THE GHANA LEGAL SYSTEM

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Published by

BLACK MASK LIMITED

P. O. Box CT 770 Cantonments-Accra, Ghana

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Printed by Black Mask Limited. Cover Design by Michael Frimpong

DEDICATION

This book is dedicated to Philemon Amoh Quansah and Cecilia Opokua Quansah, my beloved parents; Edward Kwabena Quansah, my beloved twin brother and Margaret Adwoa Quansah my beloved elder sister, all of blessed memory.

PREFACE

The motivation for writing this book is to provide, within tolerable limits, an account of the legal institutions and processes as well as the organisation of the

administration of justice in Ghana. Its principal aim is to provide law students with an overview of the legal system in which they eventually intend to practise. The Ghana legal system has been fashioned by a combination of factors such as a colonial legacy, politics, economics and military adventurism. The system, therefore, relies on the past whilst trying to adapt to the realities of the present day socio-economic circumstance and preparing itself for future growth and development. An overall knowledge of the system, is therefore, a fundamental pre-requisite to the application of the various laws which a law student will study in the course of training to become a lawyer.

The book starts with a brief introduction to the major legal systems of the world followed by a historical background to the Ghana legal system and goes on to discuss some fundamental institutions which underpin the system, and such matters as the nature of law in general, the composition of the courts, the judicial personnel who administer justice, legal and extra-legal processes for the resolution of disputes and some skills which are vital to an intending lawyer's future practice. Obviously, trying to incorporate details of all aspects of the Ghana legal system within the confines of a book of this nature is not an easy task. I have therefore been compelled to be selective and to treat some topics in an expository manner. However, it is my hope that the book will not only be useful to law students, teachers and lawyers, but also to the curious lay reader; and that having read it their understanding and appreciation of the Ghana legal system will be enhanced. The manuscript for the book was completed in November 2008 when I was lecturing at the University of Botswana; hence, selective references are made to judicial decisions of Ghanaian judges who have sat on the bench in that country as well as judicial decisions of South Africa and Zimbabwe where these will illuminate a point under discussion.

I owe a debt of gratitude to his Lordship Justice S K Date-Bah of the Supreme Court of Ghana for his encouragement; Mr E. K. Tetteh, formerly of the Attorney-General's Chambers in Gaborone, Botswana; Mr K Acquah-Dadzie, Senior Magistrate, Gaborone, Botswana; Messrs E K Abotsi, lecturer, Kwame Nkrumah University of Science and Technology, Kumasi; KI Tufour and D Dwomoh of the GIMPA Law School for reading some of the chapters and making useful suggestions; Mr J K E Edzie of the Council for Law Reporting for his editorial work on the manuscript, Messrs Emmanuel Adu-Sarkodee of CDH Financial

Services, Akrasi Sarpong of the Narcotic Board for their encouragement, Mr Kwaku Ansa-Asare, former Director of the Ghana School of Law and his wife, Helena, for their support in preparing the manuscript for this book. It goes without saying that the responsibility for any shortcomings and inadequacies of the book are entirely mine.

Finally and most importantly, I will like to express my sincere appreciation, thanks and love to my wife, Ophelia, my daughters, Belinda and Sharon, my son Emmanuel, my brother David and my sister Daisy whose individual and collective love have sustained and driven me to achieve my set goals over the years. Our collective N gratitude as a family goes to God for our lives and the numerous blessings He has bestowed and continues to bestow on us.

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23 May 2011

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ABBREVIATIONS AND ACRONYMS

1. AC: Appeal Cases (England)
2. AD: Appellate Division Reports (South Africa)
3. AFRC: Armed Forces Revolutionary Council
4. AFRCD: Armed Forces Revolutionary Council Decree
5. All ER: All England Law Reports
6. All ER Rep: All England Law Reports Reprint
7. BLR: Botswana Law Reports
8. C&P: Carrington and Payne's Reports (1828-1841) (England)
9. CC: Current Cases
10. Ch: Law Reports Chancery (England)
11. CHRAJ: Commission on Human Rights and AdministrativeJustice
12. CLR: Commonwealth Law Reports (Australia)
13. COOPA: Criminal and Other Offences (Procedure) Act
14. Co Rep: Coke's Reports (England)
15. CrAppR: Criminal Appeal Reports (England)
16. EOCO: Economic and Organised Crime Office
17. ExD: Law Reports Exchequer Division (England)
18. GLR: Ghana Law Reports
19. GLRD: Ghana Law Reports Digest
20. KB: Law Reports Kings Bench (England)

21. LRCCR: Law Reports Crown Cases Reserved (England)
22. LT: Law Times Reports (England)
23. NLC: National Liberation Council
24. NLCD: National Liberation Council Decree
25. NLR: Nigerian Law Reports
26. NRC: National Redemption Council Decree
27. NZLR: New Zealand Law Reports
28. PC: Law Reports Privy Council
29. PNDC: Provisional National Defence Council
30. PNDCL: Provisional National Defence Council Law
31. QB: Law Reports Queen's Bench (England)
32. RLR: Rhodesia Law Reports
33. SA: South African Law Reports
34. SAR FCL: Sarbah Fanti Customary Law Reports
35. SCGLR: Supreme Court of Ghana Law Reports
36. SMC: Supreme Military Council
37. SMCD: Supreme Military Council Decree
38. TLR: Times Law Reports (1885-1952) (England)
39. UKHL: United Kingdom House of Lords Reports
40. UKPC: United Kingdom Privy Council
41. US: United States Law Reports
42. WACA: West African Court of Appeal Reports
43. WLR: Weekly Law Reports

SOME WELL-KNOWN LATIN EXPRESSIONS AND MAXIMS

1. A fortiori: for the stronger reason
2. A priori: from what goes before
3. A temporae morae : from the time of default
4. Ab initio: from the beginning
5. Ab intestate: intestacy
6. Actio ex empto: an action available to a purchaser of goods
7. Actio personalis moritur cum persona: a personal action dies with the person
8. Actio quanti minoris : an action for the reduced value of purchased goods
9. Actus nonfacit reum, nisi mens sit rea: the act itself does not constitute guilt unless done with a guilty intent.
10. Ad idem: at one or in agreement
11. Alibi: elsewhere. (A special defence in criminal law that seeks to establish the person charged was not at the place alleged, but elsewhere.)
12. Amicus curiae: a friend of the court. A person who advises the court in regard to required information
13. Animus furandi: the intention of stealing
14. Animus injuriandi : the intention to injure
15. Audi alteram partem: hear the other side
16. Autrefois acquit: formerly acquitted
17. Autrefois convict: formerly convicted
18. Bona fide: in good faith
19. Capax doli: capable of wrongdoing

20. Casus fortuitous: unavoidable accident

21. Casus omissus: an omitted contingency

22. Causa causans: the immediate cause

23. Caveat emptor; qui ignorare non debuit quodjus alienum emit: let a purchaser beware; no one ought in ignorance to buy that which is the right of another

24. Caveat venditor: let the seller beware.

25. Cessante ratione legis, cessat ipsa lex: the reason of the law ceasing, the law itself ceases

26. Consensus ad idem: two minds having the same intention

27. Corpus delicti: the body, substance or foundation ofan alleged crime

28. Crimen falsi: the crime of falsity

29. Culpa: fault, negligence

30. Culpa lata dolo aequiparatu: gross negligence is equivalentto intention

31. Curator ad litem: curator for the purpose of litigation

32. Curia advisari vult (c.a.v): the court desires to considerits judgment

33. De facto: according to the fact

34. De jure: according to the law

35. Delegate potestas non potest delegari: a delegated powercannot be delegated

36. De minimis non curat lex: of trifles the law does notconcern itself

37. De novo: afresh

38. Dies interpellat pro homine: the arrival of the day replaces the necessity of demand

39. Deis non: a day on which no legal business can be transacted

40. Dolus: fraud, intent

41. Domicilium citandi : domicile for the purposes of serving court process.

42. Dominium: ownership

43. Eo nominee: by that name

44. Ex cathedra: from the seat of authority

45. Ex curia: out of court

46. Exempli gratia: by way of example. Usually written as e.g.

47. Ex mero motu: from one's own initiative

48. Ex nudo pacto non oritur action: from a nude contract, ie a contract without consideration an action does not arise

49. Ex officio: by virtue of office

50. Ex parte: from one side

51. Ex post facto: after the event

52. Expression unius personae vel rei, est exclusion alterius: the express mention of one person or thing is the exclusion of another

53. Ex tempore: on the spur of the moment, not premeditated

54. Ex turpi causa non oritur actio: an action does not arise from a base cause

55. Falsus in uno,falsus in omnibus: false in one, false in all

56. Flagrate delicto: in the act of committing a crime

57. Forma pauperis: as a pauper. A person may be permitted the services of a lawyer in court without paying fees if he has no means

58. Furtum usus : theft of the use of a thing

59. Generalia specialibus non derogant: general things do not derogate from special

60. Habeas corpus: to have the body. A writ requiring a person to be brought to court in order that the lawfulness of his restraining may be investigated

61. Id est: that is. Usually written as "i.e."

62. Ignorantia legis neminem excusat: ignorance of the law does not afford excuse

63. Imperitia culpae adnumeratur : inexperience is accounted a fault

64. In camera: in chambers or in private

65. In infinitum: for ever (also ad infinitum)

66. In jure non remota causa, sed proxima spectator: in law the proximate, and not the remote cause is to be regarded

67. In limine: at the outset; special points taken at the outset of a suit

68. In loco parentis: in the place of a parent

69. In pari delicto, potior est conditio possidentis (or defendentis): in equal fault, the condition of the possessor (or defendant) is the best

70. In poenalibus causis benignius interpretandum est: in penal causes the interpretation ought to be the more favourable

71. In re: in the matter of

72. Inter alia: among other things

73. Interest reipublicae ut sit finis litium: it concerns the State that lawsuits be not protracted

74. In toto; altogether

75. Induciae; days of grace allowed

76. Intra vires: within the power

77. Ipsissima verba: the identical words

78. Ipso facto: by the mere fact

79. Ipso jure: by the law itself

80. Leges posteriors priores contrarias abrogant: later laws abrogate prior contrary laws

81. Lex non cogit ad impossibilia: the law does not compel the impossible

82. Libertas est res inestimabilis: liberty is an inestimable thing

83. Locus classicus: a classical passage from an acknowledged authority

84. Locus standi : place of standing. Refers to a right to sue in or defend an action

85. Mala fide: in bad faith

86. Mens rea: criminal intention. See actus nonfacit, etc

87. Mero motu: see ex mero motu

88. Merx: merchandise, or article capable of being purchased

89. Mobilia non habent sequelam: movable cannot be followed up

90. Modus operandi: the way in which a thing operates

91. Mutatis mutandis: with the necessary changes

92. Necessitas non habet legem: necessity has no law

93. Nee vi, nee clam, nec precario: neither by force, nor by stealth, nor by request

94. Nemo contra factum suum venire potest : no one can come against his own deed

95. Nemo dat qui non habet: no one gives something he does not possess

96. Nemo debet ex aliena jacura lucrari: no person ought to gain by another person's loss

97. Nemo debet esse judex in propria causa: no one should be a judge in his own cause

98. Nemo tenetur se ipsum accusare: no one is bound to criminate himself

99. Nisi: unless

100. Nolle prosequi: unwilling to prosecute

101. Non omne quod licitum honestum est: not everything which is legal in honest

102. Nulla bona: no goods

103. Nulla poena sine culpa: no punishment without fault

104. Obiter dictum: said incidentally

105. Omne quod solo inaedificatur solo cedit: everything which is built upon the soil passes with the soil

106. Omnia praesumuntur rite et solemniter esse acta: all things are presumed to be correctly and solemnly done

107. Onus probandi: the burden of proof

108. Particepts criminis: an accessory to a crime

109. Pater est quern nuptiae demostrant: he is the father whom the nuptial indicate

110. Periculum rei venditae, nondum traditae, est emptoris: the risk of a thing sold, and not yet delivered, is the purchaser's

111. Prima facie: at first sight, on the face of it

112. Pro deo: for God. In reference to a lawyer appointed by the court to represent a pauper without fee.

113. Pro forma: as a matter of form

114. Pro rata: for a proportion

115. Protectio trahit subjectonem, et subjection protectonem: protection begets subjection, subjection protection.

116. Quid pro quo: something for something

117. Quifacit per alium facit per se: he who does anything by another does it by himself

118. Qui non habet in aere, luet in corpora: what a man cannot pay with his purse, he must suffer in person

119. Quod erat demonstrandum: which has been proved (Q.E.D)

120. Ratio decidendi: the reason for deciding a case

121. Res: a thing

122. Res inter alios acta alteri nocere non debet: one person ought not to be injured by the acts of others to which he is a stranger

123. Res ipsa loquitur: the thing speaks for itself

124. Res judicata: the thing has been decided. (In reference to a judicial decision)

125. Restitution in integrum: restitution or restoration in full

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4. rule 9(3)
5. rule 9(4)

Manufacture and Sale of Spirits Regulations, 1962 (LI 239) reg3(l)

Statutory Instrument Rules, 1960 (LI39)

Supreme Court Rules, 1996 (CI 16) rule54

UNITED KINGDOM LEGISLATION IN ALPHABETICAL ORDER

Administration of Estates Act, 1925

i. s46

Celluloid and Cinematography Film Act, 1922

Common Law and Civil Procedure Act 1852 and 1854

Constitutional Reform Act, 2005

Criminal Evidence Act, 1898

i. s4(l)

Fauna Conservation Proclamation, 1961

h. s7(l)

Human Rights Act, 1998

i. s3(l)
j. s6(l)

Judicature Act 1873-1875

Offences Against the Person Act, 1861

i. s57

Police and Criminal Evidence Act, 1984

i. s80

Provision of Oxford, 1258 AD

Recognition of Divorces and Legal Separation Act, 1971

i. s2

Road Traffic Act, 1930

i. s48(9)
ii. s49

Statute of Frauds

Statute of Westminster, 1275

Statute of Westminster, 1931

Street Offences Act, 1959

i. s1

Supreme Court Act, 1981

CHAPTER 1

1.1 INTRODUCTION TO THE MAJOR LEGAL SYSTEMS IN THE WORLD

1.1 General introduction

The law applied in Ghana today is mainly a modified version of imported law that is being continuously adapted to the changing socio-economic and political realities of the country. The history of a legal system, says Roscoe Pound, the American jurist, is largely a history of continuous borrowings of legal materials from other legal systems and assimilation of materials from outside of the law. Legal ideas and institutions are continuously crossing borders and the contemporary phenomenon of globalisation and regionalisation has brought in its wake the need to internationalise legal standards. Although the detailed comparative study of the different legal systems and legal traditions are for comparative lawyers, there are some basics that any person seeking to acquire knowledge of how a legal system operates should know. One cannot ignore the deep divide in terms of legal systems that exists in Africa today and the possible impact this may have on bilateral and regional development. For example, although Ghana and Cote d'Ivoire are neighbours, unless a conscious effort is made, bilateral cooperation between the two countries may sometimes be adversely affected by the fact that the legal systems of the two countries are different, making it easier for an Ivorian lawyer to understand and operate in France thousands of kilometres away than in Ghana just across the border.

What then distinguishes one legal system from another? Is it the mere fact of geographical location, race, and level of development or what? The criteria for classifying legal systems or legal traditions or legal families remain very much a matter of controversy among comparatists. Several attempts have been made by

jurists but these have all come up with different criteria. Three of such attempts will be briefly looked that.

The view has been expressed that modem legal systems should be grouped in accordance with their substance paying due heed to originality, derivation and common elements and without any reference to extrinsic factors such as geography or race. This led to a classification of legal systems into seven families, namely the French, German, Scandinavian, English, Russian, Islamic and Hindu.

Another view suggests two criteria that must be used cumulatively, not separately. The first from a technical standpoint is to ask whether someone educated in the study and practice of one law will then be capable, without difficulty, of handling another. If not, then it may be concluded that the two laws do not belong to the same family. The second criterion is the philosophical, political or economic principles that the laws are founded upon. Two laws cannot be considered to belong to the same family, even if they use the .same concepts and techniques, or if they are based on opposed philosophical, political or economic principles. This led to the classification of legal systems into three, namely the Romano-Germanic, the common law and the socialist legal systems. This view put other systems outside this classification as those systems share only part of the characteristic of the classified families. These are Islamic, Hindu, Jewish, Chinese, African and Malagasy laws.

