The paper concludes in section six by drawing on lessons from the discussions, and also makes policy recommendations for a new beginning to having and implementing an industrial policy framework in Ghana.

METHOD

As a review paper, this article adopts the doctrinal desktop research approach. With this approach, we drew much on secondary sources such as books, policy frameworks, journal articles, newspapers and other relevant reports. This approach was useful because the paper is source-based and focuses on policies, statutes, and other legal documents.[8] According to Hutchinson, the desktop method is relevant when a researcher wants 'to work within the parameters of the [law] in order to make recommendations for reform.'[9]

CONCEPTUAL AND THEORETICAL BASIS OF INDUSTRIAL POLICY

In political and development history, economists like Paul Rosenstein-Rodan, Albert Hirschman, Alexander Gerschenkron, and Raúl Prebisch had reiterated the central role of state interventions and economic mouldering of activities necessary for national development.[10] Like most socio-political concepts, industrial policy defies any single and consensual definition. According to Warwick, industrial policy (industrial strategy) is a kind of government intervention or state strategy that seeks to change the economic settings and activities for the betterment of sectors that anchor growth and wellbeing much more than it would have been achieved if such interventions were not in place.[11] This definition captures broadly the scope of many theoretical and practical elements entailed in industrial policy definitions. These elements include; the role of the state, the productive private sector as partners; with the aim of altering the environment for economic growth. In a narrow sense, the concept is described as a combination of strategic or selective interventions aimed at propelling specific activities or sectors, functional interventions intended at improving the workings of markets, and horizontal interventions directed at promoting specific activities across sectors.[12]

Generally, industrial policies are directed at improving productivity and agricultural technology as well as the attraction of investments but it is trite knowledge that manufacturing has become the

[8] Kharel, A. 'Doctrinal Legal Research' (2018) Electronic Journal. <https://ssrn.com/abstract=3130525> accessed 21 July 2021.
[9] Hutchinson Terry, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review,* 130-138.
[10] Warwick, K. 'Beyond Industrial Policy: Emerging Issues and New Trends*'* (2013) OECD Science, Technology and Industry Policy, 2, Paris: Organization for Economic Cooperation and Development.
[11] Warwick (n 8).
[12] UNCTAD 'Trade and Development Report 2011: Post-crisis Policy Challenges in the World Economy' (New York and Geneva, United Nations 2011).

primary focus of such strategies.[13] Even though industrial policy has existed as a development philosophy for over a century, economists had questioned its relevance in liberal markets until in the 1970s when it regained a place in development discussions.[14] The understanding from the last 30 years is that markets themselves do not guarantee economic desirables and rectify the imperfections that impede economic transformation in developing countries.[15] There is, therefore, a strong case for a policy ideology that responds to a wider public interaction for effective interventions for industry.[16] The theoretical support for industrial policy has increased with such new insights against the conventional top-down approach to policy formulation.

According to Page and Tarp, industrial policy practice is moving towards mainstreaming the development policy discourse with heightening realisation that the inadequacies in market orientation by which theoretical discourse for industrial policies are designed are prevalent in developing countries that require thoughtful state policies to improve economic outputs.[17] State intervention or IP has faced contentions with divergent positions in economic discussions.[18] Studies stress the role of consultation and coordination between the state and private sectors in fashioning out necessary actions for solutions to economic problems.[19]

Complexities with problems are just natural and must be expected in a complex society trapped in facets of challenges and competitions. A collective study of such societal problems also becomes the ideal and pragmatic means of arresting the problems of such a market.[20] The strengths of the individual agencies of state and their capacities to confront multi-faceted malaises come with questionable realistic impacts. The focus on practical industrial policy guidelines becomes a panacea to these challenges. Such an approach overcomes the challenges in developing countries identified by Page and Tarp.

Khan further posits that the neoliberal dominance that underpins the thought of globalisation reignites the political debate on organised economies based on deregulation and dismantling the torturous bureaucratic façade to meet the fast-paced market expectations.[21] To justify policy asymmetry, globalisation has eliminated the boundaries between productive sector activities that share commonalities. The economic focus of globalisation is to disorient such deliberate encumbrances to market forces in international business. The benefits to any economy with the removal of such blockades are incontestable.

As a modern economy, that is, in no doubt leaned toward market-driven policies, Ghana cannot be isolated from a direction that fuels and propels such an ideological shift. Industrial policy

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[13] Szirmai, A. et al. 'Promoting Productive Employment in Sub-Saharan Africa: A Review of the Literature' (2013) UNU-MERIT Working paper 2013-062.
[14] Ratcliffe, A. E. 'Industrial Development Policy: Changes during the 1970s' (1979) South African Journal of Economics, 47.
[15] Page, J., & Tarp, F. *The Practice of Industrial Policy: Government Business Coordination in Africa and East Asia* (Oxford University Press, United Kingdom 2017).
[16] Felipe, J., Development and Modern Industrial Policy in Practice: Issues and Country Experiences (Edward Elgar Publishing, United Kingdom 2015)
[17] Page & Tarp (n 13)
[18] UNCTAD, Least Developed Countries Report 2015: Transforming Rural Economies (Geneva and New York: United Nations 2015).
[19] Page & Tarp (n 13)
[20] Khan, M. K. 'Industrial Policy Design and Implementation Challenges' in J. Felipe (ed.), Development and Modern Industrial Policy in Practice: Issues and Country Experiences. (Edward Elgar Publishing, United Kingdom 2015).
[21] Ibid.

reinforces a governance system that organises agencies with a similar focus to work from a collective pool of resources and direction with a single motivation to reach a predetermined economic objective.[22]

The test is that industrial policy orientation is a natural means of sectoral planning to achieve the collective well-being of society. If the agencies of state fail to weave a proper synergy on this score to erect the standard pillars that support a coordinated endeavour, there is a guarantee for a non-resilient economic structure to prevail. Industrial policy is hinged on the localisation and clustering of economic agents by bringing together their interests and resources around a common good to find solutions for fostering those interests.[23] Thus, all variables like the state, the public, the suppliers, the customers, agents, institutions focus on an interaction aimed at a common market objective. It is for this, that Shapiro argued that the common market objective must be to enrich SMEs which are the livewire of the economy.[24]

Apart from the conventional economic forces of market and prices, the place of the state is secured in this relation to coordinate these agents to provide and satisfy the needs and aspirations of the people in any economy. The role of the state to regulate these forces against policy collusion and remove the barriers to permissible economic activities come as a major justification for the industrial policy theory. Markets and prices are virtually dummy phenomena without the state's role in manipulating their focus and interplay even in a so-called neoliberal economy.[25]

Elsner has stated that evolutionary game theory has demonstrated that progressive coordinated solutions can be made feasible through collective learning in institutions of coordination and cooperation in a self-governing system among private agents.[26] This theory holds sway for other evolutionary theories that advocate for the interrelatedness of institutional processes for sustainable and stabilised emerging systems. Even though Elsner's philosophy is purely biased toward strict state interventions in market forces, it will not defeat the prostate "interference" in providing the enabling environment for private agents' interactions. Voss claims that institutions are the outcomes of 'interactions within large populations of actors over considerable periods.[27] These agents are boundedly rational and act under conditions of limited information. This understanding is knitted to the fabric of societal culture since time immemorial. What becomes the derived solution is how each society assembles the desired constituent players to conform to the rules of the game. It must be noted that varied sets of economic or societal ideologies will result in different organisational outcomes. This informs the proposition of this paper to focus on instrumentalism as an ideal philosophy that should inform the industrial policy thinking of Ghana.

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[22] Ibid.

[23] Herr, H., & Nettekoven, Z. M. The Role of Small and Medium-sized Enterprises in Development What Can be Learned from the German Experience? (Fredrich Ebert Stiftung Study, 2017).

[24] Shapiro, H. 'Industrial Policy and Growth' (2007) DESA Working Paper no. 53.

[25] Ibid.

[26] Elsner, W. 'Global Industrial Policies, 2003' (2003). <https://www.researchgate.net/publication/37928851> accessed 15 January 2021.

[27] Voss, T. R. 'Institutions' in N.J. Smelser & P.B. Baltes, (eds.), International Encyclopaedia of the Social & Behavioural Sciences,(Elsevier, North Holland 2001).

INDUSTRIAL STRATEGY IN THE CONTEXT OF PUBLIC POLICY

Public policy must first be understood to emanate from a series of actions from the collective discourse. This proposition is the core of every public policy which informs the thinking underlining industrial policy in the first place. Policies are generated from state actions based on deliberate political and administrative efforts from either centralised or decentralised perspectives. Policy formulation takes a cue from instrumental problem-solving process where the process is taken through the local, national and international stages of consultations and inputting as an unavoidable requirement. To arrive at an appropriate policy framework, acceptable to be considered as an industrial policy, it must be embedded with these elements as the impetus for acceptability and ownership by the people. Public policy development has no place for officialdom domination and pandering to political whims but rather encourages the collective interactions of expectations to arrive at a suitable framework for a particular sector(s) of national life.[28]

In line with instrumentalism (the theory that knowledge is a product of correlated events and processes leading to change), public policy development does not accept a system of extemporaneity in that regard. Public policy is simply a product of a voluntarily executed collective inputs resulting in a structured blueprint. According to Bush, the principle of collective deliberation from the bottom up is a means to curtailing a situation where an unprincipled privileged class takes advantage of the society's store of the wealth of knowledge.[29] Depending on the economic structure of a nation, the most critical ingredients for this discourse include but are not limited to space, time, viable ecosystem and specific knowledge resources available in the community. Industrial strategy as a variant of public policy is therefore acceptable if its design and modelling yield to the standards and variables inherent in a public policy formulation. In assessing any good industrial strategy and approach, it is expected that the procuring ideals inherent in good policy prescriptions are considered.

THE TRAJECTORY OF INDUSTRIAL POLICIES IN GHANA

The pre-independent economic system of Ghana mainly depended on an import-led strategy for manufactured products from the colonial master, Britain.[30] Little effort was made to have a domestic policy to add value to the rich and vast raw and natural resources extracted from the country. The economy was predominantly an export-driven one that left the country so much undeveloped at the time of political independence characterised by little industrial infrastructure, activities and clear policy direction.[31]

Ghana's industrial strategies have mainly been ineffective for a long period especially after 1969 due to lack of political will and visionary economic leadership. Independent Ghana from the First Republic under Dr Kwame Nkrumah considered industrialisation as a tool for gaining economic liberty and a central decision point to accelerate and modernise the economic development of the country. Heavy investment was therefore channelled into the manufacturing sub-sector of

[28] Bush, P.D. 'Theory of Social Change' in G.M. Hodgson, W.J. Samuels and M.R. Tool, (eds.), *Elgar Companion to Institutional and Evolutionary Economics* (Edward Elgar, Aldershot UK & Brookfield US 1994)
[29] Ibid.
[30] Ackah, C., Adjasi, C., & Turkson, F. *Scoping Study on the Evolution of Industry in Ghana, a Learning to Compete Working Paper* no. 8. (Oxford University Press, Oxford Scholarship Online 2016).
[31] Senadza, B., & Laryea, A. D. 'Managing Aid for Trade and Development Results: Ghana Case Study' (Paper on Policy Dialogue on Aid for Trade 2012).

industry. This was galvanised on the back of historic legal architecture that supported the private sector mostly made up of indigenous businesses. The period saw the enactment of the Pioneer Industries and Companies Act, 1959 (Act 63), The Local Industries (Customs Duties Relief) Act of 1959, the Capital Investment Act, 1963 (Act 172), and The Companies Act, 1963 (Act 179). Apart from the boost to local enterprises emanating from these legal frameworks, foreign-owned businesses that conformed to the requirements of the laws were also incentivised to sustain their investments.

During this era of protectionism, the Import Substitution Industrialisation (ISI) policy was the leading strategy rolled out to achieve the objectives of the Seven (7)-Year Development Plan (1963/64-1969/70) to modernise the economy through industrialisation. The ISI focused on reducing spending on the importation of foreign goods to break away from a poverty-stricken economy and external political influence.[32] At the core of the ISI was the revolutionary establishment of large-scale manufacturing industries and industrial hubs for value-added production in addition to giving agricultural and mining support. Market forces as would prevail in a liberal-capitalist economy were relegated to the background. Steel argued that the rationale for the strong attention on the industry sector by the regime was to produce the needed inputs required to expand the productive sector in line with the development agenda of the government to mainly focus on macroeconomic objectives.[33] There was a high level of state protection for domestic production which also served as a means of creating economic space to mitigate the balance of payment challenges.