The third view expressed is that a single criterion for the classification of legal systems is their legal or juristic style.6 This requires looking at the "important" or "essential" differentiating qualities, not just trivial differences that distinguish one legal system from another. The authors of this view identified five factors as being crucial in determining the style of a legal system. These are, first, its historical background and development. From this factor, the unique historical development of the English common law as compared to the continental civil law system was distinguished. Secondly, the distinctive mode of legal thinking as a hallmark of a legal system. Based on this factor, they identified many stylistic elements that distinguish the English common system from the continental civil law system. The English common law is historically case-law based, whilst the continental civil law system is based on the codification of abstract rules. The common law comes from the courts whilst the civil law comes from study. The great jurists of England were

judges whilst on the continent they were professors. These and other differences of style permeate the two systems. Thirdly, certain legal institutions are so distinct that they lend a characteristic to a legal system. Examples of these are the doctrine of trust in English law and the negotiorum gestio in continental law. Fourthly, the choice of sources of law that each system recognises and the methods of interpreting and handling them in connection with the court machinery and rules of procedure. Finally, the style of a legal system may be marked by ideology. Ideology in this sense refers to a religious or political conception of how social or economic life should be organised. For example, whilst political ideology is the main distinguishing factor of the socialist legal systems, religion is the distinguishing factor of such systems as Islam and Hindu. The weight that should be given to any of these five factors should vary according to the circumstances of each case. Based on the above factors, the legal systems were classified as follows; Romanistic family, Germanic family, Nordic family and common law family. The authors then included the law of the People Republic of China, Japanese law, Islamic law and Hindu law.

Whilst the various views have contributed to highlighting some key issues that help in classifying legal systems, they must be viewed only as a rough and ready device that must be subject to a number of qualifications. First, legal systems dp not necessarily correspond with geographical boundaries. It is therefore possible for two distinct and separate legal systems to operate in the same country. For example, in Cameroon the French civil law and English common law operate together. Secondly, there are hybrid systems that do not fit easily into one class or another. In Botswana, South Africa and Zimbabwe, for example, the European civil law (Roman-Dutch law) operates concurrently. Thirdly, the operation of a legal system is not static since this varies according to time as well as historical, social and political developments. For example, the radical changes that have taken place since the fall of the Berlin wall on 9 November 1989 and the formal ending of the former Soviet Union on 25 December 1991. Even if some socialist laws still persist in Russia and some of the other former Soviet Republics, it is difficult today to say that they still belong to the socialist legal family given the very radical market-driven changes that have taken place. Fourthly the Euro-centric nature of these classifications that marginalise the place of African law cannot be ignored. In

the light of these observations, the following are the major legal systems, legal families or legal traditions that will be briefly examined below:

(i) The common law legal system.

(ii). The civil law or Romano-Germanic legal system.

(iii) The socialist legal system.

(iv) Religious legal systems.

(v) African law.

(vi) Hybrids or mixed systems.

In examining these legal systems, it needs to be noted that some legal systems have come to be regarded as the mother systems of certain legal families. Such systems give their characteristics to the specific legal system against which juxtaposition can subsequently be made. For example, it is indisputable that English law is the mother of the common law system, that the French and German legal systems are two key branches of the civilian system and that the Soviet legal system served as the first model for all socialist legal systems. These mother systems, namely the English legal system, the French legal system and elements of the former Russian legal system, will therefore be used to illustrate the major legal systems of the world.

1.2 The common law legal system

The common law legal system originated in England and spread throughout the world mainly through colonisation. In some countries it was only partially received, as in Muslim countries such as India and Pakistan, where it was adopted to co-exist with Islamic and other local laws. In other countries, such as the United States and Canada, it has been so adapted that it enjoys an almost autonomous place within the common law legal family. It was brought to some African countries such as Botswana, Ghana, Nigeria, Kenya and Zimbabwe during the colonial period.

The common law system, more than any of the other legal systems, has been profoundly shaped by its history and therefore can only be fully understood in the light of this history. This history is almost exclusively bound with the history of the development of the law in England. As Zweigert and Kotz point out, "no country has clung as firmly as England to its own style of law throughout the centuries or been so free from major convulsions in its legal life." There are several manifestations of this. Whilst the civil law system is almost entirely based on ancient Roman law, the latter has never had anything more than a peripheral influence on the common law. English law never adopted the idea of codification that was born of the law of nature and the period of enlightenment. England too never experienced any traumatic political events such as occurred in France in 1789, one of the effects of which was to overturn the legal system and replace it with a radically new system.

Our study of the common law legal system will essentially focus on English law, as the originator and archetype of this system. The following salient aspects of the system will be discussed.

1.2.1 History and development of English law

There are three main phases in the development of English law. The first phase was the development of the common law and the common law courts. This was followed by the next phase, which saw the development of equity and ended with the fusion of common law and equity which basically set the foundation for the modern English legal system.

1.2.1.1 The development of English law and the common law courts

The Norman conquest of England in 1066 is generally considered to mark the beginning of the history of English law. The preceding period, under Roman occupation, was known as the Anglo-Saxon period. During this period, England was not united, hence there was no central administration and no uniform legal system. The diverse local customary laws of German origin, supplemented by royal statutes, applied. The local courts were presided over by bishops and Earls.

One of the greatest achievements of William the Conqueror (1028-1087) after he dealt a crushing defeat to the Anglo-Saxons in the Battle of Hastings was to introduce a strong centralised system of administration over the whole country. Tribal rule was ended and a feudal system with the King as the supreme feudal overlord was instituted. Church and state were separated and the bishops were removed from the local courts and a separate system of ecclesiastical courts was created. The highly organised character of the English feudal system and the efficient central government prepared the way for the development of the common law. The Normans created a uniform and common law based on the unification of the diverse local customary laws. The Curia Regis or King's Court, which combined executive, legislative and judicial powers, was also created. The King was regarded as the "fountain of justice" and the "keeper of the peace" with powers over order and peace in the kingdom. The Curia Regis functioned as the highest court in England and its judges interpreted the common law. It travelled on circuit and also supervised the local courts which continued to function. The Curia Regis eventually split into three royal courts, namely the Exchequer, the Common Pleas, and the King's Bench.

The royal courts were centralised in Westminster but judges from these went on circuit to hear local disputes twice a year. This practice led to the reduction of the jurisdiction of the local courts. During the fifteenth and sixteenth centuries, the practice developed of difficult cases being adjudicated in Westminster. When the same or similar issues arose again, the earlier solutions were applied. This led to the development of the system of binding precedents. In this way, the system of stare decisis (standing by previous decisions) developed. As the judges progressively developed a system of rules applicable to similar cases, a common law or a universal legal system enforceable throughout the country emerged.

Civil actions in the common law courts were built around the writ system. To begin an action, a plaintiff had to obtain a writ. The writ was a written command issued by the Lord Chancellor in the King’s name ordering the defendant to appear in court and show cause why the plaintiff should not be given the relief he claims. If there was no appropriate writ to cover the type of claim the plaintiff was making, there would be no remedy. The rule was: "no writ, no remedy." The whole law was contained in the register of writs and meant that legal development was only possible by the granting of new writs or the extension of existing writs to new

cases. The extension of the law was severely limited by the Provisions of Oxford 1258 AD, which prohibited the issue of new writs by limiting it to those available before the year 1258. The Statute of Westminster 1275 tried to mitigate the effects of the Provisions of Oxford by providing that in similar, cases (in consimili casu), the Chancery could issue new writs. As a result, existing writs were applied to cases which they were not originally meant for. English judges developed the practice of creating law from case to case, by a casuistic process that continues to this day.

1.2.1.2 The development of equity

The growth of the common law was quite rapid in the thirteenth century but by the fourteenth century it ceased to have the momentum of previous years. There were five main defects which stifled its development.

First, the writ system became too rigid. Originally, writs were suited to each plaintiff's claim but by the beginning of the thirteenth century, the process had become fossilised. Writs could only be issued in a limited number of cases, and if the complaint could not be fitted within the four corners of one of the existing writs, no action could be brought. Secondly, difficulties arose over the procedure in the common law courts because even the most trivial error in a writ could lead to the action being lost. The formalistic nature of the writs also meant that if the wrong writ was chosen, the case will also be lost. It was quite common to make mistakes because the writs had to comply with complex rules. Moreover, writs were quite expensive and their very cost discouraged potential litigants, especially where the cost of the writ was more than the amount being claimed. Thirdly^, there were problems caused by the defences available and corruption. An action could be delayed for months or even years by the defendant simply declaring that he was cut off by floods, a broken bridge, or that he was off on a crusade or even that he was sick. There were also complaints of bribery, corruption or oppression of juries, and the inability to enforce judgments or recover property from powerful neighbours. Fourthly, the common law remedies were inadequate. The only remedy the common law could offer in civil actions was damages. A party could not be compelled to perform his obligation or ordered to discontinue a wrongful course of

conduct. Fifthly, the common law did not recognise the concept of trust and there was no way to compel a trustee to carry out his obligations under a trust. The rights of the mortgagor at common law were also limited.

Because of the numerous defects of the common law, people who were unable to obtain justice either because they could not obtain a writ or the writ was defective or there was no appropriate remedy, began to address their complaints to the King-in-Council. Initially, the Council considered these petitions but the practice developed whereby these petitions were referred to and dealt with by the principal civil minister, the Lord Chancellor, who was usually a cleric (and referred to as the "keeper of the King's conscience"). The Chancellor disregarded the formalities and technicalities of the common law and decided each case on its merits in the light of his conscience and fair dealing, and in the process developed principles that became known as equity. He was not bound by the common law remedies but devised his own. The Chancellor recognised new interests in property which were unknown to the common law and granted new remedies such as the decree of specific performance to compel a person to perform his obligation. Since the decisions taken were not based on rigid rules, it was said that "equity varies with the length of the Chancellor’s foot." To counter the uncertainty that had crept into the system, equity began to follow the practice of stare decisis, which had proven a powerful force in unifying the diverse systems of local customs under the common law. In this manner, the Court of Chancery developed case law based on equity and this body of law supplemented and sometimes corrected the common law.

Although the common law and equity operated alongside each other with mutual tolerance, the great popularity of equity led to a period of conflict with the common law courts. The conflicts between the two arose out of the practice of the Court of Chancery to issue^"common injunctions" forbidding a person on pain of imprisonment from bringing an action in the common law courts or forbidding the enforcement of a common law judgment. The common law courts retaliated by, for instance, waiting for the Chancellor to imprison the common law litigant defying an injunction and then releasing the imprisoned litigant by the process of habeas corpus. The rivalry between the two came to a head in the Earl of Oxford's case in 1615, when Coke offered a direct challenge to the Court of Chancery's jurisdiction. To put an end to the rivalry, James I, on the advice of Lord Bacon, then his Attorney-General and later Lord Chancellor, gave a firm decision that where

common law and equity were in conflict, equity prevails. The King's ruling was never fully accepted and some competition between the orders of court continued until the administration of equity and common law was fused together by the Judicature Acts of 1873-1875. The principle that equity prevails where there is a conflict now appears in the Supreme Court Act 1981. After the Judicature Acts, the two systems settled down and carved out separate but complementary roles. The Judicature Acts brought about the amalgamation of the two systems of courts in a way that allows both common law and equitable remedies to be obtained by a litigant in the same action and in the same court. Thus, although the Judicature Acts fused the administration of equity and common law, it did not fuse their principles. As one writer put it, "the two streams have met and now run in the same channel but their waters do not mix."

Equity filled the gaps left by the common law and became a system of case law governed by doctrine of binding precedent. The greatest contribution of equity is that it introduced a number of new rights which were wholly unrecognised by the common law courts, such as the rights of a beneficiary under a trust and the equity of redemption. It also provided new remedies which the common law courts did not provide such as the injunction, specific performance, rescission and discovery of documents. However, the equitable remedies were discretionary and not granted as of right and are usually granted only where it is clear that the common law remedies are inadequate.

The nature of equity is well captured in the famous dictum of Lord Cowper in Dudley v Dudley, (1705) 24 ER 118, LC where he said:

"Now equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the vigour, hardness and edge of the law, and is a universal truth; it does also assist the law where it is deffective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty connivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it."

The basic nature of equity is expressed in the renowned "maxims of equity." Some of these are:

i. Equity will not suffer a wrong to be without a remedy.
ii. He who seeks equity must do equity.
iii. He who comes to equity must come with clean hands.
iv. Delay defeats equity.
v. Equity looks to the intent rather than the form.
vi. Equity aids only the vigilant.
vii. Equity imputes an intention to fulfil an obligation.
viii. Where the equities are equal, the first in time shall prevail.
ix. Equity looks on that as done which ought to be done.

Two examples of how these equitable maxims and doctrines are applied will suffice. Since "equity looks on that as done which ought to be done", it will give effect to the parties' intentions notwithstanding the absence of some formality required by the common law. In Walsh v Lonsdale an agreement to create a lease was considered as equivalent to the lease itself. In Maddison v Alderson the equitable doctrine of part performance was applied to enforce a contract even though, by reason of the Statute of Frauds, it could not be proved at common law.

1.2.2 The sources of English law

English law is derived from a variety of sources. These have been classified by writers in a variety of ways. For example, Hogan et al12 distinguished between primary sources, such as legislation and judicial precedents, and secondary sources, such as custom and textbooks. An Act of Parliament is however, not strictly speaking, a source of law but rather law itself. On the other hand, not every legal proposition contained in a decision constitutes judicial precedent; only those which form the basis of the decision (ratio decidendi), whilst all other legal propositions are simply surplusage (obiter dicta). A simpler classification is provided by Richard Ward, and basically distinguishes between the historical sources of English law (which effectively are local sources) and European sources (basically, important international sources). The sources of English law that will be briefly discussed below consist of the following:

(i) Common law.

(ii) Equity.

(iii) Legislation.

(iv) Custom.

(v) Law merchant.

(vi) Canon law.

(vii) Roman law.

(viii) Law reports and judicial precedents.

(ix) Textbooks.

(x) European Community and European Union law.

(xi) European Convention on Human Rights.

1.2.2.1 Common law

As has already been noted above, the common law is one of the most important historical sources of English law. Initially, in civil cases, procedural formalities underpinned its growth but the rigid writ system was abolished by the Common Law and Civil Procedure Acts of 1852 and 1854. The modern law that emerged now strives to concentrate on substance rather than form. In criminal law matters, the common law developed many forms of trial that still play a significant role in the modern law.

1.2.2.2 Equity

The reasons for the development of equity as well as its nature have already been discussed. Although the numerous conflicts that arose at an early stage of its development, between common law and equity were resolved in favour of the latter, it was only after the Judicature Acts of 1873 to 1875 that many of these

conflicts were finally laid to rest. However, the unification of the two systems of courts did not result in a merger of substantive principles, hence parties have still to plead and prove any equitable remedies that they allege.

1.2.2.3 Legislation

The development of the doctrine of legislative supremacy of Parliament has made legislation a major source of law, transcending in its importance both the common law and equity. It is effectively the supreme law in English law in that legislation can be used to amend or repeal existing statutes as well as replace well-established common law and equitable principles

1.2.2.4 Custom

Custom, law merchant, canon law, and Roman law are historical sources of far less importance than the preceding sources. Custom in this context refers to local custom which is an exception to the common law and which is confined to a particular locality, such as a county, parish or a class of persons. Any person who alleges a customary right must plead and prove its existence by satisfying the so-called Blackstone test. This requires proof of:

i. Antiquity — that the custom existed from time immemorial, a time fixed by statute at 1189. Continuance — that it existed uninterrupted since 1189.
ii. Peaceable enjoyment — that it must have existed by common consent, and not exercised by use of force, secretly or under a revocable licence.
iii. Obligatory force — that it was obligatory.
iv. Certainty — that the custom was certain.
v. Consistency — that it was consistent with other customs.
vi. Reasonableness — that the custom was reasonable. This was the most important test.

1.2.2.5 Law merchant

This was the law developed by a new set of courts that sprang up to deal with disputes between merchants when England became a trading centre. Most of the rules that were developed have now been assimilated by the common law.

1.2.2.6 Canon law

The canon law or law of the Catholic Church has influenced the growth of English law in many areas. It has served also as a primary source of law. For example, the nature of law and its association with fault and the strong moral content of equity were all influenced by canon law. Canon law is of particular importance as a source of English law because of its application in ecclesiastical courts.

1.2.2.7 Roman law

Although, as will shortly be shown in subsequent sections, Roman law is the basis of continental civil law systems, it is of very minor importance as a source of English law. The little influence it has had has been indirect rather than direct. Only canon law was influenced by Roman law. However, the common law has occasionally borrowed from Roman law when judges are faced with a case of first impression. This has occurred when judges have referred to Bracton's Treatise, which incorporated principles borrowed from the Roman jurist Justinian.

2.2.2.8 Law reports and judicial precedents

The doctrine of binding precedent, which is the cornerstone of the English legal system, depends on a regular and reliable system of law reporting. Law reports are an important source of law because they contain the judgments of courts as well as the reasoning upon which these decisions are based.

1.2.2.9 Textbooks

Textbooks are basically only a secondary source of law since they contain only the opinions of their writers as to what the law is. However, historically when law reporting was still at its infancy, the main source of authority was then textbooks but today, with so many law reports, textbooks are of comparatively little authority. Nevertheless, the relative importance of a text-book depends on the type.