The net effect of these policy directions earned Ghana a growth from 9% in manufacturing as a share of Gross Domestic Product (GDP) in 1962 to 32% and 42% in 1966 and 1967 respectively from the state enterprises alone.[34] Both wholly-owned state enterprises and public-private joint ventures grew cumulatively by 250% between 1962 and 1966 as compared to solely private-owned enterprises contributions within the same period.[35] Unfortunately, but expectedly, there was a decline in the gross manufacturing output from foreign-owned private enterprises. According to the World Bank, this was a period that created an uncharitable business environment for the private sector's survival in Ghana.[36] In 1985, the World Bank observed in its annual report that the ISI strategy had inherent shortfalls that (i) discouraged growth in agriculture and exports in finished products; because in the long run, the inflows of foreign exchange could not support the import of unavailable raw materials to feed the import-substituting industries; and (ii) the strict protection given to ISI beneficiaries did not make them competitive at using domestic resources.

The fundamental pillars of the country shifted dramatically after the overthrow of Kwame Nkrumah's government in 1966. By 1970 the ISI strategy had encountered major challenges due to the deviation from the state-managed planning architecture to a new liberal market-centred economic approach under Dr Kofi Abrefa Busia's government of the Second Republic starting from 1969. This was a decision informed by the narration of the National Liberation Council (NLC) military regime, under General Joseph Arthur Ankrah, which had touted an economic stability

[32] Killick, K. Development Economics in Action: A study of Economic Policies in Ghana (Routledge, New York and Abingdon 2010).
[33] Steel, W. F. 'Import Substitution and Excess Capacity in Ghana' (1972) 24(2) Oxford Economic Papers.
[34] Ackah, Adjasi, & Turkson (n 28).
[35] Steel (n 31).
[36] World Bank 'Ghana: Industrial Policy, Performance and Recovery, West Africa Region and Industry Department of the World Ban' (Report 5716-GH, Washington, DC: World Bank 1985).

achievement based on which a future policy on market-based economic planning was ideal before handing over power in 1969. The subsequent industrial liberalisation trajectory was, however, not so well managed to the extent that by 1971 Ghana had devaluated its currency by 78% due to the effects of the global economic recession in 1970, the high levels in the influx of imported commodities resulting in the high trade deficit and a high-interest rate regime.[37] There was not much proactivity under the Second Republic on industrial policy coupled with a legal regime that became inimical to Ghana's international trade relations with close neighbours with the enactment of the Alien Enterprises Licensing Regulations, 1970 (LI 670) pursuant to section 26 (1) of the Ghanaian Business (Promotion) Act, 1970 (Act 334).

To curtail the dependence on high imports, the military regime under General Kutu Acheampong which overthrew the Second Republic in 1972 introduced a policy of self-reliance and a state-led involvement in trade, investment and agricultural businesses with a high-handed approach to price control, import liberalisation and private sector-led market. The National Redemption Council (NRC) undertook a revaluation of the cedi by reversing the exercise in February 1972, six weeks after the December 1971 devaluation.[38] The most significant legal project for the industry was the repeal of Act 172 with the Capital Investment Decree, 1973 (NLCD 141) and subsequently with the promulgation of the Investment Policy Decree 1975 (NRCD 329) to repeal the NLCD 141.

Between 1979 and 1981 under the Third Republic government of Dr Hilla Limann, Ghana recorded one period of its worst economic performance with a sharp decline in GDP. By 1982 the real GDP was averaging -7% due to the structural misalignment of the economic pillars as economic activities moved to focus on service and trade in importations instead of industrial and manufacturing promotion.[39] The NRCD 329 was repealed by the Investment Act, 1981(Act 437). Export earnings from minerals and raw agricultural products became the mainstay of the economy with about 60% contribution to the GDP.

Between 1970 and 1983, due to external economic factors and the lack of an effective national industrial policy framework, the industrial department and the macroeconomic indices were dislocated with a fragile financial sector. Under the Provisional National Defence Council (PNDC) headed by Flt. Lt. Jerry John Rawlings, the financial and economic quagmire resulted in Ghana's major banking reforms leading to the enactment of the Banking Act, 1989 (PNDCL 225).[40] This was, in essence, to open up the economic frontiers to foreign direct investors into the critical sectors of the economy including industry. Another legal development that inured industries positively was the passage of the Investment Act of 1985 (PNDCL 116) which identified businesses specifically for Ghanaians to undertake and incentivised all investments that focused on key sectors of the economy.

During the period of the PNDC, the country accepted the economic interventions under the International Monetary Fund (IMF) and the World Bank by succumbing to the Economic Recovery Programme (ERP) for reliefs. At this juncture, Ghana's export earnings from its raw materials had

[37] Herbst, J. The Politics of Reform in Ghana, 1982-1991, Exchange Rate Reform: Strategy and Tactics (University of California Press, Berkeley 1993).
[38] Ackah, Adjasi, & Turkson (n 28).
[39] Fosu, A.K. Emerging Africa: The Case of Ghana, (Michigan, Oakland University: Department of Economics, School of Business Administration) <https://www.oecd.org/countries/ghana/2674859.pdf> accessed 19 April 2020.
[40] Alagidede, P. et al. 'The Ghanaian Economy: An Overview' (2013) 1 Ghanaian Journal of Economics.

dwindled resulting in a huge decline in foreign exchange receipts. Official international assistance, as well as the country's creditworthiness, had plummeted. It must be stated that other internal factors such as the unprecedented low agricultural yields due to drought, corruption, bad economic policies by various governments before the PNDC era deepened the woes of the industrial sector and the economy in general. Private sector businesses led by SMEs were those greatly affected. After joining the ERP, as part of the Structural Adjustment Programme (SAP), from 1983, the general structure of the economy was positively impacted relative to the development of the manufacturing sub-sector of the industry. The policy objective of the ERP was basically to reverse the macroeconomic deficits by addressing all the bottlenecks in the sectors of the economy with special attention to the industrial sector. Other major policy reforms included the privatisation of state-owned enterprises, the liberalisation of the financial sector, the removal of strict import licensing regimes and the deregulation of custom barriers and quantitative restrictions.[41]

Evidently, the structural reforms posted significant figures of growth rates in the industry at about 11.2% after ten years as against the steep negative growth in 1982 at -35%. This was a period that saw mixed economic interplay setting the success pace of the current industrial policy direction. The overall industrial growth was attributed to the performance of the manufacturing sub-sector (contributing about 25% in 1985) and the utility sub-sector as a consequence of the heavy investment received. This study argues that a new industrial strategy must of necessity focus on building the synergies of all economic structures with SMEs at the centre of such planning. This paper does not hold any biases towards any segment of the SME sector, either as micro, small, medium, or large scale; foreign or indigenous but makes a strong case for a financial and infrastructural package that will favour more of those enterprises that engage in value-added manufacturing ventures. The ISI policy must be revisited with a review for adaptation into our current policy design to throw the light ahead post COVID-19 on the path to self-sufficiency, competitive local production on the wheels of emerging technology relevant to our ecosystem. Ghana's industrial policy must be redefined on a current understanding of industrial policy theories.

From 1984 to 2000, on an economic strategy rolling on the back of IMF prescription starting with the SAP, Ghana moved towards a liberalised (outward) industrial policy environment. The present phase of Ghana's industrial policy trajectory can be traced to the year 2000 to date where a more robust private sector-led industrial strategy has been galvanised. The real focus in this period is to surround growth expectations with manufacturing and value-added development strategy. The Ghanaian productive sector is privately anchored on the vast operations of SMEs but significantly dominated by foreign-owned enterprises especially in the food processing department.[42] The revisit to the discussion on the way forward for Ghana's industrial policy at this time becomes an imperative economic discourse especially when much has not been seen to flow from the recent industrial policy framework.[43] The prevailing discussion has emphasised how SMEs can be revamped and rightly positioned to expand their roles in providing employment, supporting GDP and eradicating extreme poverty through a technologically based economy. The idea is to build a

[41] Nyanteng, V. K. *Policies and Options of Ghanaian Development*, (Accra: University of Ghana, Legon 1993).
[42] Ackah, Adjasi, & Turkson (n 28).
[43] Ghana Industrial Policy (Ministry of Trade and Industry, 2011).

competitive export-oriented sector for both domestic and foreign direct investments. The reason for championing manufacturing in this article is that it is the largest component of industrial output.

THE SMALL AND MEDIUM ENTERPRISES IN GHANA

In different jurisdictions, SMEs are described by way of operations according to the players of the industry, as postulated by Davis et al.[44] They contend that there is no single definition recognised globally for SMEs but identified factors such as annual gross or net revenue, the value of assets or liabilities, the number of sales, legal structure and number of employees as constituting the definitional components of SMEs. In the same vein, Ardic et al. argued that operators in the business agree largely on the number of employees, loan size, and volumes of sales as essential indicators considered in explaining SMEs.[45] They conclude that the number of employees, as well as volumes of sales, account for the accurate parameters to define SMEs. Agyapong agrees that SMEs do not lend themselves to a single definition but it is a concept that is generally localised depending on operations and conditions in a particular country.[46] In Ghana, the body established to regulate SMEs, the National Board for Small Scale Industries (NBSSI) (currently Ghana Enterprises Agency (GEA)), provides the factors for defining SMEs as the value of fixed assets, the number of employees and an annual turnover exceeding US$200 thousand but below US$5billion.[47] It must be noted that even though SME development is largely associated with private sector development, most state-owned enterprises also fall under the categorisation of SMEs. It is known that '[A] thriving micro and small-scale enterprise sector is considered worldwide as a key to the path of successful and healthy economic development.'[48]

Korankye-Sakyi has argued that the contributions of SMEs to national development are enormous and varied.[49] He emphasises that the contribution of SMEs to national development efforts has been remarkable in history but opines that the problems that confront these firms are diverse. The role of SMEs in the economy of Ghana can be realised in their contributions to increasing the production and export of commodities, generating sustainable employment, facilitating reliable income generation of the population and supporting the GDP growth of the economy. SMEs are important economic livewire in many countries and seedbed for industrial growth. In Ghana, it is deemed that more than 85% of businesses are found in the SME sector.[50] Of course, other studies put the figure even beyond 90% depending on the typological indicators or factors used in the description.[51] Despite this, studies indicate that majority of the enterprises face growth, survival

[44] Davies, R., Madaus, R. et al. *Micro, Small, and Medium Enterprises Insolvency: A Modular Approach* (Oxford University Press, New York 2018).
[45] Ardic, O.P. et al. 'Small and Medium Enterprises: A Cross Country Analysis with a New Data Set' (2012) 4 Pacific Economic Review.
[46] Agyapong, D. 'Micro, Small and Medium Enterprises' Activities, Income Level and Poverty Reduction in Ghana-A Synthesis of Related Literature*'* (2010) *12*(5) International Journal of Business and Management.
[47] <https://nbssi.gov.gh/>, accessed 18 April 2020.
[48] Medium Term Expenditure (MTEF) 'Programme Based Budget Estimates; 2018-2021*, (*Ghana: Ministry of Trade and Industry 2018).
[49] Korankye-Sakyi (n 3).
[50] International Trade Centre 'SME Competitiveness in Ghana: Alliances for Action' (Geneva: ITC 2016).
[51] Quartey, P. 'Issues in SME Development in Ghana and South Africa' (2015) International Research Journal of Finance and Economics, 39.

and competitive challenges. The sector contributes about 70% to GDP and 49% to employment generation in Ghana.[52]

In 2016 the first series of a survey was conducted in Ghana to assess SMEs' competitiveness. The exercise which produced a country report for policy interventions assessed and analysed the strengths and weaknesses of businesses in the manufacturing and agricultural sub-sectors in major cities of Ghana relating to the local and national business environment.[53] The survey conducted in conjunction with the Association of Ghana Industries (AGI) came at a time when the stipulated year to assess the success or otherwise of the Ghana Industrial Policy (GIP) had elapsed. It acknowledged that SMEs are the most affected by global trade bottlenecks and become vulnerable to such pressures. It was, therefore, a deliberate effort to navigate the SMEs successfully through such difficult periods by making available to domestic and international private sector players the needed data and information for proper planning and decision making. Even though the survey covered a limited number of 200 firms, it invariably conveyed a representative conclusion of what constitutes both the prospects and teething problems of the manufacturing and agricultural sectors.

The most prevailing challenges of SMEs comprise a lack of access to sustainable capital and finance, lack of access to guaranteed local and international markets, lack of capacities to connect in the value chain and lack of technical capacity and industrial know-how in the application of technology. The government's policies for the nurturing and support for SMEs in Ghana have evolved with regulatory and institutional frameworks and support mechanisms that factored in the needs, the economic dynamics and prevailing business culture at any particular time. The government's current business development objectives for SMEs are; (i) to improve entrepreneurial skills and facilitate access to credit and markets for small scale enterprises, and (ii) to provide SMEs access to substantial and high-quality business development services, and envisage relying on the conventional mandates of NBSSI (GEA) to achieve these objectives.[54] However, the key challenges to achieving these objectives are that the NBSSI (GEA) which draws a greater portion of its budget from the government is not resourced to tackle the problems of the SME sector, apart from the negative attitude towards entrepreneurship and locally produced commodities.

Table 1: The table below shows the past and projected indicators of the MoTI's plans for SMEs to access business development services

Main Outputs	Output Indicator	2016	2017	Budget Year 2018	Indicative Year 2019	Indicative Year 2020	Indicative Year 2021
SMEs access to Business Development Services improved	Number of enterprises with access to business development services	78,938	85,000 (56,668)	95,000	100,500	110,000	120,000

Source: MoTI, MTEF 2018-2021 (2018)

[52] Muriithi, S. M. 'African Small and Medium Enterprises (SMEs) Contributions, Challenges and Solutions' (2017) 1 Journal of Research and Reflection in Management Sciences.
[53] International Trade Centre (n 48).
[54] MTEF (n 46).

The indicators do not reveal ambitious projections giving an expected annual increase of just about 12% as shown in table 1. In 2017, budget performance to the MoTI was approximately 40% of the appropriated allocation, which gives little confidence in the government's commitment to these projections. Even though government budget support for SME development shows an annual increment in the MTEF (2018-2021), a huge component will be expended on compensation and assets management of the MoTI. A review of the general programmes on the targets reveals an elaborate course but does not include any immediate plan to review the existing industrial policy or activate its implementation as would be expected. A greater percentage of direct financial support to SMEs in Ghana has come from traditional means through the banks with a share of GDP at 79.89% and is expected to increase to 97% by 2020. At the same time government's commitment has not yielded the desired effects on the status of the enterprises to a very large extent.

THE INDUSTRIAL ECONOMY AND ITS PROSPECT FOR GHANA

As far back as 1996, Ghana had set the economic target of growing its GDP averagely by 8% consistently to become an upper-middle-income country by 2020.[55] This was to come on the back of strong economic indicators sustained by industrialisation but this could not be achieved as 2020 dawned. The only way to appreciate the economic challenges of the Ghanaian economy and prescribe the right antidotes is to acknowledge that the country's problems have been policy-based on clustered deficiencies in networking sectors. Sectoral interdependence is a manifestation of the generality of a progressive economy, yet there is no visible direction to pushing a manifesto that builds on the synergies of these sectors. The segmentation of economic and social sectors is exemplified by the number of governmental ministerial portfolios, departments and agencies, and the isolated policy papers of different departments and agencies in public administration. In modern economies, the interdependence of sectors and development planning where one sector relies on the vision and behaviour of the other, and vice versa has been the conviction of institutionalists and socio-economists to a large extent.[56]

Despite the evidence of high volatility in the industrial growth of the country, it still contributes significantly to the GPD of the economy, creating jobs and giving hope to the vulnerable. The volatility of the sector was at play in 2016 when the overall contribution of industry to GDP dropped from 25.1% to 24.3% from the previous year.[57] At the same time, the manufacturing sector also recorded a decline as a share of GDP from 4.8% in 2015 to 4.6% in 2016. However, the construction sub-sector posted notable performance between 2015 and 2016 with massive state-sponsored infrastructural projects with a contribution of 13.7% to GDP from 13.5% in 2015. The declining trajectory continued to 2017 when the manufacturing sub-sector dipped to 3.7% in growth whereas the oil and gas, mining and quarrying sub-sectors posted 80.4% and 46.7% growth respectively bolstering the Ghanaian economy to record one of its highest growths of 8.5% in recent years.

[55] Aryeetey, E., Fosu, A.K., & Bawumia, M. 'Explaining African Economic Growth Performance: The Case of Ghana' (Paper prepared for the African Economic Research Consortium Research Project on "Explaining African Economic Growth Performance" 2001).
[56] Elsner (n 24).
[57] Ghana Statistical Service 'Provisional 2017 Annual Gross Domestic Product' (2018) 5.

With the discovery and production of oil in commercial quantities coupled with the country's position as a net exporter of crude, industrial growth performance as a contribution to GDP has seen an upsurge. A rippling effect of that has manifested in the growth of the mining and quarrying sub-sectors peaking in 2019 with a 10% growth in GDP.[58]

In 2019, the overall industry sector was second (26%) after the service sector with a contribution of 52% to GDP. All things being equal, it is expected that with the coming on board of the Mahogany and Teaks fields in addition to the Jubilee fields, the oil sector is projected to accrue about US$1.567 billion as revenue to the state in 2020. The bottlenecks of the manufacturing sector persist leading to the inefficiencies of the enterprises with remarkable low levels of productivity.[59]

Table 2: The table below shows the performances of the construction and manufacturing sub-sectors from 2006 to 2016 under industry as a share of percentages of GDP

%	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Industry	20.8	20.7	20.4	19.0	19.1	25.6	28.0	27.8	26.6	25.1	**24.3**
Construction	5.7	7.2	8.7	8.8	8.5	8.9	11.5	12.0	12.7	13.5	**13.7**
Manufacturing	10.2	9.1	7.9	6.9	6.8	6.9	5.8	5.3	4.9	4.8	**4.6**

Source: GSS data (2018)

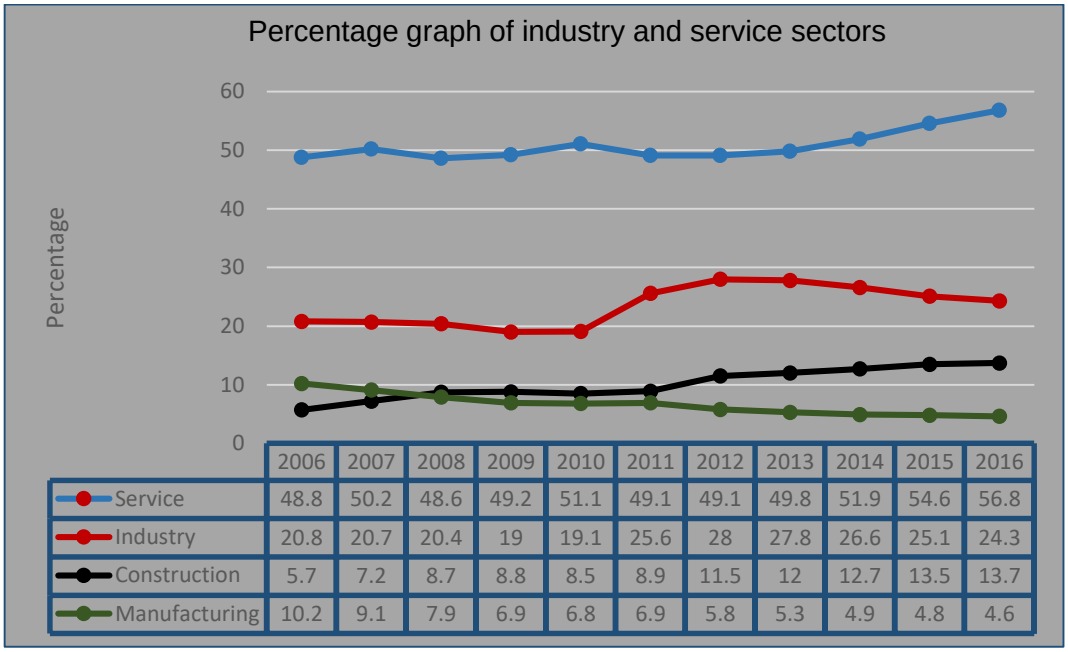
Table 3: The table below represents the service sector contribution as a share of GDP from 2006-2016

%	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Service	48.8	50.2	48.6	49.2	51.1	49.1	49.1	49.8	51.9	54.6	56.8

Source: GSS data (2018)

[58] Afful, M.C. 'Ghana: Gov't's Projected Oil Revenue to Drop By $743m –ACEP 2020). <https://energynewsafrica.com/index.php/2020/03/23/ghana-govts-projected-oil-revenue-to-drop-by-743m-acep/> accessed 18 April 2020.

[59] Ibid.



	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Service	48.8	50.2	48.6	49.2	51.1	49.1	49.1	49.8	51.9	54.6	56.8
Industry	20.8	20.7	20.4	19	19.1	25.6	28	27.8	26.6	25.1	24.3
Construction	5.7	7.2	8.7	8.8	8.5	8.9	11.5	12	12.7	13.5	13.7
Manufacturing	10.2	9.1	7.9	6.9	6.8	6.9	5.8	5.3	4.9	4.8	4.6

Source: Authors' construct from tables 2 and 3 of GSS data (2018)
Figure 1: Percentage graph of industry and service sector with sub-sectors

It is discomforting to note that since 2006, the construction sub-sector has taken the first spot in the industry with consistent growth by pushing manufacturing to second in a reversed order as shown in figure 1. The relatively stable growth in the service sector indicates mixed concerns for the overall growth of the economy.

Even though service sector growth may translate into job creation and infrastructure development, it must not be at the expense of industry where active production and employment avenues abound. It is noted that this development may be welcoming as it signified an understanding of investment in physical infrastructural development for productive sector engineering under a new development agenda focused on attracting the private sector since that period. At the same time manufacturing industries have reported high production costs from that period due to myriads of challenges. The decline in the overall real GDP from 5.7% in 2018 to 5.6% in 2019 has been largely the result of slow expansion in both the industry and service sectors. Despite the consistent downturn in the performance of the manufacturing sub-sector through the laissez-faire attitude of respective governments, it constitutes about 90% of job creation in the sector. These reasons underscore the ingenuity in the call for Ghana's industrial policy to be deliberately and strategically crafted around manufacturing. Industry has grown in numbers since 1987 from about 8,640 to about 802,176 by April 2020.

Table 4: The table below shows the spatial distribution of Ghanaian industries and their sizes

Location/Region	Group	Size of Industry/Scale	Industrial Sector
Kumasi-Ashanti	Furniture	Micro-Small	**Furniture Metalwork and machinery**
	Suame-Magazine	Micro-Small	
Tema-Greater Accra	Tema industrial area	Small-medium-large	**All sectors**
	Free zones enclave Spintex industrial area/Free zones enclave	Small-medium-large	
Accra-Greater Accra	North industrial area	Small-medium	**Manufacturing**
	South industrial area	Small-medium	**Manufacturing and garages**
Sekondi/Takoradi-Western	Light industrial area	Small-medium-large	**Manufacturing (mainly food processing and wood exporters)**
	Light industrial area	Micro-small	**Garages-metalwork and machinery**
	Heavy industrial EPZ	Small-medium-large	**Mineral processing for export**
Shama-Western	Shama EPZ	Small-medium-large	**Petroleum, petrochemical**

Source: Ackah, Adjasi and Turkson (2016)

The spatial distribution in table 4 shows an excessive concentration of most industries in urban and peri-urban towns of the countries due to many pull and push factors. The increase in numbers is good to pursue but it must have a national scope to utilise local and human resources in all regions of the country for sustainability, resilience and to anchor the economy. A reckoning for priority attention for the manufacturing sub-sector of industry is, therefore, a germane call.