There are two types of textbooks. The first type are the ancient textbooks, such as Glanville's treatise, De legibus et conseutudinibus Angliae (concerning the laws and customs of England), Bracton's treatise written in about 1250, Littletons' treatise, Of tenures, and perhaps the greatest of all, Cokes Institutes of the Laws of England, Blackstone's Commentaries on the Laws of England, published in 1765 and a host of others, which are commonly used as original sources of the common law. These are referred to as books of authority. The second type of textbooks are modern textbooks, which although well respected and frequently cited, are not considered as books of authority. These are not considered as a direct source of law but rather merely as guides which may indicate where a direct source, such as a statute or law report may be found. Nevertheless, some of the modern textbooks that have become standard works » in certain branches of the law are usually considered as being of highly persuasive authority. Even the opinions of writers expressed in journal articles have sometimes been adopted by the courts.

1.2.2.10 European Community and European Union law

Since the United Kingdom became a member of the European Community (EC) on 1 January 1973 or what is now known since the approval of the treaty of European Union (Maastricht Treaty of 1992) as the European Union (EU), European laws developed by the institutions of both the European Community and European Union have become part of English law.

In fact, the various treaties of the European Community and European Union are a primary source of law, creating a framework of powers, duties and sometimes individual rights. Article 189 of the Treaty of Rome empowered the council and commission to make regulations, issue directives, make recommendations and

deliver opinions, all of which can be considered as delegated legislation. The case law of the European Court of Justice is also an important source of law. In a number of decisions, the European Court of Justice has developed the doctrine of supremacy of community law over national law. This concept extends to the enforcement of community rights even if national courts are required to override national legislation. On the other hand, those provisions of European law that are incorporated automatically into English law can be said to be directly applicable or self-executing and can be relied upon in domestic courts. The direct applicability of European Community law in the United Kingdom is provided for in section 2(1) of the European Communities Act, 1972. The effect of this is to ensure that most conflicts between English law, whether statutory or case law and European law are resolved in favour of the latter. Under section 3 of this Act, the supremacy of European law extends to the application of principles of European law developed by the Court of Justice. In the final analysis, European Community and European Union law must now be regarded as a fundamental and important source of English law.

1.2.2.11 European Convention on Human Rights

The United Kingdom has been subject to the European Convention on Human Rights (1950) since it came into force in 1953. Designed as it is to prevent the abuse of human rights, it establishes both the European Commission on Human Rights and the European Court of Human Right. Through this machinery, certain fundamental human rights and freedoms are recognised and enforced.

The Convention was finally only incorporated into English law through the Human Right Act, 1998. The provisions of this Act have a serious effect on the interpretation and application of legislation as well as the development of the common law. Section 21(1) of the Act provided that any court or tribunal determining a question which has arisen under the Act in connection with a Convention right, must take into account, as far as it is of the opinion that it is relevant to any judgment, decision or advisory opinion of the European Court of Human Rights; certain opinions of the European Commission on Human Rights; and decisions of the committee ministers. Section 3(1) of the Act also requires that,

so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention. It is also unlawful, according to section 6(1) for a public authority to act in a way which is incompatible with a Convention right. What perhaps makes the 1998 Act a unique source of English law is that it enables English courts to make a declaration of incompatibility with respect to any United Kingdom legislation, whether primary or secondary, that is found to be incompatible with the Convention. Such a declaration does not however affect the validity or continuing operation or enforcement of the impugned legislation.

1.2.3 The personnel of the law in the English legal system

The personnel of law in the English legal system may be grouped into three: the judges, the law officers and the legal profession. These will be briefly examined below.

1.2.3.1 The judges

The term "judges" is used here in its broadest sense to refer to all those who are appointed to adjudicate upon disputes referred to a court. In its narrower sense, the term refers to those appointed to adjudicate disputes in the House of Lords, the Supreme Court of England (that is, the Court of Appeal, the High Court, and the crown court) and county courts. Some judicial functions are performed by officers known as "masters" and "registrars." On the other hand, magistrates or justices of the peace sit in magistrates' courts, and in some cases, in the crown court.

One of the peculiar features of the English legal system is the very small number of judges that are in the courts. Over 95 per cent of criminal cases are heard by magistrates or justices of the peace, who are essentially unpaid volunteer laymen. In England and Wales, magistrates are appointed from members of the general public while professional judges are appointed from the ranks of practising barristers and solicitors of specified number of years of standing, depending on the court to which they are appointed.

The Lord Chancellor is a minister of the Crown and usually a cabinet minister and by law, is responsible for the efficient functioning and independence of the courts. Formerly he was also the presiding officer of the House of Lords and the head of the Judiciary in England and Wales. The Constitutional Reform Act, 2005 transferred these roles to the Lord Speaker and the Lord Chief Justice. The Lord Chief Justice is next in judicial rank to the Lord Chancellor. He is the head of the Judiciary since the 2005 reforms and president of the courts in England and Wales. The next in the hierarchy is the Master of the Rolls who is head of the civil division of the Court of Appeal. Although the House of Lords (now Supreme Court since 2005) is the final appellate court, so far as the development of the law is concerned, the Lord Chief Justice and the Master of the Rolls occupy key positions. Other important judges are the President of the Family Division, who is responsible for the organisation and management of his division and is ex-officio member of the Court of Appeal. There is also the Chancellor of the High Court, a position which replaced that of the Vice-Chancellor since 2005 and is responsible for the organisation and management of the business of the Chancery division.

1.2.3.2 The law officers

The term "law officers" refers to two law officers, the Attorney-General and the Solicitor-General who act as legal advisers to the Crown. There is also the Director of Public Prosecutions and Crown Prosecutions Service that is responsible for instituting criminal proceedings. The Attorney-General is the head of the English bar. He is also the principal legal officer of the Crown and is invariably a Member of Parliament and a member of the government. He not only advises the government but also answers questions raising legal issues in the House Commons. He represents the Crown in certain civil proceedings and in trials for treason; other important offences with a political or constitutional element. He exercises the prerogative power of staying prosecutions on indictment by the entry of a nolle prosequi and by statute; his leave is required for the commencement of certain criminal proceedings. The Solicitor General is basically the Attorney-General's deputy.

The Director of Public Prosecutions (DPP) is appointed by the Attorney-General to head the Crown Prosecutions Service. Under the superintendence of the Attorney-General, the DPP runs an independent prosecution service and coordinates prosecution policies. His powers are quite extensive and he effectively controls the prosecution process although the process of investigation is still by and large under the control of the police. Like judges, the law officers are appointed from barristers and solicitors of specified number of years of standing.

1.2.3.3 The legal profession

Another important feature of the English legal system is the division of the legal profession into two separate branches; solicitors and barristers. This is a division that is not widely known outside Britain or the Commonwealth. The word "lawyer", which is widely used in the Commonwealth to refer to legal practitioners, has no particular application in Britain. The main distinction between barristers and solicitors was said to be the fact that the former are concerned with advocacy in court while the latter are concerned with legal work out of court. This is not strictly accurate because although barristers are primarily concerned with advocacy and they have an exclusive right of audience in the High Court, the Court of Appeal and the House of Lords (now styled, the Supreme Court), they are not however confined to advocacy. They do spend a considerable part of their time on "paper work" dealing with matters such as drafting pleadings, divorce petitions, and giving expert opinions on legal matters. On the other hand, solicitors are not also exclusively concerned with out-of-court work, because they have a right of audience in magistrates' courts, county courts and in some instances, crown courts.

Although the education of barristers and solicitors has many common features, the differences become marked at the level when they undergo their vocational training. The barrister takes the Bar Examinations under the aegis of the Inns of Court whilst the solicitor takes the final examination under the aegis of the Law Society.

1.3 The Civil Law or Romano-Germanic legal system

1.3.1 Origins

The civil law or Romano-Germanic system is the legal system of countries with a private law predominantly based or influenced by Roman law (the ius civile). The ius civile was developed during the Roman Republic by praetorian edicts, which were magistrates' edicts inventing new causes of action. This was enriched by the written opinions of Roman jurists that were later collected in Justinian's Pandect. The Pandect was part of Justinian's Corpus Juris Civilis, which was essentially a collection of the most recent imperial decrees of Justinian as well as four textbooks which had the force of law. After a lapse during the Dark Ages, Roman law was rediscovered in the medieval universities of Bologna, Cambridge, Cologne, Cracow, Oxford, Padua and Prague, and developed further by the glossators and the post-glossators, who were medieval law teachers.

Roman law spread throughout Europe and is categorised as ius civile (Latin), droit civil (French), dirritto civile (Italian) and burgerliches recht or zivilrecht (German). It has spread throughout the world through colonisation or voluntary reception. It is thus not only the basis of the legal systems in European countries such as Portugal, Spain, Italy, France, Germany, Switzerland and to a certain extent, the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), but also the former colonies of Belgium, France, the Netherlands, Portugal and Spain in Africa, Latin America and Asia. To these must be added Louisiana in the United States and Quebec in Canada.

1.3.2 The main characteristics of the civil law system

By comparing and contrasting the common law system with the civil law system, a number of factors emerge which indicate some of the main characteristics of the civil law system. These may be summarised as follows:

First, from a philosophical perspective, the civil law approach is based on rationalism and is essentially deductive. It starts from broad principles that are then applied to individual cases. By contrast, the common law approach is inductive and

operates on the premise that knowledge is derived from experience, which means that broad principles can only be developed on the basis of inductive observation.

As a result of this difference in approach, the civil law philosophy may be described as dogmatic, whereas the common law philosophy is empirical. A clear illustration of this is the fact that the common law was made through many centuries and is still being made by judges, although in recent years, there has been an increasing influence of the legislature. The writings of legal authors are rarely cited in common law countries. The common law, as Oliver Wendell Holmes said, is not based on logic but experience, whereas the civil law is based more on logic than experience.

Secondly, from a historical perspective, the civil law system is based on and has been substantially influenced by the Justinian Codes. By contrast, the influence of Roman law on the common law is very insignificant.

Thirdly, the civil law system is based on codes, which are essentially comprehensive and systematically stated provisions of the different branches of the law, complemented by subsequent legislation. For example, the Italian Cinque Codici consists of the civil code, the code of civil procedure, the code of criminal law, the code of criminal procedure and many other codes. Germany has a comprehensive code for several branches of the law, including civil law, criminal law, civil procedure, etc. These codes are deemed to lay down a number of precepts in the different topics that they cover, which are assumed to be universally valid, irrespective of the time or place in which they apply. The common law, by contrast, is essentially judge-made law, which seeks to provide solutions to individual disputes rather than lay down universal rules of conduct and is expressed in court actions and legal remedies rather than substantive rules.

Fourthly, the doctrine of binding precedent or stare decisis which requires lower courts to follow the rule of law laid down in the decisions of superior courts in the common law system, and is in fact, the very foundation of the system, does not strictly apply in civil law systems. Even though court decisions are studied in order to discover trends, particularly in areas in which there is sparse legislation, such as in the administrative practice of the French Conseil d'Etat (the supreme administrative court of France), court decisions have no binding effect on lower

courts. Besides this, there is no strict hierarchy within the case law itself. Thus, no court decisions may take precedence over others and in principle, the decisions of the highest courts (for example, the Cour de Cassation in France) have no greater weight than the decisions of the lowest court. Nevertheless, the lower courts do take notice of the decisions of superior courts because of the risk that their decisions will be reversed on appeal.

Fifthly, the legislative technique in the two systems is different. In the civil law system, the legislature normally drafts the main outlines of a law and leaves the executive a wide discretion to work out details by means of secondary legislation. The common law tradition is for the legislature to draft laws in a detailed manner that leaves as little as possible to be regulated by the executive.

Sixthly, the structure of courts in the two systems is different. In common law countries, the Judiciary normally consists of a uniform body of courts which settle all types of disputes. In civil law countries, the arrangement is different. There are separate courts for settling disputes between the administration and the citizens (these are administrative courts), whilst a separate set of courts (known as ordinary courts) have the jurisdiction to deal with disputes between citizens.

Finally, there are significant differences in the sources of law that the judges apply in the two different legal systems. Some of these differences are discussed below with respect to the sources of French law.

It must be noted that significant though these differences might be, some of them are fast disappearing. For example, the decisions of higher courts in France sometimes have as much weight as the decisions of the superior courts in England. The British Parliament, due to pressure of work, is increasingly adopting the continental style of Acts, which contain merely guidelines, leaving the government to fill in the details by means of subsidiary legislation.

1.3.3 An illustration of the civil law legal systems using the French legal system

The French legal system is a classic illustration of the civil law legal system. A brief examination of the sources of French law and legal personnel will be made below.

1.3.3.1 The sources of French law

The principal source of modem French law is parliamentary legislation (his). Under the 1958 Constitution, Parliament shares its legislative powers with the government, with the latter having its own autonomous power to enact laws by means of regulations (reglement autonomes) as well as being able to issue regulations in application of a parliamentary statute (reglement d'application). Customary law, although largely abolished during the French revolutionary period, is still a minor source of law. Case law (la jurisprudence) and doctrinal writings (la doctrine), although not recognised in principle as formal sources of law, are of persuasive value. Over and above these sources, there are certain fundamental and general principles of law that have been derived by the courts, especially in administrative and constitutional law, from written law, that are also regarded as minor sources of law.

1.3.3.1.1 Legislation

Legislation in its broad sense in the French system may be classified into three main categories: parliamentary loi, government ordoinnances and government reglement. The 1958 Constitution restricted the competence of Parliament to enact statutes (lois) to those matters set out in article 34 of the 1958 Constitution. Meanwhile, article 37 of the 1958 Constitution empowers the government to enact legislation in its own right by way of autonomous regulations (reglement autonomes) in all fields. Parliament could also authorise the Prime Minister to enact laws (by means of ordonnances) for a given period in respect of matters within the parliamentary field of competence.

The scope and hierarchy of la loi consists of the following:

(i) Constitutional law — constitutional law is superior to ordinary parliamentary statute and if the latter contradicts the former, it may be held to be unconstitutional by the Constitutional Council. The latter however is the body responsible for controlling the constitutionality of

laws, but it can only strike down legislation before promulgation into law.

(ii) International treaties and agreements — once a treaty has been ratified and duly approved by Parliament, article 55 of the 1958 Constitution accords it authority superior to that of parliamentary statute.

(iii) Organic laws and other special procedures — organic laws (lois organiques) are the means by which some of the details of constitutional law are enacted and will only become effective if the special procedure provided for their enactment has been followed.

(iv) Ordinary parliamentary statutes — these are laws made by Parliament within its defined legislative domain.

(v) Lois referendaires — the Constitution makes it possible for a bill to become law without being passed by Parliament provided it is approved by the people in a referendum and later promulgated into law by the President. Such laws are referred to as lois referendaires.

As regards government ordinances, an instance where this may be passed is where Parliament fails to pass certain legislation within the appropriate time limit set by law, for instance a finance bill under article 47 of the 1958 Constitution. Once such an ordinance is ratified by Parliament, it takes effect as a parliamentary statute.

The generic name for government regulations issued in the exercise of its powers to make regulations (pouvoir reglementaire) is reglements. This power to issue regulations is shared by the President of the Republic, The Prime Minister, ministers, administrative authorities and others, The various categories of these regulations, in decreasing hierarchical order are:

(i) Reglement autonomes — these are regulations issued within the executive legislative domains as specified in article 37 of the 1958 Constitution.

(ii) Reglement d'application — these are regulations made by the Prime Minister to implement a parliamentary statute.

(iii) Arretes ministeriels — these are ministerial orders expressly or implied provided for in a statute or decree or dealing with matters within the minister's department.

(iv) Arreies prefectoraux — these are prefectoral orders issued by a prefect to deal with matters within his prefectoral district.

(v) Arretes municipaux — these are municipal orders, such as bye-laws, issued by a municipal authority, within his municipality.

(vi) Other regulations — there are other bodies that are authorised by law to issue regulations, such as decisions of the Bank of France, orders of the presidents of the various universities, etc.

1.3.3.1.2 Case law (la jurisprudence)

Case law is not formally recognised as a source of law in the French system. The role of the courts is seen essentially as one of interpreting and applying legal rules which emanate from a source other than the courts themselves. In fact, article 5 of the Civil Code states that judges are forbidden from making general or regulatory decisions in respect of cases coming before them. This article therefore makes it clear that the doctrine of stare decisis has no place in French law. This means that a court could in general refuse to follow any precedent, even that of the highest courts.

The non-binding nature of judicial precedents may result in uncertainty. However, in practice, precedents, especially those of the superior courts are followed. Thus, lower courts tend to follow the precedents laid down by the Cour de Cassation, but in the absence of the doctrine of binding precedent, retain their right not to do so. Whilst article 5 of the Civil Code prevents case law from becoming a formal source of law, article 4 of this Code underlines the persuasive value of case law. The latter provision states that a judge will be in breach of his duties if he fails to reach a decision on the grounds of the silence, lack of clarity or insufficiency of written law. Since many provisions of the Civil Code are quite vague, this provides the authority for judges to seek guidance and inspiration from previous cases.