The Ghanaian economy has been performing on the aggregation of sector-based productivity led by the service sector.[60] Markets and price determination are not simply a function of demand and supply but a well-coordinated projection carried along with information relating to all the complex factors of production and market forces; including national and cross-border competing factors. In all production-based economies, the role of industrial policy, therefore, becomes the overridden orientation for their successes. It is a far-reaching reality that must underline a new economic focus for Ghana. It is a reality that must invigorate the energy to practicalise Adams Smith's theory of economies of scale, which empowers the conviction that Ghana has what it takes to leverage its natural and virgin resources to boost and feed its SMEs in the productive sectors.

[60] Ghana Statistical Service (n 55).

Leading to this, the nature of the Ghanaian economy requires an enormous crusading for a ubiquitous practical policy architecture that responds to interactive agents involved in all pro-modernised economies in which constant intercourse is festered. It has been established that every market is inherently mechanised on the operation of arms-length dealings, short-run variables, spot relations based on spot prices, or such as may be on the terms.[61] Management of social capital demands a connectedly built market based on inherent mechanisms of interrelatedness. This proposition defines the call of this article that, to achieve the objectives of any future industrial policy, all-round pragmatism is a prerequisite to building a guided SME sector to shoulder the manufacturing industries.

THE 2011 INDUSTRIAL POLICY

In pursuit of its long-term development vision, the thrust of Ghana's current industrial policy was to create a strategy that is aimed at value-added processing of raw and natural resources into finished and semi-processed products primarily to be shouldered by SMEs in the private sector.[62] The aim was to have a document that could guide decision-making for economic transformation driven by industry formidable to bequeath commensurable decent employment on a ratio of equity and sustainability. Admittedly, the policy set its focus on the growth, diversification, upgrading and competitiveness of Ghana's manufacturing sector.

Like Ghana's Trade Policy (TP) the industrial policy was to complement the TP to ensure a consistent but stable milieu for accelerated industrial development.[63] It is a policy that gels with the country's private sector development brocade that seeks to create a conducive environment for private sector effectiveness and engineering of growth. The critical lacuna identified to address is the production challenges confronting the manufacturing sub-sector of the industry. Throughout the document, key problems of SMEs are captured as follows;

i. most of these businesses are not formalised (SMEs are not registered because the processes for business registration and acquisition of operating permits are cumbersome, time-consuming and costly),
ii. most small businesses do not get access to business support services and incentives,
iii. most of these enterprises are not concentrated in one particular area, making it difficult for them to enjoy the benefits accruing from the localisation of industries, and
iv. there is an overall low level of science, technology, research and development and innovation in industry (This limits the absorption and adaptation of modern technologies into the manufacturing sector, thus affecting its competitiveness).

To address these, the policy puts the problem of this article in context by agreeing that 'Small-scale enterprises are the backbone of the manufacturing sector in Ghana' and offer the following prescriptions among others to surmount the challenges:

[61] Elsner (n 24).

[62] Ghana Industrial Policy (n 41).

[63] Ghana Trade Policies <http://moti.gov.gh/tradepolicies.php> accessed 17 April 2018.

i. To formalise small scale businesses to help them get access to business support services and incentives;
ii. Institute incentives to encourage the formalisation of the informal sector enterprises;
iii. Encourage cluster development of micro and small enterprises;
iv. Government to encourage the private sector to establish marketing companies to service local SME manufacturers;
v. Government to assist SMEs to upgrade technology to enhance their competitiveness;
vi. Government to encourage the private sector to establish marketing companies to service local SME manufacturers;
vii. Government to facilitate the training of SME manufacturers on the development and efficient management of distribution chains; and
viii. Government to support SMEs to implement quality assurance systems.

The main objectives of the Industrial Policy are:

1. To expand productive employment in the manufacturing sector.
2. To expand technological capacity in the manufacturing sector.
3. To promote agro-based industrial development.
4. To promote the spatial distribution of industries to achieve a reduction in poverty and income inequalities.

The 21 thematic areas that encapsulate the industrial policy instruments have been categorised into four key components in the document namely:

1. Production and distribution;
2. Technology and innovation;
3. Incentives and regulatory regime; and
4. Cross-cutting issues.

The success indicators of the policy implementation entail the extent to which the private sector will be empowered in terms of its capacity to;

1. grow the Small and Medium Enterprises,
2. expand and create opportunities for employment, and
3. reduce poverty and spatial inequalities in Ghana.

It is instructive to observe and rightly so that the first success matrix for this comprehensive policy paper identifies SMEs' development as cardinal to its assessment. Indeed, it is the position of this paper that all the other matrixes can be ceded on the broader strength of the SMEs as outlined in this document. It is therefore not strange that strings of measures are stated concerning SMEs and how they could be supported to arrive at the general objectives of the policy.

Technically, this policy document was developed in line with the country's development planning frameworks and represents the array of specific policy instruments and mechanisms that exist to foster access to a competitive economic environment that facilitates growth in the productive industry, especially manufacturing. Though the policy opines that it "provides essentially, broad

guidelines for concrete action in the field of industry,' this has not materialised on the ground and confirms the lack of goodwill for the industrial sector from the government of Ghana.

Despite the effort, commitment and resources channelled into birthing this document, it has largely been another failed enterprise. This is because the timeline objective to achieve key objectives of the policy in 2020 is gone, yet there is little to exhibit as a concrete indication for the comprehensive implementation of the policy after ten years of launching in June 2011. Little support has so far been given to the Ministry of Trade and Industry (MoTI) to implement major aspects of the policy. The policy has seen minimal evidence of the structures and the political will of the government to bring it to fruition, even though it will be disingenuous to assert that the content of the document may be obsolete. Industry players have sounded the loudest bells and pressed all the buttons for the government's fullest action to no avail.[64]

Again, a key institutional vehicle namely, the Ministerial Industrial Policy Coordinating Committee (MIPCC) to coordinate the Industrial Sector Support Programme (ISSP) under MoTI to carry out the actual implementation of the policy has since not been set up. Specific annual budget allocation to effectuate this implementation has not been adhered to as mentioned in the document.[65]

Without any comprehensive performance reports, the Ministry of August 2017 collaborated with the Ministry of Information to launch another omnibus National Policy on Trade and Industry.[66] The elaborate interventions envisaged to be the panacea for the challenges are not mean laudable acknowledgment of the position of SMEs in the economic planning of the country and the seriousness it deserves at all stages of decision making. But as long as the implementation of this policy paper has not been prioritised, it justifies the clarion theme of this article for a revisit to its underlining assumptions and motivations for a proper take-off for the economic vision yet to be set beyond Vision 2020 which has practically expired. This paper contends that any prospective national economic or development planning must be centred on the growth and central role of SMEs in the economy. Without any shred of doubt, it is reconcilable to state that the manifestation of the strength of the manufacturing sub-sector is attached to the aprons of the viable SMEs sector. A strong industrial base built on a healthy SME sector not only secures strong economic growth but also guarantees it.

CONCLUSION

It has been outlined in this paper that the underpinning rationale of the GIP of 2011 was to grow the Ghanaian SMEs, especially those in the manufacturing sector, to enable them to produce high-quality products, processes and services, and to have the capacity to compete favourably in international trade.

Again, the analysis confirms that there is a critical challenge of production that confront the manufacturing sector especially, in Ghana as shown by its declining output up till 2016 by recording a growth of 4.6% as compared to 4.9% and 4.8% in 2014 and 2015 respectively. This was projected to decline further. This gives a baseline perspective of how the overall SMEs sector

[64] Attah-Yeboah, O. 'Review Industrial Policy, Implementation Strategy: University of Ghana Business School Report Urges Government' (2018) <www.thebftonline.com> accessed 18 April 2021.
[65] Ibid.
[66] MTEF (n 46).

is under threat because as indicated earlier, manufacturing is the anchor of the SMEs sector and its growth serves as a good indicator for measuring the resilience of that sector.

Data analysis from the paper also points to a disproportional distribution of industries in the country as most of them are concentrated in the urban and peri-urban towns of the country due to many pull and push factors. The increase in numbers of SMEs especially in the productive sectors is good to pursue but it must have a national scope to utilise local and human resources in all regions of the country for sustainability, resilience and anchoring of the economy.

In confirming the objective of this study, it is revealed from the analysis that the GIP was a means to help seize the opportunities to expand and retain the market share of Ghanaian SMEs. In this regard, the policy rationale was situated within the context of the country's long-term strategic vision aimed at achieving middle-income status by 2015. This was hinged on a key success indicator of the achievement of middle-income status by achieving a per capita income of US$1.000 per annum. But within the broader economic dynamics, Ghana could not achieve this in 2015, thereby impacting woefully the success of the implementation of the GIP.

Finally, the research identified that the government's effort through the provision of incentives to actualise the objectives and implementation of the GIP has been illusional. From the study, it is clear that even though the policy stated that, it "provides essentially, broad guidelines for concrete action in the field of industry,' this has not materialised on the ground and confirms the lack of goodwill for the industrial sector from the government of Ghana. Despite the effort, commitment and resources channelled into the making of this document, it has largely been another failed enterprise. This is because the timeline objective to achieve key objectives of the policy in 2020 is gone, yet there is little to exhibit as a concrete indication for the comprehensive implementation of the policy after ten years of launching in June 2011. Little support has so far been given to MoTI to implement major aspects of the policy.

WAY FORWARD

To begin, on the basis that the 2011 GIP objectives could not be achieved within the timelines of implementation, it will require a new beginning charted with a focus on the ubiquitous SMEs which has the capacity to anchor the economic pillars of the country, rather than a focus on large scale industries. This will require pragmatism by demanding a baseline assessment of the industrial needs, constraints and opportunities of the Ghanaian SMEs and factoring them into the development of such a policy.

Moreover, this also offers the basis for the conviction to review the parameters and scope of the objectives as well as the implementation plans and mechanisms outlined in the policy. It is posited that Ghana's new beginning to industrial policy must follow the instrumentalists' approach thereby making it generally consistent with what is acceptable. This approach demands rallying all stakeholders in government, private sector and industry for inputs into a formidable and implementable framework.

Additionally, as a policy measure, Ghana must equip its SMEs through a tailored IP that leverages its resources at a lower opportunity cost to produce in abundance for both domestic and export markets, especially under the larger market of the new African Continental Free Trade Area (AfCFTA) to bolster its economy. On this basis, it is recommended that the intentions of any IP

must be informed by industry-related priorities such as a receptive business environment, comprising regulatory and institutional frameworks and infrastructure development; entrepreneurship development; secured financing; enterprise development services; innovation and technology; and domestic and international market access through the means of instrumental approach to policy formulation.

Again, the focus on the manufacturing department of industry-led by SMEs towards this new paradigm must be non-negotiable. SMEs in the manufacturing sub-sector must continue to be the focal factor for any consideration or thought intended in new IP development. Anything short of this will present another lead to failure.

Finally, to position the SMEs as the focus for the new beginning of robust economic growth, the following considerations will be necessary:

i. Minimising entry challenges and financial implications for new firms;
ii. Sufficient and sustainable financial supply to SMEs;
iii. Development of entrepreneurship through mentoring, education and training; and
iv. Strengthening of business networking and information flow through appropriate technology.

It is clear from the paper that, the effort to practically link the growth of SMEs to economic development has not been harnessed as expected due to the challenged GIP. This requires that the efforts invested in the process of developing an IP must be as crucial as the results it is intended to achieve through its implementation, monitoring and evaluation stages. We find that not enough effort and political will have been injected into the implementation of the current GIP as much as it was done in putting out the policy framework, hence a new beginning must be charted.

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MEDIATION AS AN OPTION UNDER ALTERNATIVE DISPUTE RESOLUTION: THE CASE OF GHANA

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ABSTRACT

The paper carries out a detailed discussion on mediation as one of the options under the Alternative Dispute Resolution mechanism in Ghana. It looks at the historical basis and its connection with the culture and tradition of the people as well as the legal framework for the practice of Mediation. It also looks at issues of jurisdiction, capacity, and role of the court system. On the whole, the paper indicates that mediation in Ghana is regulated by law, founded on the basis of consensus by parties; agreements or awards out of mediations are binding, final, and enforceable. The paper indicates that mediation is deeply rooted in the customary laws and usages of the people as their foremost mode of conflict resolution mechanism before the introduction of the formal court system and litigation. Notwithstanding, mediation is ever-present as a tool for conflict resolution in every Ghanaian home and community of people.

Keywords: Ghana, Alternative Dispute Resolution, Mediation, Consensus, Facilitative process

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INTRODUCTION

The paper is a qualitative study that takes an interdisciplinary approach, where statutory legislation, conventions, case laws, legal research, and other relevant literature are considered. It starts with a brief look at the framework of Ghana's legal system which lays the foundation for the practice of mediation. It attempts to look at the historical antecedence of the Alternative Dispute Resolution (mediation) in Ghana. It discusses a host of enacted legislations providing for mediation. Focus is also given to the practice and practitioners of mediation. The special Court-Connected Alternative Dispute Resolution concept is also discussed thoroughly.

A BRIEF OVERVIEW OF THE GHANA LEGAL SYSTEM[2]

Supremacy of the Constitution

The Republic of Ghana has a pluralistic and dualist legal system. It is a common law country, which operates the doctrine of the supremacy of the constitution against the supremacy of parliament as is the case of some common law countries such as the United Kingdom.

According to Article (1) Clause (2) of the Constitution[3]:

> The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall to the extent of the inconsistency, be void.
>
> 2. (1) A person who alleges that - (a) an enactment or anything contained in or done under the authority of that or any other enactment; or (b) any act or omission of any person; is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

It is therefore trite law in Ghana when it comes to the Supremacy of the Constitution that any legislation by any entity or person(s), whether by the legislature, or any other institution or an act or omission that contravenes any provision of the constitution is null and void and of no effect. This Supreme Court of Ghana has stated quite clearly without any ambiguity that Article 2(1) has *"in-built repealing mechanisms".*

This was the position of the Supreme Court per Acquah JSC in the case of Amidu v President Kufour [2001 - 2002] SCGLR 86, where the court held that:

> Article 1(2) of the 1992 Constitution is the bulwark which not only fortifies the *supremacy of the Constitution* but also makes it impossible for any law or provision inconsistent with the Constitution to be given effect to. And once the Constitution does not contain a schedule of laws repealed by virtue of its provisions, whenever the constitutionality of any law vis-à-vis a provision of the Constitution is challenged, the duty of this court is to determine the authenticity of the challenge. And in this regard, the fact that the alleged law has not been specifically repealed is totally immaterial and affords no validity to that law. *For article 1(2) contains a built-in repealing mechanism which automatically comes into play whenever it is found that a law is inconsistent with the Constitution.* It therefore follows that the submission based on the fact that the [refulation] 3(1)…of L I 239 [has] not been specifically repealed, and therefore valid, misconceives the effect and potency of article 1(2), and thereby underrates the *supremacy of the 1992 Constitution*.[4]

[2] Bimpong-Buta Seth Yeboah. *The role of the supreme court in the development of constitutional law in Ghana*. Diss. University of South Africa (2005). 33 - 72

[3] 1992 Constitution of Ghana

[4] Ibid (n2) at pp 107 -108

Similarly, in a unanimous decision, the Supreme Court in the case of *Adofo v Attorney General & Cocobod*[5], held that:

> This constitutional provision unequivocally and authoritatively establishes a doctrine of supremacy of the Constitution in the Ghana jurisdiction. This doctrine implies that the supremacy of Parliament is limited and that enactments by Parliament and those of previous legislatures are subject to the supremacy of the Constitution. This supremacy of the Constitution implies the assertion that constitutional clauses granting an effective indemnity against the provisions of the current Constitution, which exist under the terms of the transitional provisions of the 1969, 1979 and 1992 Constitutions, are also supreme. Those clauses therefore establish an effective indemnity.

The constitution has provided an open door for both natural[6] and artificial[7] legal personalities to carry out this patriotic constitutional duty envisioned in defence and protection of the Constitution. This means that both natural and artificial persons have the full capacity under the 1992 Constitution.

From above, the Constitution[8] has provided under Article 11 the laws of Ghana:

> (1) The laws of Ghana shall comprise: (a) this Constitution; (b) enactments made by or under the authority of the Parliament established by this Constitution; (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution. (d) the existing law; and (e) the common law. (2) The common law of Ghana shall comprise 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 including those determined by the Superior Court of Judicature. (3) For the purposes of this article, "customary law" means the rules of law, which by custom are applicable to particular communities in Ghana.

Similarly, Josiah-Aryeh (2006)[9] indicates in his articles that:

> Article 11 of the constitution of Ghana defines the laws of Ghana to include English common law, the doctrines of equity, the Constitution, and the "customary law of Ghana". The customary law of Ghana is defined to include rules existing within the various communities of Ghana. In origin, these were ethnic-based rules which had over time developed to constitute an essential part of the corpus of Ghanaian law. They were an essential part of the colonial system of adjudication for section 87 of the Supreme Court Ordinance 1876 provided that in the adjudication of cases in the erstwhile Gold Coast (the former name of Ghana) European judges were to take account, in appropriate cases, of "native laws and customs" particularly in the areas of marriage, succession, and property.

The Customary law of Ghana is par excellent in the sense that it is the manifestation of the various customs, norms, and usages of the various societies making up the state called Ghana. They form the foundation of customary law tradition and growth. These customs, norms, and usages are manifest within the body of communities, families, traditional councils, mediation, and arbitration committees. In addition are pronouncements

[5] [2005-2006] SCGLR 42
[6] Article 2(1); Agyei Twum v. Attorney-General & Akwetey [2000] SCGLR 403
[7] New Patriotic Party v Attorney-General (Ciba Case) [1996-97] SCGLR 729, the Supreme Court held that both natural and artificial bodies can bring an action for the enforcement of the 1992 Constitution under Article 2(1).
[8] Ibid (n2)
[9] Josiah-Aryeh Nii Armah. *Customary Law in the Twenty-First Century: A Survey of Ghanaian Customary Law* (2006)

of chiefs and heads of families as well as informal judicial bodies. These are the grounds where customary law lives and grows (Harvey, 1964).

Fundamentally, the supremacy of the Constitution has established in Ghana the rule of law. Therefore, the practice of Mediation (ADR) is anchored on this footing with the Alternative Dispute Resolution Act, 2010 (Act 798) as its main legal instrument supported by some others of parliament, regulations, and policies. It follows that any mediated settlement that is inconsistent with the Constitution shall be void.

Historical Perspective on Alternative Dispute Resolution in Ghana

Conflict and disputes are inevitable and are as old as human existence. As long as humans co-exist, differences, misunderstandings, and disputes are bound to exist. And would therefore need to be resolved for stability, peaceful co-existence, and development to prevail, without which they would be chaos and total disaster.

Malan (1997) provides that "as human beings on this planet, we enjoy a very interesting existence in a fascinating environment. One of the most gripping elements of human life is the everywhere-present phenomenon of conflict. We dislike it, but we also need it."[10] This underscores the inevitability of conflict in human existence no matter the jurisdiction.

Human survival in any nation is cardinal to its development. This becomes very difficult in the presence of disputes; hence the institution of various laws and mechanisms to deal with them in an amicable and swift manner even though these mechanisms may grind slowly. The essence of legal regimes and policies are therefore established to serve as tools for social engineering and development, which is not the preserve of only some nations but all nations. Hence international advocacy for the adoption of various conflict resolution mechanisms of the Alternative Dispute Resolution (ADR), has been very much welcomed in Ghana.

Fiadjoe (2013), provides that the mechanisms of ADR are those which have their origin in the fabric of the tradition of various societies. He states that:

> The origins of ADR trace to traditional societies. Traditional societies, without the trappings and paraphernalia of the modern state, had no coercive means of resolving disputes. So, consensus building was an inevitable and necessary part of the dispute resolution process. The court system only developed as a necessary by-product of the modern state. Societies in Africa, Asia, and the Far East were practicing non-litigious means of dispute resolution long before the advent of the nation-state, for the building of long-term relationships was the bedrock on which those societies rested.[11]

It means the use of mediation dates far back and was a non-coercive approach to resolving disputes based on consensus. Above lends credence to the narrative espoused by Malan (1997). Under his discussions on Conflict and Conflict Resolution, attention is drawn to the traditional African setup in which traditional or tribal leaders and elders serve as conflict resolution practitioners termed interveners. He indicates that:

> During the thousands of years of traditional leadership the situation outlined above (pp 4-6) could have prevailed in Africa, as elsewhere in the world: typical types of conflict arising out of typical causes, and leading to basic patterns of conflict resolution - fighting and/or talking. For the greatest part of this very long period, the setting of such conflicts and their resolution must have been predominantly local. The events took place between individuals, village communities, or tribes who lived in the same or adjoining areas. The people who became involved as "interveners"[12] were probably mostly local elders and/or tribal leaders. When kingdoms developed (about the 50th century BCE in Egypt, and

[10] Malan Jannie. *Conflict resolution wisdom from Africa*. (1997).

[11] Fiadjoe Albert. *Alternative dispute resolution: a developing world perspective*. Routledge. (2013) 2

[12] Traditional conflict resolution practitioners

> about the 8th century BCE in West Africa) stronger and wider authority came onto the scene, but the traditional methods of instigating and resolving conflict probably underwent little change.[13]

This suggests that these mediation processes were led by respected community elders and chiefs when it came to disputes within their traditional jurisdictions. The case of Ghana is not any different from this historical narrative. ADR was the main legal regime that was used in conflict management and resolution until the advent of the introduction of the court system which brought about litigation that is founded on rights, and who is at fault, and not necessarily based on building on consensus for an amicable resolution of a dispute (Fiadjoe, 2013). He indicates:

> In the case of Ghana, for example, there is abundant evidence showing the historical existence of ADR processes. In the Privy Council case of *Kwasi et al v Larbi,* [1953] AC164 there is the discussion in the judgment of the Board on the question of whether there is a right to resile from arbitration after the award has been made. Reference was made to Sarbah's *Fanti*, *Customary Laws (Gold Coast)* published in 1887 and the case of *Ekua Ayafie v Kwamina Banyea*, [1884] Fanti LR 38 reported in 1884.
>
> Also, in the present-day customary law regime of Ghana, there is still recognition of non-litigious modes of dispute resolution whereby the parties to a dispute may refer their disagreement to conciliation, mediation, or arbitration, outside of the formal court system, *to a chief or some respected elder of the community.* In a general sense, this respect for a non-litigious process of dispute resolution was underpinned by a society that was then largely culturally homogenous. Respect for the lineage, the household and personal abhorrence of crime, and the focus on community rather than personal interests, all served, in large measure, to preserve the equilibrium of the society. The introduction of the court system, as part of the modern state, was an indication of the loss of society's homogeneity through the growth of internal fecundity or external admixture. In that kind of a mix, old sanctions tended to become inadequate to the new needs of maintaining law and order. [14]

This narrative appears to give a detailed historical perspective of the evolution of the alternative dispute resolution mechanism in which chiefs and respected elders as third-party neutrals played a significant role. Similarly, Brobbey (2008)[15] indicates that the chieftaincy institution in Africa came with the mandate of governing or ruling people within a particular traditional sitting. And that system was the major legal framework[16]. It is stated that:

> Chieftaincy is traceable from the period in the history of Africans in the then Coast. Before the arrival of the colonialists[17], life was organised by and revolved around the leaders or heads of the community. The headmen or leaders in their respective communities governed the Africans…they were given names and titles in the African dialects by those whom they governed. The names and titles connoted those who ruled, governed or headed the people as rulers, governors or leaders...the primary function of *the leader or chief was to govern or rule to ensure social stability and order*.[18]

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[13] Ibid (n 10) pp 13 - 14
[14] Ibid (n 10) at pg. 5
[15] Brobbey Stephen Alan. *The law of chieftaincy in Ghana: Incorporating customary arbitration, contempt of court, judicial review*. (Advanced Legal Publications, 2008)
[16] Gedzi Victor. *Principles and practices of dispute resolution in Ghana: Ewe and Akan procedures on females' inheritance and property rights*. (2009) 166-169. Traditional Judicial structure in Ghana
[17] In the case of Ghana (Gold Coast), it was colonized by the British
[18] Ibid (n 15) at p 2

In sum, respected heads of families, elders, tribal chiefs, and queen mothers, as third-party neutrals were the major actors/practitioners of customary dispute resolution through arbitration, mediation, and other settlement processes.[19] Therefore the conflict resolution processes and techniques which were used to resolve disagreements or disputes were outside of litigation.[20]

African Regional Conference on ADR Curriculum Development and Teaching

This said conference, was the maiden conference on Alternative Dispute Resolution organised in Accra, Ghana under the auspices of the International Bar Association. The event took place between 20th – 22nd July, 1998, with Sam Okudzeto, Esq of Sam Okudzeto & Associates as the Chairman, a Ghanaian Law Firm. It was an African Conference with participants coming from almost all the parts of the African continent particularly Nigeria, Zimbabwe, Tanzania, Mozambique, Malawi, Benin, Namibia, The Gambia, Swaziland, Kenya, South Africa, Sierra Leone, Zambia, Ethiopia, Botswana, Cameroon, Uganda, Burkina Faso, Republic of Angola including Ghana. These countries included those with both common law and civil law jurisdictions. Other international participants included England, Italy, Germany, The Law Society of Scotland, UK, the National Judicial College, USA as well as Australia.