1.3.3.1.3 Legal writings (la doctrine)

Although la doctrine is not regarded as a source of law, it has traditionally played a significant role in the development of the French law and today influences the interpretation of the written law by judges and lawyers. La doctrine may be defined as the body of opinions on legal matters expressed in books, articles, manuals,

journals, legal periodicals, practical commentaries and other scholarly publications, and provides a systematic and critical exposition of positive law through written commentary. It may also include commentary on existing legislative acts, discussions on issues preceding the promulgation of new legislation, suggested interpretation of new legal provisions and annotated reports and commentaries on the decisions of the courts. It does not solely consist of academic writings but includes the comments of judges, practitioners and law teachers. It is not uncommon to find the views of certain great jurists cited in commentaries on the codes or in the courts. For example, Carbonnier influenced the reform of family law in the 1960s and 1970s, just as Pothier had done with the Code Napoleon.

1.3.3.1.4 Custom

Although the codifications of the early nineteenth century greatly reduced the role of customary law, it still remains a subsidiary source of law. Whereas the loi emanates from the State, either through the legislative or executive branch, custom originates from the people, but is recognised and safeguarded by the State. Custom in French law has been defined as "the continuing behaviour over a period of time of those governed by the law, with the understanding that their behaviour is required by the law." For custom to be recognised as a formal source of law, it must satisfy these three conditions:

i. The custom must evolve through a slow, but spontaneous process of development.
ii. It must have popular support and consent as to its usage.
iii. The obligatory nature of the custom must be recognised.

French law recognises three types of customs. The first type are customs which support the law — consuetude secundum legem — which arises in the context of legislation that facilitates and directs its application. The second type are customs which precede the law — consuetude praetor legem. This is custom that is independent of, but not inconsistent with the law. The third type are customs that are contrary to the law — consuetude adversus legem. For example, although article 931 of the Civil Code provides that donations shall only be legal if made by

notarial deed, the French courts have repeatedly upheld the validity of a custom that allows "donations by hand."

1.3.4 Legal personnel in France

1.3.4.1 Judges

In France, being a judge is a career. Judges are not selected from among practising lawyers, as is the case in England. Judges in the ordinary courts are usually law graduates who have been trained in a special school for magistrates, the Ecole National de la Magistrature, in Bordeaux. On admission to the school, the law graduate becomes an Auditeurs de justice and is paid as a civil servant during the 27 months' training. The school trains two kinds of judges, the Juges de siege (literally, "sitting judges") who try cases, and the Magistrats debout (literally, "standing judges") or Magistrats du parquet, who act as prosecutors. Judges in the administrative courts are trained in the Ecole Nationale d'Administration, based in Paris and Strasbourg, which also trains most government officials and politicians, and they have a different status. French judges are independent from the executive although article 64 of the French Constitution slates that the President of the Republic is the guarantor of this independence. The Higher Judicial Council (Conseil Superieur de la Magistrature) is the overseeing body that deals with appointments and disciplinary matters.

1.3.4.2 The legal profession

What can be considered as the legal profession in France consists of lawyers (avocats) and a number of other persons who provide other forms of legal service. The main ones are:

(i) Avocats — they have the exclusive right of audience in all courts of general jurisdiction and to conduct litigation and carry out pre-trial procedural steps for their clients.

(ii) Avocats aux Conseils — this is a separate body of lawyers who have a monopoly of the right to carry out the formal pre-trial steps for clients and the right

of audience to cases before the Cour de Cassation, the Conseil d'Etat, and the Tribunal des Conflits.

(iii) Notaires — the notaire is a public officer whose function is to give authenticity to documents and give legal advice on some issues. Facts attested to by him in a notarial deed, known as acte authentique are presumed true unless disproved by a formal procedure known as I'inscription des faux.

(iv) Avouespres des Cours d'Appel — the profession of avoue is a specialised one within the legal profession. They have a monopoly of representing their clients before the Cours d'Appel.

(v) Huissiers de justice — they have a monopoly of functions analogous to those of bailiffs such as the service of writs and other formal documents in civil matters and the execution of judgments.

(vi) Administrateurs et mandataires judiciaires — this is also a specialist profession of personnel who intervene when a business is insolvent. The Administrateur (administrators) intervene to manage or oversee the management of a company during administration, and] mandataires judiciaires (liquidators) are responsible for

1.4 The socialist legal system

The importance of the socialist legal system has been substantially reduced by the collapse of the former Soviet Union and its satellite states. It will suffice just to make a few general observations about certain aspects of the law that used to apply in these former communist countries.

The socialist legal tradition has its historical origin in the Bolshevik revolution, which on 7 November 1917 began a new epoch in Russian history with the coming to power of the Bolsheviks. This initiated a new international political and economic order known as socialism or communism. The Bolshevik Party was determined to build a new communist society based on the ideas of Marx and Engels. What makes the socialist legal system fundamentally different from the two preceding legal systems that have been examined is the fact that it has been

substantially influenced by Marxist doctrine. Like the civil law system, the roots of pre-1917 Russian law could be traced not only to Roman Law but also to other continental European countries. The principles of Marxism and Leninism are what have given socialist law its unique characteristics. According to Marx the law and the State are two different words designating the same thing. There is no law without a State and there is no State without law. They regard law as an instrument which, in the class struggle, safeguards the interests of the ruling class and maintains social inequality. Since the State is also considered as an instrument of capitalist exploitation, it must go in order to give way to a communist society. In this communist society, all coercion will be needless. The State and the law, all of which aim to ensure compulsion and exploitation, will become useless and so will wither away in time.

Until the collapse of the Soriet Union and its satellite states in the early 1990s, neither the State nor the legal system had come close to disappearing as the Marxist doctrine had advocated. The view was that the Soviet State and the law were a crucial part of the transition from socialism to communism. The tasks of the Soviet State and law during the transitional period from socialism to communism were three-fold. The first was one of national security; the power of the State had to be consolidated and increased in order to discourage the enemies of socialism from attacking the Soviet regime. The second purpose of Soviet law was the economic task of developing production on the basis of socialist principles so as to create the abundance which alone could enable everyone to be supplied according to his needs. The third purpose was one of education; the objective being to destroy those tendencies in people to be selfish and destroy anti-social behaviour that was the heritage of poor economic organisation.

With the disintegration of the Soviet Union and the former eastern bloc and the radical political, economic and social reforms that have taken place in these countries, there are today very few countries that can still be regarded as belonging to the socialist legal system. In fact, only Albania and Cuba can legitimately be placed within this system. The other two communists' countries, China and North Korea, strictly belong to the legal systems of the Far East.

1.5 Religious legal systems — The Islamic legal system

Although the common law system, the civil law system and to some extent the socialist legal system are undoubtedly the most important legal families of law in the modern world and, in the case of the first two, there is hardly any country in the world today whose legal system has not been influenced by them, religious legal systems such as Muslim or Islamic law deserve to be mentioned too amongst these major legal systems.

Islamic law is unique in that it is not an independent branch of knowledge or learning but is rather based entirely on the Islamic religion. As a result of this, its validity does not depend on any earthly law-giver but rather on the manifested will of Allah. A number of consequences follow from this:

The first consequence is that Islamic law is in principle immutable. Unlike the other legal systems where the contents of law can be altered to meet the changing needs of society. Islamic theory takes the view that the law of Allah was given to man once and for all and it is for society to adapt itself to the law rather than generate laws of its own to respond to changing circumstances. Islamic legal theory recognises the important role of Islamic jurists over the centuries in clarifying the law but the orthodox view is that their works were directed not to the creation of a new law but to the discovery, understanding and formulation of a law which already exists.

Another consequence is that since Islamic law reflects the will of Allah rather than that of a law-maker, it covers all areas of life and not simply those that are of interest to the State or society. The law, or shar’ (or shari'a), which literally means, "the way to follow", specifies how the muslim should conduct himself without making any distinction in principle between duties towards others (civil obligations, alms-giving) and those towards Allah (such as fasting and prayers). Since it does not assert any rights, the real sanctions for the violation of the rules provided is the state of sin into which the believer falls when he neglects these duties.

1.5.1 The structure of Islamic law

According to Rene David and John Brierley, the science of Islamic law,//&/i (fiqh), is generally divided into two parts. The first one is the "roots", the doctrine of sources (usul) which explains by what methodology or procedure and on what basis the body of rules for the shar' or divine law was established. The second one is the doctrine of "branches" (which contains the systematic elaboration of the basic categories and rules of Islamic law.

The uniqueness of Islamic law is striking when regard is had to its organisation, classification and ideas, but perhaps more so when we examine its sources.

1.5.2 The sources of Islamic law

There are four sources of Islamic law, namely the Koran (Qur'an) the Sunna the ijma and the kiyas (or qiyas).

1.5.2.1 The Koran

The Koran is the highest and most important source of Islamic law and consists of the collection of Allah's revelations to the last of his prophets and messengers, Muhammad (570-631), made a few years after his death. Many of its juridical provisions are too vague to be of value as legal rules and even some of the basic institutions of Islam are not even mentioned in it. For example, the Koran specifies that the Muslim must take pity on the weak and helpless but does not specify what consequences follow for failing to do this.

1.5.2.2 The Sunni

The Sunni the traditional or model behaviour of the prophet, God's messenger, contains the way of life and conduct of the prophet, whose example serves as a guide to believers. It is made up of collected traditions of the acts and statements of Mohammad, handed down through uninterrupted chain of intermediaries.

1.5.2.3 The Ijma

The ijma is the consensus or unanimous agreement of scholars of the Muslim community.

To remedy some of the inadequacies of the Koran and the Sunna as well as deal with some of their discrepancies, the doctrine of the infallibility of the Muslim community when it is in unanimous agreement was developed. The unanimity required is that of competent persons, that is those whose special role it is to discover and reveal the law. Today, the Koran and Sunna are regarded merely as historical sources and judges are no longer bound to consult them since they have been infallibly and definitively interpreted by the ijma.

1.5.2.4 The kiyas (or qiyas) or analogical reasoning

This is based on the premise that no matter how resourceful it is, the book of fikh approved that the ijma cannot provide answers to all questions that could arise. Analogical arguments and reasoning (kiyas or qiyas) have therefore been admitted and treated as a source of law. Although this remains a recognised and accepted means of interpreting and applying the law, some reject this.

1.5.3 Islamic law today

Despite the apparently static nature of Islamic law, it is still considered to be one of the legal systems of the world. In fact, there are over 500 million Muslims in the world today. Besides this, some countries, such as Tunisia, Mauritania, Iran and Afghanistan have express - affirmed their adherence to the Islamic faith in their constitutions.

Notwithstanding Islamic law's deference to ancient wisdom, the forces of modernisation and westernisation have managed to penetrate it. A technique that has been regularly used to adapt Islamic law to modern conditions is the interventions of the ruling person or body. Although Muslim legal theory considers sovereign power, whether exercised by a monarch or Parliament, as a servant and not a master of the law, the latter can shape State policy (siyasa) in the process of

exercising their special responsibility of watching over the administration of the law. Since Islamic law recognises the legitimacy of regulatory measures taken by authorities in this respect, wide use has always been made of it.

Custom and legislation have introduced changes to Islamic law. The process of modernisation has also been facilitated by codification which seeks to introduce western concepts of law. Some special courts that traditionally applied only Islamic law have been eliminated in some countries. As a result of these changes, there is hardly any country that is governed exclusively by traditional Islamic law. These attempts at modernisation have produced certain tensions within the Muslim society due to the wish of some fundamental Muslims to adhere to orthodox Islamic principles. Nevertheless, Islamic law remains the dominant ideal in most countries where Muslims make up a majority of the population.

1.6 African Law

The term "African Law" is used here to refer to the amalgam of bodies of autochthonous laws that pre-existed colonialism. It is not religious law, although it is sometimes predicated upon supernatural beliefs and ritual practices. These have at various stages been referred to as "native law", "native law and custom", "native customary law", "customary law", "local law", and "tribal law" in a general context, or "Fanti customary law", "Buganda customary law", "Swazi customary law", "Tswana law and custom", "Nuer law", etc, when reference is being made to the legal institutions of specific ethnic groups. As Antony Allott points out, African law differs radically from all other systems of law examined here in that it is not strictly speaking a single system or even one with variant schools, but rather a family of systems which share no traceable common parent. Nevertheless, they share sufficient similarity in procedures, principles, institutions, and techniques for a common account to be given about them.

Since independence, African governments have tried to rid the il-legal systems of inherited colonial legislation of the negatively ethno-centric attitudes towards indigenous African law. This has usually been done by adopting terminology which seems to diminish the inferior attributes attached to this law during the colonial era. There is however no uniform terminology used. The search for

alternatives to the prejudicial terminology of the colonial period seems to have started from a conference held in London on "The future of law in Africa", from 28 December 1959 to 8 January I960. The conference debated the terminological and definitional problems but was unable to agree on any specific terms. Nevertheless, after the debate, the terms "native law", and "customary law", were then used interchangeably in subsequent discussions during the conference. A similar conference in Dar es Salaam in 1963 on "Local courts and customary law", recognised the terminological problems created by a change in the juristic form of customary law, though a movement towards recording or restating customary law in a written form concluded that the term "customary law", was no longer accurate to designate this "statutory" form of customary law. The term "law or rule of customary origin" was suggested as an alternative. This suggestion was hardly ever taken seriously. The general term. "African law", is now often used but when dealing with the law of a particular country this is usually referred to as customary law and sometimes indigenous or autochthonous law.

1.6.1 Some general features of African law

Some of the general features which the diverse African customary laws share are certainly not due to any genetic relationship between the inhabitants of the continent or cultural influences between one society and the other, but rather the similarity in the responses to the various challenges faced in a shared environment and the similarity in social systems. About five main characteristics can be said to be shared by the different customary law systems that make up African law.

The first common feature is that African law is generally unwritten, largely due to the predominantly illiterate environment in which it operates. It is mainly based on customary practices and usages that have been solemnly observed by the community in which it operates and been handed down from one generation to another. There is no written legislation, law reports or accounts of juristic analyses. To diminish some of the uncertainty caused by its unwritten nature, there have been attempts in some countries to reduce customary law into writing through re-statements and similar projects, but the desirability of this exercise and its effect on some of the inherent qualities of customary law remains a matter of considerable debate.

Secondly, although the legislature has intervened to regulate customary law in most countries, these attempts have been mainly to provide procedures to facilitate the recognition and enforcement of customary law rather than to actually create substantive rules of customary law.

Thirdly, although customary law varies, sometimes considerably, from tribe to tribe and from country to country, most of its basic structure, precepts, principles, institutions and techniques are fairly similar.

Fourthly, the legal processes in customary law are generally localised rather than remote. Disputants and judges are often neighbours. Since the judge is not a remote member of an official order but rather a local person who knows the parties well, this makes it much more difficult for the parties to deceive him.

Fifthly, at the heart of the African adjudication process is the notion of reconciliation or the restoration of harmony. The role of the court or arbitrator is less to find the facts, state the rules of law, and apply them to the facts, than to set right a wrong in such a way as to restore harmony within the disturbed community. Harmony will not be restored unless the parties are satisfied that justice has been done. Mutual acceptance of the decision and subsequent reconciliation are the only guarantee, in view of the defective enforcement procedures, that a judgment will be duly executed. This reconciliatory aspect of customary law is of particular importance because of the absence of a strong central authority in many pre-colonial African societies.

1.6.2 Sources of African law

There are five main sources of African law, viz, custom, legislation, precedent, expert opinion and other supplementary sources.

1.6.2.1 Custom

Custom is actually the main source of African law. Custom in this sense refers to the body of standardised patterns of behaviour that have been established by usages, practices and observances of the people in a given community having the

force of law. These are enforceable rules which for the most part are unwritten but must be distinguished from various social, moral and religious norms that co-exist with customary laws. Their unwritten nature does not usually pose too many problems before the customary courts that are often staffed by people from that locality who are deemed to be steeped in these customs. Difficulties do arise when matters go before non-customary courts, which are usually given jurisdiction to deal with appeals from the customary courts. The judges in the non-customary courts often lack knowledge and training in customary law matters but are usually allowed to sit with assessors or consult external sources of customary law, when they are in doubt.

1.6.2.2 Legislation

The role of customary law as a source and a form of law in the different African countries today has largely been established by legislation. Nevertheless, the legislation in almost all these countries has been confined to dealing with procedural matters. Because of the wide diversity of customary laws within the different African countries, early attempts to unify and codify rules of customary law in some countries did not go far.

1.6.2.3 Precedents

Precedent is a source of customary law although its extent remains a matter of controversy. There are potentially two types of precedents. The first type is where a customary court judge, often a chief, determines what the rule is in a given dispute. This usually results in the establishment of a precedent or even a new rule of customary law. Isaac Schapera, in discussing legislation and precedents in Tswana customary courts explains the latter thus:

"...chiefs have from time immemorial had the power to change the law, either by abolishing or amending an existing usage or by establishing a new rule of conduct. Within relatively recent times legislation of this kind has become fairly common, owing mainly to the new conditions created by the impact of Western civilisation ...Although seldom recorded in writing which itself is of course an innovation in Tswana life, such laws are usually well known to the people...

A new law may be formally formulated by the chief and his councillors and then put to a general assembly by the members of the tribe for enactment. Customary law is imperceptibly built up in this way and assented to by the parties and by their fellows in the community who were present during the proceedings. Such precedents may be cited in future cases by those considered to be knowledgeable. Typical examples of such persons are the remembrancers of the Tswana traditional courts.

A second and more formal type of precedent are the recorded reports of customary court decisions that went on appeal before the High Court or the Court of Appeal. Although not strictly binding on customary courts, the latter, especially where their attention is drawn to such decisions, will be loath to ignore them because of the likelihood that their decisions will be reversed on appeal.

1.6.2.4 Expert opinions

Expert opinion is a very important source of customary law, especially in appeal proceedings before non-customary courts. These experts, often referred to as assessors, are not formally trained in any schools or institutions of law but rather consist of individuals who by their upbringing through frequent involvement in local disputes are deemed to know the law better than the ordinary citizens. Such individuals are usually the elderly, well-known and respected in the community and regarded as repository of customary law.

1.6.2.5 Other sources

Modern African statutes usually require courts to treat customary law as a question of law and not as one of fact. As a result, judges, especially those dealing with appeals in non-customary courts, are allowed to consult extraneous sources such as textbooks, commentaries, anthropological accounts and similar written sources, when they consider these to be appropriate.

There is also the possibility of the use of supplementary or residual sources to which recourse can be made in cases for which there is no provision in customary

law. One of these supplementary sources that have been used in some countries is legal fiction. Where they cannot create legal fiction, judges have sometimes relied upon the so-called innate principles of justice or fairness prevailing within the particular ethnic community. This may consist of certain fundamental principles which have been reduced to axioms or adages and are ascertainable by experience or observation. It may involve a brief or pithy statement expressing basic juristic principles underlying existing laws.

1.6.3 The future of African law

During the colonial period, European law and judicial system as well as their institutions and habits of legal thought were superimposed upon the pre-existing indigenous laws and institutions in most African countries. Colonial administrators were given wide powers of inspection and supervision and acted as appellate bodies to which cases were taken to from customary courts. The supervision of the customary courts was kept away from professional judges and magistrates because of the fear that they might subvert traditional laws and try to force them into conformity with the technicalities of western laws.

Since the independence of most African states in the 1960s, there has been a growing recognition of the importance of African culture and traditions and the need to rationalise customary law and customary law institutions, but progress in this direction has been rather slow. Nevertheless, although the structure of customary courts varies from country to country, they are now fully integrated into the modern courts that were introduced during the colonial period. The process of restricting the scope of application of customary law that started during the colonial era has steadily continued. Even the so-called repugnancy clause that colonial administrators used to strike down customary laws that they disapproved of or that which were at variance with their standards of justice and morality can still be found in the modern laws of many African countries. Some countries, such as Ethiopia, abolished customary law. Others are struggling with the process of modernising some of the archaic and manifestly unacceptable aspects of customary law. African law and society are undergoing profound and irreversible changes. The challenge today is to modernise customary law in a way that makes it

continuously relevant to meet today's needs and conditions, without undermining the features that make it a distinct and unique legal system and culture.

1.7 Mixed or hybrid legal systems

In spite of the classification of the major legal systems of the world given at the beginning of this chapter, the reality is that not all the legal systems in the world can be rigidly fitted into these distinct categories. There are some legal systems that are a mixture of one or more of one of these major legal systems and are therefore described as mixed or hybrid legal systems. What exactly is meant by a mixed or hybrid legal system?

It is not easy to define the concept of mixed systems, for, as Esin Oriicu has rightly warned, "attempting a comprehensive study of 'mixed systems' and analysing that concept in general terms is a very dangerous and delicate task." Two particular difficulties need to be noted. First, there is nothing like a pure legal system because all legal systems are the outcomes of mixtures. In fact, it is true to say that all legal systems are still mixing in one way or another, as legislators and courts continuously look to other jurisdictions for inspiration or guidance on how to respond to shared human problems. Secondly, it is not easy to find a satisfactory definition that will cover all the different instances of mixing, whether historical or contemporary, overt or covert, structured or unstructured, complex or simple, blended or unblended. A mixed legal system refers to the fact that at least two different legal traditions or cultures are or were in contact and that the end product of the encounters is a jurisdiction utilising elements of more than one legal tradition. McKnight has referred to this as systems which have substantive attributes (and those of method) derived from two or more systems generally recognised as independent of each other." The concept of mixed or hybrid systems must however be distinguished from the related concept of legal pluralism. The latter applies where laws of different origins or from different legal systems exist and operate side by side in a given society with different legal mechanisms applying to identical situations.

In order to determine the existence of a mixed legal system, K D Anthony has suggested a number of factors that should be considered:

i. The infrastructure of the legal system — that is, its institutional foundations.
ii. Legal norms — that is, substantive rules and legal sources and their relative importance.
iii. Legal methodology — the principles of reasoning relating to the discovery and application of the rule of law.
iv. Legal style — how legal principles and concepts are expressed.
v. Values which underpin the system, and more specifically, the folklore which sustains it.

A mixed legal system may be identified if it manifests more than one of these distinctive features. A number of forces may be responsible for the existence of a mixed legal system. The most common force is historical, its imposition by the colonialist during the colonial period. Another force is the pressure of modernisation which has led many countries to copy or imitate the laws of others. The mixing of laws may result from more subtle ways such as infiltration, infusion and influence. A typical example of this is the possibilities offered by the European Union for the laws of one member state to influence the laws of other member states.

Whatever form a mixed system may take, it is important to note that a mixture may be a mere historical relic or actually alive and ongoing. In the globalised world of today with all the advances of technology, increased communication and openness, legal systems do not stand in isolation. Although almost all, including the great legal traditions of the world are today steadily feeding upon each other, the concept of a mixed system is however reserved only to those situations where significant elements of a different legal system have been incorporated into another legal system. Such is the case with Botswana, which combines elements of the common law tradition, in the form of English common law, with elements of the civil law tradition, in the form of Roman-Dutch law.

1.8 The position of the Ghana legal system within the major legal systems

From the discussion above, and as will be seen from the discussion of the evolution of the Ghana legal system in chapter 2, it is clear that Ghana's system falls within the common law legal systems. In terms of our colonial heritage, the country inherited the English common law and the doctrines of equity as well as the English legal tradition.

CHAPTER 2

HISTORICAL FOUNDATION OF THE GHANA LEGAL SYSTEM

2.1 Brief Political background

Ghana was the first sub-Saharan African country to gain independence from British colonial rule on 6 March 1957. The Independence Constitution ushered in a parliamentary democratic system of government with a Prime Minister and a Governor-General. On 1 July 1960 a Republican Constitution replaced the Independence Constitution and introduced a presidential form of government. The then Prime Minister, Dr Kwame Nkrumah, was elected President. By 1964, President Nkrumah had centralised power in the presidency and limited opposition to his rule by the use of the Preventive Detention Act, 1958, which provided for detention without trial for up to 5 years (later extended to 10 years). President Nkrumah also declared himself President for life and established a one-party State.6 A military coup d'etat overthrew him on 24 February 1966 and a new ruling body, the National Liberation Council (NLC), was established. Civilian rule was restored under the 1969 Constitution (ie 1969-1972 Kofi Busia's Administration). The 1969 Constitution vested executive power in the President who exercised the power directly through the Prime Minister and the Cabinet. The legislative authority was vested in the National Assembly which did not include the President. Judicial power was vested solely in the Judiciary headed by the Chief Justice. The 1969 Constitution was abrogated by a military coup d'etat on 13 January 1972 and substituted by the National Redemption Council/Supreme Military Council (NRC/SMC). Whilst the SMC was still preparing to return the country to civilian

rule, it was overthrown in a violent coup d'etat by a group of junior and non-commissioned officers on 4 June 1979 and the Armed Forces Revolutionary Council (AFRC) was established. The AFRC permitted the scheduled presidential and parliamentary elections to take place in June and July 1979; promulgated the 1979 Constitution; and handed over power to the newly elected President and Parliament of the Third Republic (Dr Hilla Limann's Administration 1979-1981). The 1979 Constitution provided for the separation of powers between an elected President and a unicameral Parliament, an independent Judiciary headed by the Chief Justice, which protected individual rights, and other autonomous institutions, such as the Electoral Commission and the Office of the Ombudsman. The 1979 Constitution was also abrogated by yet another military coup d'etat on 31 December 1981 and the Provisional National Defence Council (PNDC) was established in its place.13 The PNDC ruled the country until 199314 when the 1992 Constitution came into effect on 7 January 1993 ushering in the Fourth Republic.

2.2 The Bond of 1844

The historical foundation of the Ghana legal system may be traced to the Bond of 1844, a group of separate but connected treaties that the British signed with a confederation of Fante States under which the British promised protection to the Fante signatories in the event of aggression from the Ashantis. The agreement extended British protection to the signatory states and gave Britain a degree of authority over them. In subsequent years, additional coastal and interior states signed the Bond, thereby legalising the imposition of British legal system over these states. The Bond provided as follows:

i. "Whereas power and jurisdiction have been exercised for and on behalf of Her Majesty the Queen of Great Britain and Ireland, within divers countries and places adjacent to Her Majesty's forts and settlements on the Gold Coast; we, Chiefs of countries and places so referred to, adjacent to the said forts and settlements, do hereby acknowledge that power and jurisdiction, and declare that the first objects of law are the protection of individuals and of property.

ii. Human sacrifices, and other barbarous customs, such as panyaring, are abominations, and contrary to law.
iii. Murders, robberies, and other crimes and offences, will be tried and inquired of before the Queen's judicial officers and the Chiefs of the district, moulding the customs of the country to the general principles of British law. Done at Cape Coast before his Excellency the Lieutenant-Governor, on this 6th day of March, in the year of our Lord 1844."

Before 1844, Captain MacLean, as Governor of the Settlements on the Gold Coast, was said to have been exercising an irregular jurisdiction over the territories outside the British forts on the coast, in the area earlier called "the Protectorate," and later termed "the Colony proper." This area, though freed from subservience to Ashanti by the Treaty of 1831, was not a British possession. This is supported by the following statement:

"Indeed we had no legal jurisdiction in the country whatever. It had never been conquered or purchased by us, or ceded to us. The chiefs, it is true, had, on several occasions, sworn allegiance to the Crown of Great Britain; but, by this act, they only meant the military service of vassals to a superior [?]. Native laws and customs were never understood to be abrogated or affected by it." "... [the Judicial Authority in the forts] resides in the Governor and Council, who act as Magistrates, and whose instructions limit them to the administration of British law, and that, as far as natives are concerned, strictly and exclusively within the Forts themselves; but practically, and necessarily, and usefully, these directions having been disregarded, a kind of irregular jurisdiction has grown up, extending itself far beyond the limits of the Forts by the voluntary submission of the Natives themselves, whether Chiefs or Traders, to British Equity; and its decisions, wing to the moral influence, partly of our acknowledged power, and partly of the respect which has been inspired by the fairness with which it has been exercised by Captain MacLean and the Magistrates at the other Forts, have generally . . . been carried into effect without the interposition of force."

In 1853, the British established the first Supreme Court within their forts and settlements on the Gold Coast. The court sat mainly at Cape Coast and its jurisdiction was similar to that exercised by the courts of Common Pleas, Queen's Bench and Exchequer in England and of the Admiralty over treasons, piracies,

murders, conspiracies, and such other offences, of what nature or kind whatsoever committed upon the sea, or any haven, river, creek, or place where the Admiral or Admiralty have authority, power or jurisdiction, according to the common course of the laws of the realm of England and not otherwise.

2.3 SUPREME COURT ORDINANCE, 1876

In 1874, the British defeated the Ashanti, and established the British crown colony of the Gold Coast, incorporating the Fante states and the newly conquered Ashanti domains into one colony, despite strong opposition by a coalition of traditional rulers, including the Fante. As part of consolidating its victory, the Supreme Court Ordinance of 1876 was passed. It was titled "An Ordinance for the Constitution of a Supreme Court, and for other purposes relating to the Administration of Justice." The preamble to the Ordinance stated that:

"whereas by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing the date 24th day of July, 1874, Her Majesty's Settlements on the Gold Coast and of Lagos were constituted arid erected into one Colony, under the title of the Gold Coast Colony; And whereas it is expedient to make provision for the administration of justice in the said colony."

The Ordinance was therefore instrumental in establishing a Supreme Court "for the Gold Coast Colony and for the territories thereto near or adjacent, wherein Her Majesty may at any time before or after [4 April 1877] have acquired powers and jurisdiction."

Thus, the modern Ghana legal system was established by this Ordinance which also prescribed the law and procedure to be used in the courts. The effect of the Ordinance was to create a dual system of laws, namely (1) the received English Law, that is English statutes of general application and the common law; and (2) the customary law and local legislation.

2.3.1 THE SUPREME COURT UNDER THE 1876 ORDINANCE

The Supreme Court established by the 1876 Ordinance consisted of:

a. A Court of Appeal or Full Court which could only be duly constituted by any two of the judges of the Supreme Court, one of whom must either be the Chief Justice or a person for the time being discharging the functions of the Chief Justice;
b. The Divisional Court, which might be constituted by any one of the judges of the Supreme Court, authorised under section 6 of the Ordinance to exercise the original jurisdiction, civil or criminal, of the Supreme Court.

The decision of the Full Court was to be reached by a majority decision in the absence of a unanimous decision; but no provision was made in the event of equality of votes. Thus, a recipe for uncertainty was created as amply demonstrated in the case of Bainyi v Dantsi where the court constituted by four judges reached a stalemate. Two justices answered the question before the court in the affirmative and the other two answered in the negative. The court had to decide whether the kings and chiefs of the Gold Coast could lawfully exercise judicial powers and functions vested in them by native law and custom (subject to the limitations imposed by the Native Prisons Ordinance) within the Colony, or was all jurisdiction of all kinds now vested in the Supreme Court to the exclusion of all other jurisdictions except in those cases to which the Native Jurisdiction Ordinance applied. Thus the question remained unresolved, a most unsatisfactory situation. However, the Ordinance gave a casting vote to the more senior of the two judges where the Divisional Court was so constituted.

An appeal lay to the Full Court from a final judgment and decisions of the Divisional Court or judge where the claim determined exceeded £50 in value, and by leave of the judge making the order from all interlocutory orders and decisions. The Full Court was empowered under a residual power to entertain an application dealing with any suit or matter pending before it and to make orders t and give directions as the justice of the case warranted.34 Finally, any question of law arising in a criminal or civil trial may be reserved by the trial judge by way of case stated to be answered by the Full Court.

2.3.1.1 Jurisdiction of the Supreme Court.

The Supreme Court was a superior court of record.36 Apart from the jurisdiction specifically given to it by the 1876 Ordinance and other Ordinances of the Gold Coast Legislature, the court was also allowed to exercise, within the limits and subject to the Ordinance, all the jurisdiction, powers and authorities vested in or capable of being exercised by the High Court of Justice in England, except the jurisdiction and powers of the High Court of Admiralty. This jurisdiction included all Her Majesty's civil and criminal jurisdiction which at the commencement of the Ordinance or at any time thereafter might be exercisable in the Territories, near or adjacent to the Gold Coast Colony. The court was also given the powers and authorities of the Lord Chancellor of England to appoint and control guardians of infants and their estates, and keepers of the persons and estate of idiots, lunatics and those of unsound mind unable to look after themselves. Jurisdiction in probate, divorce and matrimonial causes and proceedings was conferred to be exercised in conformity with the law and practice for the time being in force in England. Most importantly, section 14 of the Ordinance provided that:

"The common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the Colony obtained a local legislature, that is to say, on the 24th day of July 1874, shall be in force within the jurisdiction of the Court."

The body of English law thus introduced by this provision was made applicable "so far only as the limits of local jurisdiction and local circumstances permit, and subject to any existing or future Ordinances of the Colonial Legislature..." These provisions contributed in no small measure to the development not only of customary law but of the common law of Ghana.

2.4 SUBORDINATE COURTS UNDER THE 1876 ORDINANCE

The Ordinance divided the country into judicial divisions, namely Eastern, Central and Western provinces. A divisional court sat in the capital of each province with a proviso that where necessary "several Divisional Courts may be held concurrently in the same province."

Magistrates' courts were established, constituted principally by District Commissioners who were authorised to exercise judicial powers as ex officio commissioners of the Supreme Court. Magistrates and divisional courts exercised concurrent jurisdiction except that cases decided in the magistrates courts of a particular province went on appeal to the provincial divisional court. Magistrates could transfer a case which in their view was of sufficient gravity to the divisional court for trial.