It must be noted profoundly that Ghana was heavily represented[21] by persons from various fields of practice, such as the legal fraternity, politicians and state actors, academia, commerce, the chieftaincy institution, etc. who participated in the conference. The focus of the conference to build capacity in conflict analysis, prevention, management and resolution; the advantages of an alternative mechanism to litigation as well as equip participants with basic skills in negotiation and mediation. Participants were also taken through skills in arbitration and the difference that exists between ADR and other peace modules.

The conference empowered participants and provided the platform to learn about the modern trend in the development of ADR in its various forms and most importantly its benefits. This, fortunately, fell in line with the traditional setting and practices as well as the legal system of participants but was without an established legal framework. Based on the above discussions, the Alternative Dispute Resolution concept[22] of Ghana must be understood to be founded on these underlying historical antecedents, principles, and awareness.

LEGISLATIONS PROVIDING FOR MEDIATION IN GHANA

Mediation in Ghana is regulated by law. Several enactments have made room for the use of mediation as an option in resolving disputes when they occur. It must be noted that before the enactment of the parent Act, the Alternative Dispute Resolution Act, 2010 (798), various enactments which predate it, provided for mediation. Legislations that provide the legal basis for the practice of Mediation in Ghana include the following:

Courts Act, 1993 (Act 459)

The Courts Act provides the promotion of reconciliation of disputes in civil and criminal matters. It requires the courts and tribunals to assist parties to resolve their disputes amicably without having to go through litigation as much as possible, where it appears practical. The Courts Act, 1993 provides that:

> Section 72: Courts to Promote Reconciliation in Civil Cases

[19] Nolan-Haley Jacqueline M., and James Annor-Ohene*. Procedural justice beyond borders: mediation in Ghana.* Harvard Negotiation Law Review Online, Forthcoming, Fordham Law Legal Studies Research Paper 2384666 (2014).
[20] Adjei Dennis Dominic and Ackah-Yensu Frances Barbara. *Alternative Dispute Resolution*. Buck Press. Accra. (2021)
[21] about 70% of the participants were Ghanaian citizens in various fields and enterprises.
[22] Emphasis of this paper would be limited to only Mediation

> (1) Any court with civil jurisdiction and its officers shall promote reconciliation, encourage and facilitate the settlement of disputes in an amicable manner between and among persons over whom the court has jurisdiction.
> (2) When a civil suit or proceeding is pending, any court with jurisdiction in that suit may promote reconciliation among the parties, and encourage and facilitate the amicable settlement of the suit or proceeding.
> Section 73: Reconciliation in Criminal Cases.
> Any court, with criminal jurisdiction, may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree, on payment cases of compensation or on other terms approved by the court before which the case is tried, and may during the pendency of the negotiations for a settlement stay the proceeding for a reasonable time and in the event of a settlement being effected shall dismiss the case and discharge the accused person.

Section 73 largely is founded on the principles of Victim-Offender Mediation (VOM) or Restorative Justice coined by Albert Eglash[23] which has become essential in the criminal justice system.

The jurisprudence of the criminal justice system appears to view crime as having been committed against the State, as opposed to against the immediate victim and the community at large. Hence appearing to neglect the victim's preferences and needs when prosecuting and sentencing the offenders of the acts committed against them[24]. The Alternative Dispute Resolution (ADR) mechanisms have mediation as one of the approaches. VOM is a type of Mediation used to resolve non-aggravated criminal offences. Victim-offender mediation is also referred to as Restorative or Transformative justice. Restorative practices involve addressing criminal justice issues placing emphasis on repairing the harm done to victims and relationships rather than only punishing offenders[25]. Kaul indicates that therapeutic VOM within the niche of the traditional criminal justice process has a high potential for rehabilitation of the criminal offenders, giving them the opportunity to redress whilst correcting their wrongs under the alternate dispute resolution philosophy[26]. Kaul states that "ideally, any judiciary's opinion about restorative justice depends on their belief of how much potential a criminal offender to rehabilitate himself, and whether the level of seriousness of his crime even gives him access to this method of mediation"[27]. Similarly, Adjei and Ackah-Yensu indicate that Victim-Offender Mediation is rooted in the belief that accords with the concept of individualism that pervades modern society. They indicate that:

> The key concern is that the criminal justice system should be centered on the victim rather than the State since the offender may end up living in the same community as the victim and also the need to consider the feelings of the victim with the intention of restoring and transforming both parties to continuously live in social peace and harmony. …this is accomplished by usually a meeting, in the presence of one or two trained facilitators, between victim and offender[28]

Section 73 of Act 459 therefore, empowers the Court to refer a criminal case to mediation if it is of the opinion that the case is non-aggravated and amenable. A party may also request the court for mediation, which the court may grant considering the circumstance of the case.

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[23] Ibid (n 18) at p 100
[24] Ravinsky Laura. *Reducing recidivism of violent offenders through victim-offender mediation: a fresh start*. Cardozo J. Conflict Resol. 17 (2015): 1019.
[25] Van Sluytman Margot, and B. A. Poet. *Sawbonna: victim-led restorative justice*. (2020).
[26] Kaul Tulika. *A Guide to Victim-Offender Mediation: An Alternative to the Criminal Justice System*. Ct. Uncourt 6 (2019): 19.
[27] Ibid (n2)
[28] Ibid (n 18) at p 106

High Court Civil Procedure Rules 2004 (C.I 47)

Order 58 of C. I. 47 deals with commercial court matters such as disputes arising from trade and commercial transactions. Order 58 Rule 4 provides that after a Reply has been filed or the time for filing the Reply has elapsed, the Administrator of Commercial Court shall, within three days assign the case to one of the Commercial Court Judges, to conduct a pre-trial settlement conference, which is also known as Case Management Conference.

The parties are invited to settle issues for trial and effect settlement of the dispute and may be represented by their counsel. Order 64 rule 1 also provides for reference to arbitration.[29] This has found its way into the Practice Direction of Her Ladyship Sophia Akuffo, C.J (2018)[30] with the overriding objective of ensuring that criminal cases are resolved fairly, justly, efficiently, and expeditiously. Of which provision is made for Case Management Conference, where the Judge or Magistrate must consider whether the offence in question is amenable to amicable settlement under the law and if it is, then amicable settlement ought to be vigorously explored and the court must refer the case to ADR[31] and adjourn[32] for the outcome of the amicable settlement subject to the provisions of Section 169 (2) of Act 30[33].

High Court (Civil Procedure) (Amendment) Rules, 2020 (C.I. 133)

C. I. 133 under Order 1 amends Order 32 of High Court Civil Procedure Rules 2004 (C.I 47) under Application for directions. Order 1 of C.I. 133 provides that a party to a civil case before the court, when applying for directions may request the court for the proceedings to be stayed for the parties to attempt a settlement of the case through Alternative Dispute Resolution (ADR) (Mediation) or other means of an amicable settlement. During the hearing of the Application for Directions, the presiding judge may ask the parties if they are willing to submit their case to ADR or other means to attempt an amicable settlement if the case before the court is amenable to ADR. If the parties agree to settle by ADR, a period of one month will be granted and may be extended if required to enable any possible settlement. Upon successful resolution of the dispute; the Terms of Settlement will be drawn for parties to sign. The Terms of Settlement will be entered as consent judgment by the Court. On the other hand, if the mediation process could not resolve the dispute, the stay of proceedings is revoked and then the judge will give a hearing to the application for directions. From which the case takes its normal course of a full trial.

Labour Act, 2003 (Act 651)

Sub-Part II of the Labour Act, 2003 provides for the Settlement of Industrial Disputes in the working environment or labour front. According to section 153, parties to an industrial dispute are under an obligation to negotiate in good faith with a view to reaching a settlement of the dispute in accordance with the dispute settlement procedures established in the collective agreement or contract of employment governing parties. Section 154 is specifically on Mediation. It states that subject to the time limit in respect of essential services, if parties fail to settle a dispute by negotiation within seven days after the occurrence of the dispute, either party or both parties by agreement may refer the dispute to the Labour Commission and seek the assistance of the Commission for the appointment of a mediator.

Domestic Violent Act, 2007 (Act 732)

Under Act 732, the Court is expected to promote reconciliation under section 24. It provides that "if in a criminal trial in respect of domestic violence which is not aggravated or does not require a sentence that is more than two years, where *(a)* the complainant expresses the desire to have the matter settled out of Court, the Court shall

[29]Westchester Resources Ltd v. Ashanti Goldfields Co. Ltd & Africore (GH) Ltd v. Ashanti Goldfields Co. Ltd (Consolidated) Suit No. J4/63/2013; 11 November 2015 (Unreported)
[30]Practice Direction (Disclosures and Case Management in Criminal Proceedings) (2018)
[31] Victim-Offender Mediation
[32] Section 169 (2) of Criminal Procedure Code, 1960 (Act 30)
[33] Ibid (n 27)

refer the case for settlement by an alternative dispute resolution method, or *(b)* the Court is of the opinion that the case can be amicably settled, the Court may with the consent of the complainant refer the case for settlement by an alternative dispute resolution method." This makes room for the restoration of a broken domestic relationship affected due to the offence. But what needs to be noted quite clearly is that the offence must not be aggravated and the victim must voluntarily consent to the willingness to undergo the mediation. The objective of this provision is seeking to restore a broken family rather than inflicting penal consequences such as a custodial sentence which may further destroy the existing domestic or family bond as well as attendant societal implications.

Children's Act, 1998 (Act 560)

The Children's Act provides under section 28, the functions of the Child Panels, a non-judicial function to mediate in criminal and civil matters which concern a child. Section 31 provides that a Child Panel may mediate in any civil matter concerned with the rights of the child and parental duties. Furthermore, section 32 also creates room for criminal matters. It states that a Child Panel shall assist in victim-offender mediation in minor criminal matters involving a child where the circumstances of the offence are not aggravated. It shall seek to facilitate reconciliation between the child and any person offended by the action of the child. Similarly, the Court would consider whether the offence committed is non aggravated, if it is the opinion of the court that is it aggravated such as defilement, it shall not grant mediation. On the other hand, if it is non aggravated it may call for mediation as an approach toward restoring reconciliation.

Ghana Investment Promotion Centre Act, 2013 (Act 865) - (GIPC)

The Ghana Investment Promotion Centre[34] is a state entity engaged in facilitating national and international investment and commercial transactions for economic growth and development. Act 865 regulates the operation of GIPC, it provides under section 3 as an objective of the institution, which has to do with enhancing a transparent and responsive environment that is conducive to promoting investment in Ghana. Section 33 is dedicated to the Dispute Resolution Procedures. It indicates that (1) where a dispute arises between a foreign investor and the Government in respect of an enterprise, an effort shall be made through mutual discussion to reach an amicable settlement; (2) A dispute between a foreign investor and the Government in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions within six months may be submitted at the option of the aggrieved party to arbitration...unless there is an arbitration agreement to the contrary, the method of dispute settlement shall be mediation under the Alternative Dispute Resolution Act, 2010 (Act, 798). A close look at the established mode for resolving investment disputes at GIPC is mediation even to the exclusion of Arbitration unless there is an agreement to that effect, this is so because of the spirit of creating an enabling environment for investment. Therefore, when it comes to international disputes under GIPC, the focus is placed on resolving disputes amicably through mediation as the first option.