The Supreme Court Ordinance of 1876 abolished the position of judicial assessor. In 1878 the first Native Jurisdiction Ordinance was passed, to control native authorities in the Protectorate; but it was allowed to lapse. In 1883 it was repealed and replaced by another Native Jurisdiction Ordinance, based on the recommendations of Chalmers, a former judicial assessor. But unfortunately the Ordinance only applied to those head-chiefs to whom it was extended by Proclamation; in these districts the chief was authorised to form native tribunals in accordance with customary law, and given a limited criminal and civil jurisdiction, to the exclusion of any other native tribunals. Section 29 gave power to suspend chiefs who abused their power, etc. Appeals went to a commissioner's court. In areas to which the Ordinance was not extended the native tribunals functioned as before. Allott has stated that the Ordinance had many defects such as (1) it gave the same powers to a head-chief and a village headman; (2) it provided no machinery for the enforcement of the tribunal's orders; (3) there was no administrative control of the tribunals; and (4) the decisions of native courts were not recognised as res judicata in the English courts. The overall effect of the regulation of the native tribunals was to create a rigid dichotomy between the British and customary courts.

2.5 POST-1876 DEVELOPMENTS

A number of significant developments in the legal system took place after the enactment of the. Supreme Court Ordinance. As stated above, the Native Jurisdiction Ordinance was passed in 1878 to facilitate and regulate the exercise in the protected territories of certain powers and jurisdiction by native authorities. It was repealed and replaced by another Ordinance in 1883. Under the 1883

Ordinance the native courts had jurisdiction over natives but not over Europeans. Jurisdiction may be exercised over a non-native by consent in writing. The 1883 Ordinance was amended in 1910 by which various grades of native courts were established. In 1943, there was a reorganisation of the native courts and by 1949 there were four-grades of native courts in the Gold Coast.51 The Local Courts Act, 195852 transformed the four grades of native courts into one native court with jurisdiction, to administer mainly customary law. The courts were presided over by local magistrates instead of traditional rulers but provision was made for the appointment of assessors in land matters and matters in which the magistrate may think difficulty may be encountered in the application of the customary law. Under the Courts Act, 1960, the local courts were at the bottom of the courts hierarchy and appeals in civil cases (except land matters) from these courts went to the magistrates' court and then to the High Court. Jurisdiction was extended to cover all persons except that they had no jurisdiction in any course or matter in which the government or any public officer acting in his official capacity was a party.

The Courts Act, 1971 created a unified court system consisting of (1) the superior courts of judicature made up of the Supreme Court, the Court of Appeal and the High Court of Justice; and (2) inferior courts made up of the Circuit Court, District Court Grades I and II and Juvenile Court and such other traditional courts as might be established by law. In 1972, this system was varied by the Courts (Amendment) Decree, 1972. The full bench of the Court of Appeal was created to replace the Supreme Court at the apex of the integrated court system. In 1979 the unified court system, as it operated under the 1971 Act, was reinstated. Article 114(5) of the 1979 Constitution defined the judiciary as consisting of the superior and inferior courts with the Supreme Court, being the final court of appeal.

In 1981 a dual court system was created comprising (a) the regular courts, being all the courts in existence immediately before 31 December 1981, namely the superior and inferior courts established under article 114(5) of the then suspended 1979 Constitution: and (b) a system of public tribunals consisting of the National, Regional. District and Community Public Tribunals. The Public Tribunals operated independently from the regular courts and had jurisdiction to try offences specified by law. The dual system of courts was abolished by the 1992 Constitution and an integrated system restored once again.

The historical foundation of the legal system reflects the country's colonial heritage. Since independence, tremendous strides have been made to modernise the legal system as will be seen from some of the chapters in this book. The challenge facing Ghana today is to try and adapt the legal system to meet the complex socio-economic circumstances facing the country. In doing so, there is a need to constantly appraise the legal heritage in order to transform it to serve the peculiar needs of the country always bearing in mind that the system will only be effective and attract the respect of the citizenry if it reflects their aspirations and their sense of justice. In this regard, the courts have a very important role to play. In the words of an American judge:

"...it is the courts and not the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts, their respect for law will survive the shortcomings of every other branch of government: but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society."

CHAPTER 3

BASIC INSTITUTIONS OF THE GHANA LEGAL SYSTEM

A number of institutions are vital to the operational efficiency of the Ghana legal system. This chapter will set out and examine some of these institutions.

3.1 Attorney-General and Ministry of Justice

As the heading suggests, this institution comprises of the office of the Attorney-General and the Ministry of Justice. The National Democratic Congress (NDC) Government has evinced an intention to decouple the office of the Attorney-General from the Ministry of Justice but this intention is yet to be put into effect. The office of the Attorney-General is created by article 88(1) of the 1992

Constitution, the Attorney-General is the principal legal adviser to the Government. He shall be responsible in terms of articles 88(3), (4) and (5) for the institution and conduct of all criminal prosecutions; all such prosecutions shall be at his suit or any other person duly authorised by him; civil cases shall be instituted and conducted on behalf of the State by him and the same defended by him; and all civil proceedings against the State shall be instituted against the Attorney-General as defendant. In New Patriotic Party v President Rawlings, a majority of the Supreme Court held that it would not be proper to make the President a party to the action as the defendant, the Attorney-General should be the appropriate defendant. This view was reiterated in Amidu v President Kufuor where the majority of the court relying on the New Patriotic Party case held that the proper person to be sued was the Attorney-General. Acquah JSC said:

"Apart from actions brought under article 2 and those seeking prerogative orders, the President has immunity from legal proceedings in the performance of his functions under the Constitution.. .But.. .the grant of the immunity to the President does not mean that legal proceedings cannot be instituted for relief arising from any damage, harm or otherwise caused to the individual in exercise of the executive authority of the President. In the event of such situations, actions may be instituted against the Attorney-General ...as provided by article 88 (5) of the Constitution...What the immunity granted by article 57 (4) does is to prevent the institution of such actions against the President personally."

The office of the Attorney-General has the following three divisions, namely:

(1) The Civil Division, which is headed by the Solicitor-General, is responsible, inter alia, for the initiation, conduct and defence of civil ligation on behalf of the state; giving legal advice to Government Ministries and Departments on all aspects of civil law; representing the Government in industrial, commercial and loan negotiations involving a Department or Agency of Government; and representing the Attorney-General on various Committees and Governing bodies.

The Prosecution Division, which is headed by the Director of Public Prosecution, performs, inter alia, the Attorney-General's constitutional duty of initiating and conducting criminal prosecutions; advises the Police on criminal law and their case dockets; exercises general oversight over public prosecutors other than State

Attorneys; prosecutes international crimes through the conclusion of mutual co-operation and assistance agreements with various countries; advises the Attorney-General on application for pardon to the President and formulates penal policy and initiates action for penal reforms.

The Legislative Drafting Division which is headed by a Director, deals, inter alia, with the drafting of bills based on instructions from Ministries, Departments and Agencies and prepares explanatory memoranda for the bills; drafts subsidiary legislation such as, constitutional instruments, legislative instruments, executive instruments, bye-laws and Gazette notices of a legal nature.

Administratively, the Attorney-General is the political head of the Ministry of Justice the mission statement of which is to entrench at the core of the body politic an abiding respect for the rule of law and a constant observance of human Rights, to ensure equality of access to justice and treatment before the law for all citizens, to promote by law social justice, to facilitate the operations of a fair, efficient and transparent legal system and to propagate a culture of due process and legality for these purposes. The Ministry acts as the defender of the constitutional order, the guarantor of the rights and liberties of the citizens, the protector of the state legal interest, the enforcer of the criminal laws, the developer of the human resources of the legal sector and the championing of the rule of law.

Objectives are set out as follows:

1. To formulate policies, monitor and evaluate for the fair and efficient operation of the legal system.
2. To revise, reform and replace laws for the realisation of the policy objectives of Government with regards to national and social growth.
3. Broaden the scope of legal services.
4. To develop and provide the requisite legal and paralegal manpower.
5. To accelerate the disposal of criminal prosecution.
6. To improve crime prevention and public accountability in the utilisation and management of the nation's financial and resources.
7. To heighten public awareness of the nation's law and statutes and publish the official law reports.

The Ministry has the following Departments under its supervision. (1) Council For Law Reporting; (2) Legal Aid Board; (3) Economic and Organised Crime Office; (4) Registrar-General's Department; (5) Ghana Law School; and (6) the Copyright Office. The functions of some of these Departments will be elaborated below.

3.1.1 Council for Law Reporting

The Council for Law Reporting was set up by the Council for Law Reporting Act, 1972. It is a corporate body with perpetual succession and a common seal. It may sue and be sued in its corporate name. The functions of the council are to be responsible for the preparation and publication of the "Ghana Law Reports" containing the judgments, rulings and opinions of the superior courts of judicature. It may also effect any other publications that in the opinion of its governing board could conveniently be effected together with the preparation and publication of the reports. Its functions are overseen by a governing council.

Over the years, the work of the council in producing the Ghana Law Reports has been bedevilled by both financial and administrative factors. It has not been able to produce the reports on a consistent basis and currently there is a huge backlog. This state of affairs, if not checked quickly, will have an adverse effect on the operation of judicial precedent, a vital cog in the wheels of administration of justice in Ghana.

3.1.2 Legal Aid Scheme

Historically, it is difficult to ascertain when the provision of legal aid to indigent persons started in Ghana. However, there seem to be a court-initiated practice in place in the 1940s confined to giving legal assistance to persons accused of murder. The first legislation to introduce a formal legal aid scheme in Ghana was the Legal Aid Scheme Law, 1987. This Law was subsequently repealed and re-enacted as the Legal Aid Scheme Act, 1997. Under this Act a Legal Aid Scheme was established with the following objectives derived from the Act and its mission statement:

a. To provide legal assistance to any person for purpose of enforcing any provision of the Constitution and in connection with any proceedings relating to the Constitution if the person has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings.
b. To provide legal assistance to any person if he earns the minimum wage or less and desires legal representation in any—

i. criminal matter;
ii. civil matter relating to landlord and tenant, Insurance, inheritance with particular reference to the Intestate Succession Law, 1985 (PNDCL 111);
iii. maintenance of children and such other civil matter as may from time to time be prescribed by Parliament or;

c. If in the opinion of the Board the person requires legal aid.

In terms of the Constitution and the Act setting up the Scheme, the scope of legal aid is confined to representation by lawyers in the "steps preliminary or incidental to any proceedings or arriving at or giving effect to a compromise to avoid or bring to an end any proceedings. Only lawyers can provide legal aid, consequently, it is incumbent on the Scheme to attract lawyers and make their services available to all persons in respect of the above matters. The most pressing problem of the Scheme is lack of logistic support. This has been the case since the legal aid scheme was set up. The Scheme does not have adequate resources to make a meaningful impact on the society as a whole. Private legal practitioners refuse to accept briefs to give legal assistance to accused persons at criminal sessions thus putting the burden on the regional directors of the Scheme to do most of these cases themselves. In spite of the Scheme's inability to attract legal aid lawyers, the courts continue to give orders to the Scheme to supply defence counsel in criminal cases thus putting the Scheme in an awkward position. The increase in the number of courts over the years has aggravated the Scheme's capacity to employ lawyers to represent indigent persons in all courts. For the Scheme to carry out its mandate with any measure of efficiency there is an urgent need for sufficient funds to be made available to it, failing which its existence is of no joy to the numerous indigent persons needing its assistance.

Application for legal aid is made to any of the Legal Aid Scheme's offices countrywide by filling in an application form specifying the applicant's finances and the legal problem for which assistance is sought. Thereafter, the applicant will

be interviewed by a selection committee. The selection committee will subsequently inform the applicant as to whether he/she is eligible for legal aid and how the problem is likely to be dealt with. If the applicant is found eligible for legal aid the selection committee will assign a lawyer to help the applicant. If the applicant is not eligible (for financial reasons or because of the type of legal problem he/she has), the selection committee can give the applicant information about handling the problem on his/her own. If it turns out that the problem is not a legal one, the selection committee may be able to suggest some other service that could help the applicant in the resolution of the problem.

3.1.3 Statute Law Revision Commissioner

The Statute Law Revision Commissioner was established in 1998. The Commissioner is appointed by the President in consultation with the Council of State and the Minister for Justice. He was required to prepare a revised edition of all Acts and subsidiary legislation in force on 1 January 1999, making any necessary amendments in order to bring them into conformity with the Constitution. The Commissioner prepared a complete revised edition of the laws of Ghana, which was submitted to the minister and enacted into law by Parliament in 1999.

In 2005, the Ministry of Justice completed the revision of a number of other laws in line with the Commissioner's recommendations, in order to bring them into conformity with constitutional requirements and current developments within the country as well as in compliance with international standards. Among the laws repealed was "imprisonment with hard labour" as a sentence under the Criminal Code, in violation of article 15 of the 1992 Constitution which prohibits the subjection of an individual to torture or other cruel, inhuman, degrading treatment or punishment. The Commissioner deemed such imprisonment as a degrading treatment in the light of the kind of tasks the convicts are made to do, for example, carrying "night soil". The Commissioner distinguished this kind of hard labour

from "labour required as a result of a sentence or order of a court", which is permitted under article 16 of the 1992 Constitution. Section 42(g) of the Criminal Code, 1960, which effectively permitted domestic violence, was also repealed.

3.1.4 The Law Reform Commission

The Law Reform Commission was established in 1968 with the objective of keeping under review all the laws, both statutory and otherwise, with a view to their systematic development and reform, including in particular the modification of such laws, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.

Its first programme identified inheritance and marriage laws as among the main areas requiring attention. Among the laws that the Commission has successfully spearheaded reforms are the Maintenance of Children Decree, 1977, the Intestate Succession Law, 1985, the Customary Marriage and Divorce (Registration) Law 1985, the Head of Family (Accountability) Law, 1985, and the Criminal Code (Amendment) Act, 1998. The Maintenance of Children Decree establishes family tribunals to hear complaints about maintenance of children during the subsistence of marriage and after divorce. The Intestate Succession Law provides protection for children in communities where they are not entitled to shares of their deceased parents' estates. The Criminal Code (Amendment Act), 1998 criminalised female genital mutilation and trokosi system.

The unification of family laws was identified in its 1996 report as a goal of the commission. To that end, the commission outlined a plan to assess the application and efficacy of existing legislation through questionnaires to be drafted in co-ordination with women's groups and non-governmental organisations(NGOs). In July 2006, the commission outlined proposals to the criminal justice system that will see a radical change in the sentencing of convicted criminals. The proposals seek to bring community sentences, suspended sentences, conditional discharge, compensation orders and curfew orders for certain classes of offences and offenders. The proposals also put heavier emphasis on reforming rather than punishing offenders. In December 2006, the commission, in collaboration with the

German Development Organisation (GTZ), inaugurated a joint steering committee for research in codification of customary law relating to land and family in Ghana.

The efforts of the commission have not generally borne the desired. A number of factors, such as backlogs in the legislative agenda of Parliament and delays within the Attorney-General's Department in responding to the commission's recommendations contribute to this. Also, the commission's work is hampered by a lack of political will on the part of the Attorney-General to approve certain laws that may strengthen constitutionalism in the country and thereby limit the government's power and control. Within the commission itself, there is a lack of resources to facilitate research (such as a well-stocked library, computers, legal software, etc) and a lack of personnel, particularly lawyers, due to the poor remuneration and overwork.

3.1.5 Economic and Organised Crime Office (formerly the Serious Fraud Office)

The Economic and Organised Crime Office (EOCO) was created by the Economic and Organised Crime Act, 2010 as part of the Public Service of Ghana. The objectives of the office are (a) to prevent and detect organised crime; and (b) to generally facilitate the confiscation of proceeds of crime. The functions of the office include the following:

a. to investigate and on the authority of the Attorney-General prosecute serious offences that involve (i) financial or economic loss to the Republic or any State entity or -institution in which the State has financial interest; (ii) money laundering; (iii) human trafficking; (iv) prohibited cyber activity; (v) tax fraud; and (vi) other serious offences;
b. recover the proceeds of crime; and
c. cooperate with relevant foreign or international agencies in furtherance of the provisions of the Act.

The administration of the EOCO is the responsibility of an eight-member governing Board, the members of which, including the chairperson, are appointed by the President in accordance with article 70 of the 1992 Constitution. The day to

day administration of the office is the responsibility of the executive director who is appointed by the President in accordance with article. 195 of the 1992 Constitution.