Commission on Human Rights and Administrative Justice Act, 1993 (Act 456) (CHRAJ)

CHRAJ[35] is a state institution with the mandate of protecting the fundamental human rights of citizens, administrative justice, and issues bordering on corruption as well as ensuring good governance has been empowered under Act 456 to adopt mediation as one of the mechanisms in resolving its disputes. Section 7(d) of Act 456 provides for the Commission to take appropriate action to call for the remedying, correction, and reversal of instances specified in paragraphs (a), (b), and (c) of section 7[36] such means as are fair, proper and effective,

[34] https://gipc.gov.gh/the-centre/
[35] https://chraj.gov.gh/
[36] Section 7—Functions of the Commission.
The functions of the Commission are: (a) to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power, and unfair treatment of any person by a public officer in the exercise of his official duties; (b) to investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the offices of the Regional Co-ordinating Council and the District Assembly, the Armed Forces, the Police Service and the Prisons Service in so far as the complaints relate to the failure to achieve a balanced structuring of those services or fair administration in relation to those services; (c) to investigate complaints concerning practices

including negotiation and compromise between the parties concerned. This is in line with facilitating industrial harmony and reconciliation.

Securities Industries Act, 2016 (Act 929)

Act 929 establishes the Securities and Exchange Commission[37] with the mandate of regulating and promoting the development of efficiency, fairness, and transparency in the securities industry conducive for investors. Section 19 provides for the submission of complaints and examination of issues within the securities industry. It empowers a complaint to dispute, or a violation to seek any redress before the courts. However, it requires the case to be submitted to the Commission for hearing and determination and when not satisfied the complaint may proceed to court.

The Copy Right Act, 2005 (Act 690)

The Ghana Copy Right Office[38] is established under Act 690, which is empowered to implement copyrights, investigate and redress issues of infringement, and resolve disputes that arise out of the Act. Dispute resolution is provided for under section 48. It requires parties to a dispute to undergo negotiation among themselves as the first option and when that fails, appear before the Copyright Administrator to facilitate a meditation between the parties for an amicable resolution. However, it makes room for seeking review at the court of competent jurisdiction should they feel unsatisfied with the decision.

Matrimonial Causes Act 1971 (Act 367)

The Matrimonial Causes Act, 1971 is enacted to regulate marriage and its attendant challenges such as matters concerning divorce or broken marriage. It encourages the use of mediation to resolve such disputes if they are not beyond reconciliation. Section 8 of the Matrimonial Causes Act provides for the Promotion of Reconciliation. It states that on the hearing of a petition for divorce, the petitioner or his counsel shall inform the court of all efforts made by or on behalf of the petitioner, both before and after the commencement of the proceedings, to effect reconciliation. If at any stage of the proceedings for divorce it appears to the court that there is a reasonable possibility of reconciliation, the court on its own motion may adjourn the proceedings for a reasonable time to enable attempts to be made to effect a reconciliation and may direct that the parties to the marriage, together with representatives of their families or any conciliator appointed by the court and mutually agreeable to the parties, attempt to effect a reconciliation. Therefore when it comes to disputes pertaining to divorce among spouses before the courts, the court encouraged facilitating an amicable resolution through mediation of the disputes if it deems it fit.

THE ALTERNATIVE DISPUTE RESOLUTION ACT, 2010[39]

Mediation under the ADR Act

In his lecture[40] on ADR, Nene Amegatcher indicates that mediation is derived from the Latin word “mediare” which means “heal”. A process that brings about healing. Unlike other dispute resolution methods, its major goal is to accomplish healing and restore relationships of disputing parties. The basic function of mediation is facilitating communication using a neutral third party to assist parties to arrive at their own resolution on consensus.

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and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental rights and freedoms under the Constitution.

[37] https://sec.gov.gh/

[38] https://www.copyright.gov.gh/

[39] Alternative Dispute Resolution Act, 2010 (Act 798)

[40] Ghana Bar Association Annual Conference Continuous Legal Education Workshop Elmina-Tuesday 20th September 2011, A Daniel Come to judgment: Ghana’s ADR Act, a progressive or retrogressive piece of legislation?

Mediation places ownership of the process with the parties with the mediator as a facilitator or moderator. The parties control the outcome[41]. Mediation is different from litigation or arbitration which are contest dispute resolution mechanisms. The mediator as a facilitator does not make decisions for the parties nor declare a party judge guilty or liable for a wrong nor declare the innocence of a party. It, therefore, means the mediator basically serves as a facilitator who assists the parties to make their own decision on the basis of consensus without being unduly influenced by the mediator.

Sections 63 – 88 of Act 798 provide for mediation. A party may with the consent of the other party submit any dispute to *"an institution or a person agreed on by the parties"*.[42] Communication between the parties towards an agreement to refer a dispute to mediation could take the form of telephone, emails, or any other verbal mode of communication[43]. The court on its own motion[44] before which an action is pending may at any stage in the proceedings if it is of the view that mediation will facilitate the resolution of the matter or a part of the matter in dispute, may refer the matter or that part of the matter to mediation[45]. A mediator can be a natural person or an entity of one or more mediators.[46]

The *ethical standards* required of the mediator(s) include *independence and impartiality*;[47] *disclosure of any likelihood of bias* that would affect the mediation proceedings devoid of any conflict of interest.[48] Act 798 also guarantees confidentiality, it provides under section 78 that:

> (1) A record, a report, the settlement agreement, except where its disclosure is necessary for the purpose of implementation and enforcement, and other documents required in the course of mediation shall be confidential and shall not be used as evidence or be subject to discovery in any court proceedings.
>
> (2) A mediator shall not disclose information given in the course of the mediation to a person who is not a party to the mediation without the consent of the parties.
> (3) Without limiting the effect of subsection (1) a party to mediation shall not rely on *(a)* the record of the mediation; *(b)* statement made at the mediation; or *(c)* any information obtained during the mediation as evidence in court proceedings.

From above, a mediator[49] cannot serve as an arbitrator or representative or counsel for one of the parties in arbitration or judicial proceeding or serve as a witness to any of the parties[50] or be joined as a party or liable for acts and omissions in the discharge of his functions unless it is proven that the mediator acted in bad faith.[51]

Another ethical requirement is the power of the mediator. Section 74[52] gives the mediator the power to act independently and impartially in the conduct of mediation such as conducting joint or separate meetings

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[41] See Barnes and Obeng on Mediation as a Court-Connected ADR (2021).
[42] "an institution or a person agreed on by the parties" this suggest that qualification of who serves as a mediator is at large but most significantly is based on the consent and consensus of parties, agreeing to submit their dispute to such a person or institution for a mediation to be conducted. It is therefore clear that it is not necessarily dependent on one's professional or academic qualification; however, S. 115 (d) of Act 798 also empowers the ADR Centre to keep a register of arbitrators and mediators.
[43] Ibid (n 28) s. 63
[44] Ibid (n 29) s. 83 (Resort to arbitral or judicial proceedings) The parties shall not initiate, during the mediation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the mediation proceedings., Stay of proceedings.
[45] Ibid (n 28) at s. 64
[46] Ibid (n 29) at s. 65
[47] Ibid (n 29) at s. 67
[48] Ibid (n 29) at s. 68
[49] The mediator(s) become funtus officio upon the termination of the mediation proceedings.
[50] Ibid (n 29) at s. 84
[51] Ibid (n 29) at s. 86
[52] Power of mediator, s. 74 of Act 798

(caucusing), be guided by the principles of objectivity, fairness, and justice in the proceeding, and has the power to end the mediation whenever the mediator is of the opinion that further mediation between the parties will not help to resolve the dispute.

In sum, the mediator is to exhibit professionalism when it comes to compliance with the ethical requirements in order to conduct successful mediation to become enforceable which would stand the test of time without the risk of being set aside. These professional principles include confidentiality, integrity and independence, impartiality, and diligence. Others are comportment, dignity, and avoidance of conflict of interest through full disclosure of anything likely to bring about bias before and in the course of proceedings.

Mediation is terminated when the dispute is *resolved amicably* by consensus with a settlement agreement.[53] It can also be terminated by the mediator for *non-payment of a deposit by parties* or when upon a reasonable assessment in consultation with the parties to the effect that *further mediation is not worthwhile and would not resolve the dispute or where a party or parties jointly terminates* the mediation proceedings. *This notice may be in writing or by word of mouth (oral).*[54]

THE ALTERNATIVE DISPUTE RESOLUTION CENTRE

The ADR Act, 2010 (Act 798) has provided for the establishment of an Alternative Dispute Resolution Centre[55] by the State, which shall be a separate legal entity that can sue and be sued. Its functions shall include facilitating the practice of ADR and providing facilities for the settlement of disputes through arbitration, mediation, and other voluntary dispute resolution procedures. The Centre shall also keep a register of arbitrators and mediators, examine and provide guidelines on rules and fees for arbitrators and mediators. Other responsibilities include conducting research, education, and issuing specialised publications on all forms of alternative dispute resolution and amicable settlements in advancing the practice of ADR in Ghana.

COURT CONNECTED ALTERNATIVE DISPUTE RESOLUTION (CCADR)

Irene-Charity Larbi, JA[56] in an address to mark the launch of the yearly National ADR Week Celebration[57] for the 2021 Legal Year Term, gave a detailed presentation on the background for the institutionalization of the Court-Connected ADR concept and its relevance in contemporary legal jurisprudence and the court system. She stated that:

> Alternative Dispute Resolution was instituted in the year 2005 as an intervention to ease pressure on the regular court system and to create a platform that would offer disputants the opportunity to play a key role in resolving their disputes. To promote and entrench this intervention, a one-week in every legal year term is set aside to sensitize the General Public. *Our Court Connected ADR Programme uses Mediation mainly*[58] for the resolution of cases. ADR[59] has a lot of benefits that support quality justice delivery over conventional litigation such as privacy, helping parties to willingly comply with agreements, providing a healthier method for resolving disputes, decongest the courts by reducing the backlog of cases, financial and emotional relief to parties, cuts down cost as compared to the cost to litigation and thereby makes justice more accessible to a greater number of people, empowers parties due to flexibility, beneficial to lawyers in the sense that they tend to

[53] Ibid (n 29) at s. 82, (Status and effect of settlement agreement) Where the parties agree that a *settlement is binding,* the settlement agreement has the same effect as if it is an arbitral award under section 52.
[54] Ibid (n 29) at s. 80, End of Mediation
[55] Ibid (n 29) ss 114 -115
[56] Her Ladyship Justice Irene-Charity Larbi, is Justice of the Court of Appeal and Judge-in-Charge of ADR
[57] At Bolgatanga in the Upper East Region of Ghana, dated Monday, 19th July, 2021
[58] Emphasis: The Court Connected ADR of Ghana is focused mainly in Mediation to the exclusion of Arbitration and Customary Arbitration which are other options to ADR under the ADR Act, 2010
[59] ADR used here is in the light of Court Connected ADR (Court Connected Mediation Practice)

> have happier clients, greater professional satisfaction, broader problem-solving skills than litigation and to make quality justice real and accessible to all, especially the poor and vulnerable.

Her Ladyship, Irene-Charity Larbi[60] indicated that two major activities are carried out during the ADR Week Celebration, namely the use of mediation to resolve cases where mediators are assigned to each court to help resolve cases that are amenable[61] to mediation and referred by Judges and Magistrates; and secondly, creation of public awareness to educate the citizenry on the use of ADR.

The CCADR Programme is practiced in one hundred and thirty-one (131) courts across Ghana with at least five mediators assigned to one Court. The CCADR programme has six hundred and thirty-five (635) registered mediators.[62]

Adjei and Ackah-Yensu (2021)[63] provide that the Court-Connected Mediation is any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or mandatory basis, or any program or service operated by the court. This approach[64] has been adopted by many countries as an alternative to conventional litigation for the benefit of reduction of cost, access to justice[65], reduction of caseload and delays[66] before the courts, and restoration of a broken relationship[67] as well as for personal satisfaction of parties based on its participatory approach[68]. There is also a national and international drive in transforming local and international conflict into peaceful agreements.[69]

The National ADR Secretariat of the Judicial Service of Ghana

The ADR Programme is coordinated under the National ADR Secretariat headed by a Justice of the Court of Appeal In-Charge of ADR. Table 1 below shows the general performance of CCADR since its institutionalisation in Ghana from 2007 – 2020.

[60] Ibid (n 43)
[61] Ibid (n 19) at pp 276 - 277
[62] Ibid (n 43)
[63] Ibid (n 19) at pp 232 -233
[64] Mediation
[65] Ibid (n 19) at p 249
[66] Ibid (n 19) at p 252. Also see Yin and Seiwoh (2021) on costs and delays in accessing justice.
[67] Ibid (n 19) at p 255
[68] Ibid (n 19) at p 256
[69] Ibid (n 19) at p 257

Table 1: Breakdown of Annual Performance (2007-2020)

Year	Month	Cases Mediated	Cases Settled	Percentage %
2007	January – December	853	466	53
2008	January – December	1,723	807	47
2009	January – December	5,358	3,871	72
2010	January – December	3,754	1,633	43
2011	January – December	4,392	2,025	46
2012	January – December	5,924	2,722	46
2013	January – December	6,668	2,806	42
2014	January – December	4,416	1,999	45
2015	January – December	1,464	635	43
2016	January – December	1,372	605	44
2017	January – December	3,486	1,571	49
2018	January – December	4,112	2,075	50
2019	January-December	6,384	3,041	49
2020	January-December	5455	2312	42
Total		**55,361**	**26,568**	**48%**

Source: National ADR Secretariat, Judicial Service, Ghana, 2021

It is evident from Table 1 that on the average 48% of cases brought before mediation every year, got a successful settlement. This speedy output is based on a year-on-year basis. This data does not include cases handled by private entities and persons engaged in the practice of Mediation. This output needs commendation as same cannot be said of litigation[70] which travels several years before a resolution is achieved due to technicalities and the complex nature of litigation.

Court-Connected Alternative Dispute Resolution (CCADR) - Practice Manual, 2010

In taking appropriate steps in the development of the practice of Mediation (ADR) in the Court System, apart from enacting the New ADR, 2010[71] the Judicial Service of Ghana, per its policy direction, with the support of the United Nations Development Programme (UNDP) developed the CCADR Practice Manual. This was a novelty as it sought to streamline and provide a well-structured procedure and processes required for the practice of ADR before the Court, such as with the use of the High Court (Civil Procedure) Rules, 2004 (C.I 47) in the litigation of Civil Matters. It must be noted that the ADR Act, 2010 has no Regulation to it, however, this practical manual has provided even more detailed direction and guidance than some traditional Regulations.

According to the Manual,[72] the Court-Connected ADR refers to the various methods of resolving disputes that are available to the court other than court trial[73] processes. These methods include Negotiation, Mediation,

[70] For example, Adu v. Kyeremeh 1987-88 GLR 137.This case was in court for about 26 years.
[71] Loosely called the New ADR Act, even though it is a decade old and counting (enacted in 2010)
[72] Court-Connected Alternative Dispute Resolution Practice Manual, 2010
[73] Litigation

Conciliation, Arbitration, Customary Arbitration, Mediation-Arbitration (Med-Arb), and Neutral Case Evaluation. *Mediation[74] however is the main method used for the CCADR.*[75]

The characteristics of the CCADR include confidentiality, privacy, relatively fast, relatively cheap, restoration and preservation of relationships between parties, and also the fact that agreements or awards are final and binding.[76] However, the manual acknowledges the challenges to the practice of CCADR to include the lack of detailed and procedural protections and the lack of review mechanism or appeal by dissatisfied parties including limiting the scope for the development of legal precedence. Other challenges of CCADR are the misuse of confidential information disclosed during the mediation process as well as others using such information as a strategy for buying time and testing the strength of their case, should they venture into the realm of litigation.

CASES AMENABLE TO ALTERNATIVE DISPUTE RESOLUTION

When it comes to cases that are amenable to ADR, the Alternative Dispute Resolution Act, 2010 has not generally provided for matters which can be handled through the various options of the ADR mechanism as envisaged by the preamble to the Act. The preamble to states that:

> AN ACT to provide for the settlement of disputes by ARBITRATION, MEDIATION, AND CUSTOMARY ARBITRATION, to establish an Alternative Dispute Resolution Centre and to provide for related matters.

However, notwithstanding the above, part one of the Act is dedicated to Arbitration, section 1 under arbitration agreement provides for the scope of cases that are not amenable to the Act without attempting to mention some of the cases which are amenable, it states under section 1 that:

> This Act applies to matters other than those that relate to *a)* the national or public interest; *(b)* the environment; *(c)* the enforcement and interpretation of the Constitution; or *(d)* any other matter that by law cannot be settled by an alternative dispute resolution method.

Based on the above, it is argued that the Act has not provided explicitly for cases that are not amenable to Mediation under Part Two and Customary Arbitration under Part Three but only for Arbitration under Part One. However, it is construed "loosely"[77] that section 1of Part One applies to Part Two and Three, but without any strict legal basis, since the Act has not expressly mentioned that. This understanding is supported by the Latin maxim *"expression unius est exclusion alterius[78]"* this is a legal principle under statutory construction or interpretation, which means that *"when one or more things of a class are expressly mentioned others of the same class are excluded*." However, the CCADR Practice Manual has provided a broad list of cases that cannot undergo ADR in general, and not only Arbitration as in the case of the ADR Act, 2010 as follows:

> (a) Child custody cases in which sexual, physical, mental, psychological or allegation of verbal abuse; (b) disputes raising some constitutional, human rights or important public law and order issues; (c) disputes involving interpretation of statutes or documents; (d) civil disputes in which substantial fraud, forgery or stealing is alleged; (e) where the court has reasonable cause to believe that the parties intend to use the ADR process to delay the court process; (f) dispute out of which a precedent should be set; (g) a case that is a felony or aggravated assault and; (h) disputes pertaining to jurisdiction.[79]

[74] Emphasis of the Manual when it comes to CCADR is Mediation
[75] Ibid (n 58) at p 1
[76] Ibid (n 58) at pp 1 - 2
[77] Emphasis mine
[78] https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius

[79] Ibid (n 58) at p 3

It can therefore be concluded that cases that can be submitted to ADR in general, are "at large" in Ghana based on the combined strength of section 1 of this Act (ADR Act,2010); and Sections 72[80] and 73[81] of Courts' Act, 1993 (Act 459) as well as the CCADR Practice manual[82] serving as the legal parameters, limitations, and framework. But what needs to be noted is that all civil cases can be submitted for ADR. Non-aggravated criminal offences may also be submitted to victim-offender mediation if the judge deems it appropriate.

The Role of the Court in Mediation

When it comes to the practice of CCADR, the Court plays a significant role since they are clothed with the capacity to determine which case is amenable to mediation at any time before final judgment is delivered and to also refer such a matter for mediation. All courts[83] have the capacity and jurisdiction to carry out this mandate.

JURISDICTION TO THE PRACTICE OF MEDIATION

Jurisdiction is significant when it comes to the practice of law, and when not properly invoked, may not be given a hearing or even if given a hearing per incuriam, the outcome[84] of such proceedings may risk being set aside for want of jurisdiction. The practice of mediation is not any different, most especially with CCADR. It must be invoked in accordance with the law. However, its scope is wider beyond the parameters of the formal court system into private practitioners and entities.

ADR Service Providers

The practice of ADR (mediation) is conducted by state-established entities, private corporate entities as well as individuals. The following include some of the statutorily established bodies which have the capacity to conduct mediation. All Courts in Ghana, namely District/Magistrate Court, Circuit Court, Court of Appeal, Supreme Court as well as specialized courts such as Commercial Courts. Other quasi-judicial State entities that conduct mediation are the Labour Commission, Commission of Human Rights and Administrative Justice (CHRAJ), Lands Commission, Domestic Violence and Victims Support Unit (DOVVSU) of the Ghana Police Service, Department of Social Welfare, Legal Aid Scheme and the National Peace Council.

On the other hand, Private practitioners of ADR (Mediation) include both corporate entities as well as any person(s) selected by both parties to the meditation by consensus. Some private ADR service providers in Ghana include the Centre for Citizens Empowerment (CCE), Ghana Association of Chartered Mediators and Arbitrators (GHACMA), Gamey & Gamey, Ghana Arbitration Centre (GAC), West Africa Dispute Resolution Centre (WADREC), Federation of International Women Lawyers (FIDA-Ghana), The Ghana ADR Hub, Global Mediation and Arbitration Centre (GLOMAC), Apuko Counseling Services (ACS), etc.

[80] Section (72) Courts to Promote Reconciliation in Civil Cases: (1) Any court with civil jurisdiction and its officers shall promote reconciliation, encourage and facilitate the settlement of disputes in an amicable manner between and among persons over whom the court has jurisdiction.

[81] Section (73) Reconciliation in Criminal Cases: Any court, with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree, on payment cases of compensation or on other terms approved by the court before which the case is tried, and may during the pendency of the negotiations for a settlement stay the proceeding for a reasonable time and in the event of a settlement being effected shall dismiss the case and discharge the accused person.

[82] Ibid (n 62)

[83] See: Ss 72 & 73 of the Court Act, 1993; Order 58 Rule 4 of High Court Civil Procedure Rules 2004 (C.I 47); S. 64 of the ADR Act, 2010; p. 24 of CCADR Practice Manual, 2010

[84] Agreement or Award

CONCLUSION

In sum, the paper draws the following conclusion as significant factors to note when it comes to the practice of Mediation in Ghana.
Ghana is a common law country that operates supremacy of the constitution and rule of law that provides equality before the law. It has not provided through it or enactment under it for special right or capacity to any person(s) over any other or on the basis of citizenship, natural or artificial legal personality, etc. when it comes to undergoing mediation. Parties to mediation proceedings are co-equals and the process is founded on consensus.

Before the introduction of the formal legal regime and court system into Ghana (Gold Coast then), several customary practices, principles, laws, and usages were used as strategies and techniques by respected traditional or tribal leaders, Chiefs, Queen mothers, heads of families, and elders in the resolution of misunderstanding, disagreements, and disputes. However, the name or concept "Alternative Dispute Resolution (ADR)" was not popular, but it has turned out that all those customary strategies, practices, and usages fall under the various mechanisms of ADR. It is safe to state emphatically that ADR (mediation) has been in practice over decades informally before colonisation in Ghana and other African countries. Ghana has a parent act, the Alternative Dispute Resolution Act, 2010 (Act 798), and other supporting legislations that serve as the legal basis for the practice of ADR in Ghana.

Victim-Offender Mediation which is a mode of restorative justice has statutory backing. It focuses on building reconciliation and restoring broken relationships especially when it comes to matters of domestic relations and other relationships which are non-aggravated disputes but are still under a developing pace.

Natural and artificial person(s) (corporate body or firm) can conduct mediation that would result in an amicable resolution between the parties in the form of an agreement or award that is binding, final, and enforceable in any competent court of jurisdiction in Ghana and international as a consent judgment.
Finally, Ghana has established a CCADR programme. All courts in Ghana have the jurisdiction and capacity to entertain such cases. The CCADR encourages any court with criminal (non-aggravated cases) and civil jurisdiction to promote reconciliation and facilitate the settlement of disputes in an amicable manner between parties.

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Constitution of Ghana, 1992
Commission on Human Rights and Administrative Justice Act, 1993 (Act 456)
Criminal and Other Offences (Procedure) Act, 1960 (Act 30)
Court Act, 1993 (Act 459)
Domestic Violent Act, 2007 (Act 732)
High Court Civil Procedure Rules 2004 (C.I 47)
Ghana Investment Promotion Centre Act, 1994 (Act 478)
Labour Act, 2003 (Act 651)
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Westchester Resources Ltd v. Ashanti Goldfields Co. Ltd

INTERNATIONAL CONVENTIONS AND TREATIES

United Nations Convention on International Settlement Agreements Resulting from Mediation (The Singapore Convention on Mediation)
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958).

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