In order to enhance the effectiveness of its functions, the EOCO has extensive powers. Section 18 of Act 804, for example, stipulates that the executive director, deputy executive director and other officers authorised by the executive director shall have the same immunities as those conferred on a police officer under the provisions of the Criminal and Other Offences (Procedure) Act, I960, the Police Service Act, 1970 and any other law related to a police officer. Section 19 of Act 804 empowers the EOCO by notice in writing to request for any information relevant to its investigations from a person or a representative of an entity whose affairs are under investigation. It also enables the EOCO to request for the production of documents it may deem necessary for its work. Failure to comply with such request is an offence on conviction of which the culprit may be fined or imprisoned. Furthermore, section 20 of Act. 804 allows for a search of documents after an application has been made to court, without notice to the person or entity specified in the application Other powers conferred on the EOCO are seizure of properties acquired with the proceeds of trading in narcotic drugs; seizure and detention of currency suspected to be proceeds of crime; seizure of tainted property, that is property which the executive director or any authorised officer has reasonable grounds to suspect that the said property is the proceeds of a serious offence. Section 70 of Act 804 establishes a cooperative relationship with other State bodies such as the security agencies. Public officers are required co-operate with the EOCO in the performance of its functions. Failure to do so is an offence punishable with a fine or imprisonment.

If the functions of the EOCO are vigorously undertaken, they will go a long way in curbing corruption and enhancing accountability in the governance structures of Ghana.

3.1.6 Registrar-General Department

The Department is mandated to ensure an efficient and effective administration of entities inter alia the registration of businesses, industrial property, marriages,

administration of estates, and public trustees, to provide customer friendly services and accurate data for national planning. The Department registered some 43,482 companies in 2010.

3.2 Ministry of the Interior

The institutions through which the Ministry of the Interior performs its functions are:

a. The Ghana Police Service;
b. The Ghana Prisons Service;
c. The Ghana National Fire Service;
d. The Ghana Immigration Service;
e. The Narcotic Control Board;
f. The National Disaster Management Organization;
g. The Refugee Board; and
h. Ghana National Commission on Small Arms.

The ministry exists to ensure the maintenance of internal security and peaceful development within the law, in Ghana. This is achieved by reviewing, formulating, implementing and evaluating policies relating to the protection of life and property; preventing and mitigating effects of disasters; immigration control; prevention and detection of crime; ensuring safe custody and facilitating the reformation and rehabilitation of offenders by employing and establishing good public relations with them; being guided by the belief in integrity, transparency, efficiency and prompt responsiveness to clients. The latter comprises all persons in Ghana and especially the vulnerable in society.

The ministry has the following objectives:

1. to ensure adequate protection of life and property;
2. to ensure efficient crime detection and prevention;
3. to strengthen disaster prevention and response mechanism and social mobilisation;
4. to regulate and monitor the entry, stay and exit of non-Ghanaians and the travelling public;

5. to develop highly efficient and humane custodial reformatory system;
6. to improve institutional capacity to enhance service system; and

Two of the ministry's institutions which play a vital role in ensuring the legal system operates efficiently, namely the Ghana Police Service and the Ghana Prisons Service will be discussed below.

3.2.1 Ghana Police Service

Policing in Ghana was originally organised by traditional authorities led by local kings or chiefs. This they did by employing unpaid messengers to carry out executive and judicial functions in their respective communities. Professional policing was introduced by the British colonial authorities in 1831. The colonial administrator at the time, Captain George Maclean, Governor of the then Gold Coast, recruited 129 men to patrol the trade routes between Ashanti and the coast and to protect colonial merchants and officials around the castle, where the governor lived.

In 1844 these troops were taken over by the British Colonial Authorities and became the "Gold Coast Militia and Police." In 1871 when the British assumed full sovereignty over the Gold Coast, the 129 men in the Police Force were reinforced with 400 Hausa men from Northern Nigeria and some Sierra Leoneans as well as men from the Northern Territories of the Gold Coast. All the commissioned officers at the time were British. The force became the "Gold Coast Constabulary" in 1876. The Police Ordinance, passed in 1894, gave legal backing to the formation of a civilian police force in the Gold Coast Colony. By 1902, the police had been divided into General, Escort, Mines and Railway Police and this was legalised by the Police (Amendment) Ordinance, 1904. A Marine Police Unit was formed in 1906 but was replaced by the Customs, Excise and Preventive Service in 1942. The Criminal Investigation Department was established in 1922. Following the riots of 1948 led by the "Big Six", the Special Branch and the Police Reserves Unit were formed for riot control and the prevention of destabilisation of the government. The Special Branch, whose task was intelligence gathering was used to hound political opponents. The Reserve Unit had a reputation of dealing harshly with street demonstrators and protestors. The Wireless and Communication Unit was

established in June 1950. A women's branch was opened in 1952 with 12 officers and in 1959, the Police College in Accra was opened. Prior to this date all officers were trained in the United Kingdom

The present organisation of the Police Service is predicated on the 1992 Constitution and the Police Service Act, 1970. The 1992 Constitution provides for a Police Service of Ghana to be equipped and maintained to perform its traditional role of maintaining law and order. The 1992 Constitution also established a Police Council to advise the President on matters of policy relating to internal security, including the role of the Police Service, budgeting and finance, administration and the promotion of officers above the rank of Assistant Commissioner of Police.

Section 1 of Act 350 states the primary functions of the Police Service which include, inter alia, the prevention and detection of crime, the apprehension of offenders, the maintenance of public order and safety of persons and properties. Apart from' these primary functions, the police undertake other important services to the public, such as performing motor traffic duties to ensure safety on our roads; vetting and issuance of police criminal check certificates and assisting and helping the female gender to deal with traumatic and psychological problems as a result of sexual abuse (usually against minors) through the Domestic Violence and Victim Support Unit (DOVVSU).

The Police Service is a single cohesive unit, organised on national basis with a unified command under the leadership of the Inspector-

General of Police (IGP), who, subject to any direction/directives from the Police Council, is responsible for exercising general day-to-day supervision and control over the administration and operations of the Police Service. The IGP is appointed by the President acting in consultation with the Council of State. The IGP is aided by two Deputy IGPs responsible for administration and operations. There is also the Headquarters Management Advisory Board (HEMAB) which assists the IGP at the Police Headquarters with schedules which include welfare, technical, legal and special duties.

The police structure is organised at national level into twelve administrative regions each headed by a commissioner. These are: Accra, Tema, Ashanti, Brong Ahafo, Eastern, Volta, Western, Central, Northern, Railways, Ports and Harbours,

Upper East and Upper West Regions. Below the regions, there are 54 Police Divisions, commanded by divisional commanders, 188 Police Districts commanded by district commanders, and 675 Police Stations and posts supervised by station officers. The service has at June 2008, a manpower strength of 22,313 personnel for a population estimated at 22 million. In terms of police/civilian ratio, this translates into a ratio of about 1:994. The primary law governing the Police Service, Act 350, is some 41-years old, making its provisions somewhat out of date with modern policing concepts suitable in a democratic State.

It has therefore been suggested that a comprehensive legislative framework should be enacted to implement proposals for the police to be subject to greater civilian oversight and more attuned to the the protection of citizens with full respect for the human rights guaranteed in a democracy.

The overall importance of the Police Service to the operational efficiency of the legal system cannot be overemphasised. The service is vital to the proper administration of the criminal justice system in that it's efficient detection, investigation and collection and collating of relevant evidence of criminal activities will enhance the work of the Attorney-General in successfully prosecuting criminals who are brought before the courts. If the service under performs, this will have a negative effect on the criminal justice system with the possible loss of confidence by the public leading to a possible prevalence of self-help and anarchy. It is therefore incumbent on government, in terms of its constitutional obligation, to provide the requisite financial and logistic support to enable the service to perform to its optimum capacity and ability.

3.2.2 Ghana Prisons Service

It has been said that prison, as an institution for punishment, was unknown among the indigenous people of Ghana. The closest comparable example was "Bo Ampam" (to put in a log), which was practised by the Ashantis. It was a means by which accused persons were detained until their cases were heard and as such passes more of a remand system than imprisonment. The Prisons Ordinance 187656 first set up a system of imprisonment in Ghana.

The current service was the creation of the Prisons Service Decree, 1972.

Article 205(1) and (2) of the 1992 Constitution provides for the establishment of a Prison Service of Ghana to be equipped and maintained to perform its traditional role efficiently. It also sets up a Prison Service Council to advise the President on matters of policy relating to the organisation and maintenance of the prison system in Ghana including the role of the Prisons Service, prisons budgeting and finance, administration and the promotion of officers above the rank of Assistant Director of Prisons. The Prisons Service is under the general superintendence of the Director-General who is appointed by the President acting in consultation with the Council of State.

Section 1(1) of the 1972 Decree provides that it shall be the duty of the Prison Service to ensure the safe custody and welfare of prisoners and whenever practicable to undertake the reformation and rehabilitation of a prisoner. It will appear from this provision that the primary duty of the service is a custodial one. Reformation and rehabilitation of prisoners are secondary to this primary duty. This is reinforced by the provision in section 41(1) of NRCD 46 which states that with the view to encourage prisoners to lead useful and responsible lives after their release, the Director-General shall, after consultation with such government, welfare and other bodies as he may think fit, establish in every prison courses of training and instruction designed to teach simple trades, skill and crafts to prisoners who may benefit from such training.

In pursuance of its primary duty of keeping prisoners safe in custody the Prisons Service has hardly pursued any meaningful rehabilitative programme. Prisons have tended to be overcrowded and conditions in most cases are harsh despite government's efforts to improve them. Much of the prison population is held in facilities that were originally old colonial forts or abandoned public or military building, with poor ventilation and sanitation, dilapidated construction, and limited space. In 2009 some 13,778 prisoners were held in premises designed to hold one-third of this number. This deplorable situation continues to bedevil the service. The multi-sectoral programme, "Justice For All", spearheaded by the Ministry of Justice and Attorney-General aimed at decongesting prisons and making justice accessible to all seems to be making headway in .decongesting prisons. One hopes this initiative is the beginning of a more comprehensive review of the penal system

with the view of making custodial sentence an option of last resort. There is a need to establish institutional framework within which other alternative means of dealing with offenders, such as probation and suspended sentences can be effectively utilised. The current overcrowding in prisons is unacceptably high. There is no doubt the need for government to build new prisons to accommodate those who may not be susceptible to alternative modes of penal sanction. The necessary funds must be found to do this in order to create the required conducive atmosphere for the protection of the rights of prisoners and for their effective reformation and rehabilitation.

3.3 Commission on Human Rights and Administrative Justice

The Commission on Human Rights and Administrative Justice (CHRAJ) was provided for in the 1992 Constitution as a result of the recommendation of the Committee of Experts on the Proposals for a Draft Constitution for Ghana. Consequently, article 216 of the 1992 Constitution provides that there shall be established by an Act of Parliament within six months after Parliament first meets after the coming into effect of the Constitution, a Commission on Human Rights and Administrative Justice. Parliament, in compliance with this constitutional obligation, enacted the Commission on Human Rights and Administrative Justice Act, 1993 to establish the commission. The commission is a successor to the Office of the Ombudsman established under the 1979 Constitution and as such it serves both as an office of an Ombudsman and a Human Rights Commission.

CHRAJ consists of a Commissioner and two Deputy Commissioners. The Commissioner and the Deputy Commissioners must qualify to be appointed Justices of the Court of Appeal and High Court, respectively. They are appointed by the President in consultation with the Council of State and hold office until they reach the ages of 70 and 65, respectively. Once appointed they cannot be removed from office except for stated misbehaviour or incompetence or on the ground of inability to perform the functions of their office arising from infirmity of body or mind.

The constitutional and statutory mandate of CHRAJ is found in article 218 of the 1992 Constitution and section 7 of the CI-IRAJ Act. Article 218 of the 1992 Constitution provides that the functions of CHRAJ shall include:

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 Armed Forces, the Police Service and the Prisons Service in so far as complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those service;
c. to investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental rights and freedoms under this Constitution.
d. to take appropriate action to call for the remedying, correction and reversal of instances specified in paragraphs (a), (b) and (c) of this clause through such means as are fair, proper and effective, including—

i. negotiation and compromise between the parties concerned;
ii. causing the complaint and its finding on it to be reported to the superior of an offending person;
iii. bringing proceedings in a competent Court for a remedy to secure the termination of the offending action or conduct, or the abandonment or alteration of the offending procedures; and
iv. bringing proceedings to restrain the enforcement of such legislation or regulation by challenging its validity if the offending action or conduct is sought to be justified by subordinate legislation or regulation which is unreasonable or otherwise ultra vires;

e. to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General and the Auditor-General, resulting from such investigations;

f. to educate the public as to human rights and freedoms by such means as the Commissioner may decide, including publications, lectures and symposia; and
g. to report annually to Parliament on the performance of its functions.

In broad terms, the functions of CHRAJ can be categorise under three main headings, namely (1) receiving and investigating complaints of human rights violations and other acts of administrative injustice; (2) investigating all instances of alleged or suspected corruption or embezzlement of moneys by officials; and (3) public education on human rights issues. To facilitate the performance of these functions, section 8 of Act 456 empowers it to:

a. subpoena and compel the attendance of witnesses and the production of documents;
b. cite a person before a court of competent jurisdiction for contempt for failure to obey a subpoena; and
c. to request for any information relevant to a matter before the Commission.

Under section 18(1) of Act 456, it is empowered to determine whether a decision, recommendation, act or omission that was the subject matter of an investigation;

a. amounts to a breach of any of the fundamental rights and freedoms under the Constitution; or
b. appear to have been contrary to law; or
c. was unreasonable, unjust, oppressive, discriminatory or in accordance with the rule of law or provision of any Act or a practice that is unreasonable, unjust, oppressive, or discriminating; or
d. was based on irrelevant grounds or made for an improper purpose; or
e. was made in the exercise of a discretionary power and reasons should have been given for the decision.

Where any of these is the case, the commission shall report its decision and the reasons for it to the appropriate person, minister, department or authority concerned and shall make the recommendations that it thinks fit. Such recommendations are not of themselves binding. Where they are not complied with, it may apply to a court for an appropriate remedy in relation to them. Under section 22(1) of Act 456, decisions, findings and recommendations of the

commission were subject to the supervisory jurisdiction of the Supreme Court. In Adamu v University of Cape Coast, it was held that the words "subject to the supervisory jurisdiction of the Supreme Court no proceedings shall lie against the Commission" in section 22 (1) of Act 456 were inconsistent with the provisions of article 33 of the 1992 Constitution which vested original jurisdiction in fundamental human rights matters in the High Court. Accordingly, as provided by article 1(2) of the 1992 Constitution, the said words were inoperative as from the date on which Act 456 came into effect. Furthermore, it was held that the extensive investigatory powers granted to the commission by its inaugural Act necessarily warrants it to act judicially and hence subject to the common law prerogative writs and these can be issued by the High Court in the exercise of its supervisory role over subordinate tribunals. The court accordingly held that the commission's decisions, findings and recommendations, whether judicial or administrative, were subject to the prerogative writs of the High Court, notwithstanding the ouster clause in section 22 of Act 456.

To ensure its independence in the execution of its functions, article 225 of the 1992 Constitution provides that it shall not be subject to the control of any person or authority.

The manner in which CHRAJ is to carry out its constitutional mandate, particularly under article 218(a) of the 1992 Constitution, came under scrutiny in Republic v High Court (Fast Track Division), Accra; Ex parte CHRAJ (Anane, Interested Party). The applicant, CHRAJ, purportedly acting under article 218(a) of the 1992 Constitution, without a formal complaint from an identifiable complainant and on its own initiative, investigated allegations of corruption and abuse of office made in the media against Dr Richard Anane, a member of Parliament and the then Minister of Transportation. The investigations culminated in adverse findings of abuse of power and perjury against him, and recommendations, inter alia, that he be removed from office.

Dissatisfied with these findings and recommendations, Dr Anane instituted proceedings under Order 55 of the High Court (Civil Procedure) Rules, 2004 (CI47) challenging their constitutionality and sought the following reliefs:

1. A declaration that upon a true and proper construction and the combined effect of articles 218(a) and 278(1) of the 1992 Constitution of the Republic of Ghana, sections 7(1) (a) and 7(1) (e) of the Commission on Human Rights and Administrative Justice Act, 1993, (Act 456) and the Commission on Human Rights and Administrative Justice (Complaints Procedure) Regulations, 1994 (CI 7), the Commission on Human Rights and Administrative Justice is by law mandated as a pre-condition to receive a formal complaint from an identifiable complainant before it can proceed under its functions to cause or initiate any investigation into any matters arising thereunder.
2. A further declaration that the investigations and /or the panel hearing commenced by the Commission on Human Rights and Administrative Justice at its own instance into allegations of abuse of power and conflict of interest against him in the Commission's proceedings referred to as File No 511/2005 and the decision and /or report of the Commission on Human Rights and Administrative Justice thereon dated 15 September 2006 without having received any formal complaint from any identifiable complainant was made without jurisdiction, in error and constitutes an illegality made in flagrant violation of articles 218(a) and 287 (l)(e) of the Constitution, 1992, sections 7(1)(a) and 7(1)(e) of Act 456 as well as the Commission's own (Complaint Procedure) Regulations as set out in CI 7.
3. A declaration that the finding of perjury made against him as contained in the decision/report of the Commission on Human Rights and Administrative Justice dated 15 September 2006, was made without jurisdiction, in error pursuant to patent procedural impropriety.
4. An order of certiorari to quash and to remove from the registry/records of the Commission on Human Rights and Administrative Justice for purpose of being quashed the proceedings referred to as File No 511/2005 particularly the decision and recommendations of the said Commission dated 15 September 2006 in so far as it relates to the investigation into allegations of Chapter 24 of the Constitution of the Republic of Ghana (conflict of interest) and articles 218 (a) of the said Constitution (abuse of power) as well as sections 7 (l)(a) and 7(1)(e) of the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456) on grounds of jurisdictional error on the face of the record and irrationality.

5. An order of certiorari to quash and to remove from the registry/records of the Commission on Human Rights and Administrative Justice for purposes of quashing the findings of perjury against him in the decision report dated 15 September 2006 as well as the recommendations of the Commission made pursuant to the said finding of perjury.

The Fast Track High Court granted the certiorari application and quashed the findings, decisions and recommendations of the applicant commission.

CHRAJ instituted proceedings in the Supreme Court pursuant to article 132 of the 1992 Constitution, praying for an order of certiorari to quash the said decision of the Fast Track High Court on grounds that:

a. The learned trial judge erred in law when he wrongly assumed jurisdiction to interpret and apply articles 218(a) and 287(1) of the Constitution, holding that a formal complaint by an identifiable complainant was a condition precedent to the commencement of investigations by the Commission, where as the interpretation of the Constitution was the sole preserve of the Supreme Court, thus making his ruling susceptible to illegality.
b. That the ruling of the learned trial judge suffers from irrationality to the extent that he adopted a strict reading of the functions of the Commission under the Constitution and the Commission on Human Rights and Administrative Justice (Act 456), with the consequence that very pertinent investigations into human rights violations at the Commission's initiative — such as the previous probes conducted into allegations of corruption against certain public officers, are rendered null and void.74

Georgina Wood CJ put the issue for consideration as follows:

"The question for our consideration is whether or not a formal complaint, made by an identifiable person, individual or body corporate — regarding a 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, is a condition precedent to invoking the investigative powers of the applicant Commission under the article 218(a) of the Constitution. Stated differently, do non-formal complaints expressed through allegations made by anonymous or unidentifiable persons through the media and other public fora regarding these very

matters, constitute complaints within the meaning of article 218(a) of the Constitution, thereby empowering the applicant Commission to set its investigatory machinery into motion?"

This called for what type of construction must be placed on the word "complaint" in article 218(a) of the 1992 Constitution. For CHRAJ, it was argued that "complaint" was not a term of art, and consequently, to arrive at the true meaning of the word one needed to read the whole of the Constitution, in the light, particularly, of articles 162 (4) and (5), 218 (a) and (e), 230,284,287(1) and (2), Act 456, Commission on Human Rights and Administrative Justice (Compliant Procedure) Regulations, 1994 (CI 7) and the Evidence Decree, 1975 (NRCD 323), s 156. It was contended that when these -are read purposively, in line with the modern approach to constitutional interpretation, which approach essentially aims at getting at the general legislative intent of the relevant constitutional provision, the court would come to the undoubted conclusion that grievances or allegations expressed in the media and at other public fora (non-formal complaints), all constitute "notices of complaint", requiring the commission to act. Consequently, CHRAJ can commence investigations either suo motu, or at the instance of a complainant; or when allegations or suspicion of corruption, abuse of office, conflict of interest by public officials come to its notice from any source, including the media and without any identifiable complainant or can act in concert with the mass media, any citizen or complainant who may be anonymous.

Counsel for Dr Anane contended that in interpreting constitutional provisions, such as article 218(a) of the 1992 Constitution, there was a need to take account of the purpose of the provision, that is the "spirit" in the sense of the underlying object or values, etc. This it was emphasised, was fundamental. The object was to arrive at a decision that advanced the purpose or spirit of the provision and which took account of the basic norms and values of society. These values, in the Ghanaian context, included respect for human dignity and rights such as privacy of the citizens and eschewed the kind of arbitrariness, unpredictability, randomness, uncertainty, etc that undermine the rule of law and good democratic governance. Accordingly, on a true and proper construction of the word "complaint" in article 218(a) of the 1992 Constitution, a complaint that can constitute an adequate basis for the institution of investigation by CHRAJ is to be restricted in meaning to formal complaints by identifiable individuals and corporate bodies and lodged with

CHRAJ. Complaint in article 218(a) of the 1992 Constitution cannot, therefore, extend to complaints made through the media and other public fora regarding the violations of freedoms, injustice, corruption, abuse of power, etc.

The Attorney-General expressed the view that "complaint" as used in article 218(a) of the 1992 Constitution must bear its ordinary dictionary meaning and must be reasonably, logically, literally and technically construed as meaning that there must be a person (natural or legal) who must lodge a complaint with CHRAJ, before the it can exercise its powers under article 218 (a) of the 1992 Constitution.

The issue was therefore reduced to whether "complaint" in article 218(a) of the 1992 Constitution must be construed purposively or literally. The Chief Justice having reviewed the authorities concluded that they show a clear shift from the purely strict, or literalist, or mechanical approach in constitutional interpretation, towards a more purposive approach but conceded that the ordinary and plain meaning rule, known also as the textualist or originalist or literalist rule, was not dead and that in appropriate cases, it might be the answer to the controversy. She however, chose what she described as a hybrid approach, a combination of two or more guides, namely the ordinary or plain meaning and the subjective-purposive based approach and held (Brobbey, Ansah, Aninakwah JJSC concurring and Date-Ban JSC dissenting) that the word "complaint" is limited to formal complaints made to the Commission, by an identifiable complainant; not necessarily the victim, but an identifiable complainant, armed with a complaint. This interpretation, in her view:

"... accords with reason and is consistent with the discoverable intention of the framers, the "broad values and principles of our democratic culture and the need for the rights of all citizens to be protected by and under the Constitution. I hold the view that this interpretation, which is respectfully adopted, shall provide the friction-free, social order that a law driven society, such as we aspire. I am afraid that the overly liberal and broad interpretation of article 218(a) advocated by the Commission would lead to injustice. It would lead to an utterly unpredictable and unworkable situation, which I believe was never intended by the framers of the Constitution."77

Date-Ban JSC on the other hand, was of the view that the plain meaning of article 218(a) of the 1992 Constitution did not suggest that the complaints to be investigated by CHRAJ should be only those lodged with it and that the complaint should have been made by an identifiable complainant.78 To reach that interpretation, he submitted, required reading into the provision more than its plain meaning. This he conceded was not necessarily right or wrong, but there had to be a reason why the court should depart from the plain meaning. The plain meaning he suggested must be checked against the purpose of the enactment concerned, if ascertainable. He alluded to the following conclusion:

"The framers' intent was thus to provide for the establishment of the applicant Commission in order to supplement the courts in the enforcement of the Constitution and the fundamental human rights embodied in it. The applicant's mode of discharging its function was however to be limited to education and investigations. Adjudication was not part of its mission. Its mission to investigate violations of fundamental rights and freedoms would, however, be severely impaired, if its function were to be interpreted to be mainly reactive and not proactive also, where the language of the Constitution and of its constitutive legislation so admits. I see nothing in the original statement of the concept which requires this court to interpret article 218(a) in such a fashion as to make the applicant principally a reactive organisation."

In the light of the above, he interpreted "complaint" generously to mean an expression of dissatisfaction which is brought to the attention of CHRAJ through any credible means, including through the public media and other public for a, in relation to "violations of fundamental human 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."

On the face of it, the Supreme Court's decision may seem to cripple CHRAJ from carrying out independent investigations to expose and check abuses of human rights and of power. However, the Chief Justice suggested in her judgment81 that CHRAJ could put in place appropriate simple administrative mechanisms, measures, and procedures that would ensure that allegations like the ones in issue in the case end up in CHRAJ as formal complaints thereby bringing such matters within the ambit of article 218 (a) of the 1992 Constitution. If this suggestion is

implemented, this decision would in practice do very little to obstruct the independent investigation of CHRAJ.

Since its inception, CHRAJ has made satisfactory progress towards the achievement of its mandate. Its findings on corruption in 1996 against two government ministers, for example, brought CHRAJ into the limelight and public confidence in the commission was enhanced. It has also effectively exercised its powers of enforcing its recommendations by taking appropriate court proceedings. These successes notwithstanding, CHRAJ faces financial and logistic problems. Insufficient funding has been the bane of the commission over the years. This must be addressed to enable the commission to carry out its mandate. CHRAJ is also incapacitated by its inability to prosecute corruption and other criminal cases. Statutory reference of these cases to the Attorney-General has so far not proved effective. The Commission should be empowered to investigate and subsequently prosecute these cases.84 There is a general consensus that if CHRAJ is strengthened and given the necessary financial and logistic support, it will prove to be one of the enduring legacies of the Fourth Republic in upholding public accountability and observance of human rights culture among Ghanaians.

3.4 Legal Profession

The legal profession as an institution occupies a strategic role within the legal system. It provides the necessary fuel that propels the efficacy of the system. The profession has a vital and indispensable role in the legal system in particular and in society in general. For when passions are inflamed, when the individual is lost in the mass, when the majority override the minority, the only defender and conservator of basic human rights in society is the profession. Members of the profession were in the forefront of the agitation for Ghana's independence from colonial rule and have continued to be watchdogs for the respect for the rule of law and observance of fundamental human rights. The legal system will be poorer without the legal profession.

3.5 The Court System

The Court system comprises the Supreme Court, the Court of Appeal, High Court and Regional Tribunals, and such Lower Courts and Tribunals as Parliament may establish. The Chief Justice is the Head of the system and is responsible for its administration and supervision. All citizens have the right and unimpeded access to the courts to challenge any acts of the President, Parliament or any other body, public or private, which are inconsistent with the provisions of the constitution.

Chapter 4

THE NATURE AND FUNCTIONS OF LAW

4.1 THE NATURE OF LAW

The term "law" may be used in many senses. One may speak of the laws of economics, for example, by which the price of an article is determined by supply and demand, or the laws of physics by which anything one throws up ultimately must fall to the ground. There are also the laws of football by which for example, a goal cannot be scored from an offside position. These laws, though important in their specific spheres of operation, are not the concern of this chapter. This chapter is concerned with laws in relation to human conduct, a topic which has agitated the minds of jurists for centuries and upon which much juristic ink has flowed in an attempt to find a universally accepted definition, but to no avail. A learned author has stated that the question:

"What is law?" has been asked by priests and poets, philosophers and Kings, by masses no less than prophets. A host of answers might be given, yet the answer to the question remains one of the most persistent and elusive problems in the whole range of thought. For one may well view the entire gamut of human life, both in thought and in action, as being comprised within the concept of law."

That said, it has also been asserted that the adherents of the legal institution must never give up the struggle to define law because it is an essential part of the ideal that it is rational and capable of definition.3 In the light of this assertion, it is proposed in the following discussion to set out some of the attempts made to

ascertain the nature of law in order to give the reader an overview of the nature of law.

4.1.1 Law as a command

The English jurist John Austin4 considered law as a command backed by threats of sanction to be applied for disobedience. This theory of law became know as the "imperative" theory of law. The command was a rule laid down by a politically superior being which may be either an individual or a determinate body of individuals. It follows from this that any rule which emanated from a person or body having sovereignty was a command and therefore law. His broadest definition of law was "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."5 This definition explained three fundamental aspects of his theory, namely (a) there are inferior (subjects); (b) there are superiors (rulers); and (c) the relationship between (a) and (b) is political. The relationship was based on habitual obedience of the subjects and disobedience to a law was followed by sanction. Austin regarded any rule which is not a command as not truly law. In his view, "laws proper or properly so-called are commands; laws which are not commands are laws improper or improperly so-called."

Austin divided laws which are commands (laws properly so called) into two broad categories: (a)Laws set by God. (b) Laws set by men.

He called the second category "positive" law and then divided them into two further categories of:

a. Laws set by political superiors which included, for example, laws made by Parliament and District Assemblies. These he called "positive law" proper.
b. Laws set by superiors in general. These laws were of non-political nature and would include, for example, the laws a master makes for his servant or the rules regulating membership of a private club such as a Golf Club. This he called "positive morality."

Furthermore, Austin identified another set of rules which was closely analogous to "positive morality" which he called laws by "analogy" and "metaphor." The former

were rules enforced by an indeterminate body and which related to human conduct. These would include opinions and conventions which society holds in respect of the behaviour of its members. The sanction for acting contrary to these rules would not be as harsh as the sanction which will be visited on a culprit who disobeyed a command. Laws by metaphor were identified as those which describe the behaviour of matter in given circumstances. For example, the laws of economics which state that the scarcity of a commodity will cause its price to rise. Because the relationship of these laws to laws properly so-called was too remote, he called them laws by metaphor.

Austin's theory of law has come under criticism from other jurists.7 One of such criticism is that the command theory distorts more than it clarifies in that laws, unlike commands, may be complete as laws even though not addressed to the person who is supposed to comply with them. Another criticism is that a law is not a once and for all command; it is more like a standing order to be followed until revoked. Most legal rules are not in a form of a command. The law of marriage, for instance, does not command any person to marry. Rather it merely sets out the conditions to be met if one wants his marriage to be legally recognised. Furthermore, in Austin's view, sovereignty was indivisible and unlimited. In the English case of Ex parte Mwenya Lord Evershed remarked as follows:

"As I understand it, however..., the statement...seems to proceed to some extent at least upon the basis of the theory of the indivisibility of sovereignty, particularly associated with the name of Austin. But if this theory was accepted in England a 100 years ago (and influenced, as I shall show, the prevalent English view of those days as regards protectorates) it is not, as I believe, accepted now."

4.1.2 Law as acts of officials

Law has also been defined as what officials do about law or what the courts do in fact about law.10 This definition is based on the premise that what is stated to be the law by Parliament is not law because it is subject to interpretation by the courts and it is the interpretation that really constitutes law. It stresses the empirical and pragmatic aspects of law. An illustration of this view of the law may be seen from the case of Asare v Attorney-General.11 The facts were that on 24 February 2002,

the Speaker of Parliament, Ala Adjetey, swore the presidential oath and acted for the President from 24 to 27 February 2002 while both President John Kufuor and Vice-President Aliu Manama had travelled overseas for official functions. The swearing in of the Speaker of Parliament was done pursuant to article 60(11) of the 1992 Constitution, which provides that: "Where the President and the Vice-President are both unable to perform the functions of the President, the Speaker of Parliament shall perform those functions until the President or the Vice-President is able to perform those functions or a new President assumes office; as the case may be." The issue was whether on the facts the President and Vice-President were unable to perform the functions of the President during their temporary absence from Ghana. In interpreting the said section, two possible interpretation principles were opened to the court. The plaintiff argued that on the literal meaning of the said article 60(11) of the 1992 Constitution, the President and his vice cannot be said to be unable to perform the functions of the President whilst on temporary absence from the country. He submitted that the doctrine of separation of powers is fundamental in constitutional law. He conceded that the three organs of government, namely the Judiciary, Legislature and Executive do not exist in water-tight compartments and that there is some contact between them and some checks and balances. Nevertheless, it was his view that an interpretation ought to be placed on article 60(11) of the 1992 Constitution so that it does not occur so readily and so easily for one organic head (in this case the Speaker 6f Parliament) to assume, succeed to and perform the whole functions of another organic head (in this case the Executive President) merely on the temporary, official travel of the President and the Vice-President. It was submitted that to do otherwise will undermine the doctrine of separation of powers. However, the court held the view that the interpretation to be given to the words of article 60(11) of the 1992 Constitution should depend upon the court's perception of the purpose of the provision and the context of the words, rather than on their dictionary meaning. The "plain meaning" approach to judicial interpretation, it was said, was not necessarily the most apposite because words hardly ever have a meaning in vacuo. Words take on a meaning in association with the other words in whose context they are used. Therefore, the interpretation of words almost invariably means doing more than finding their mere dictionary (or "literal" or "plain") meaning. Adopting this approach to the facts of the case, the court ruled that "where both the President and the Vice-President are absent from Ghana, they are to be regarded as unable to

perform the functions of the President and thus the Speaker of Parliament is obliged to perform those functions. In terms of law as acts of officials, this interpretation given by the court to article 60(11) of the 1992 Constitution should be regarded as law rather than what was set out by the framers of the Constitution.

It is true that sometimes written rules are framed in vague terms and thus need to be interpreted by a judge but most Riles are hardly a subject of litigation. Consequently, if law is simply what the judges say it is, it will be difficult to identify most of what constitute the law. This idea of law was a feature of what became known as "America realism", the fundamental feature of which was described as "the aggrandizement of the judiciary." One of its chief proponents, Justice Holmes, made the following remarks:

"Take the fundamental question, what constitute law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is deduction from principles of ethics or admitted axioms or what not. But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the action or deduction, but that he does want to know what Massachusetts or England courts are likely to do in fact. The prophesies of what the courts will do in fact and nothing more pretentious are what I mean by the law."

The emphasis from this extract is on what the courts may do rather than a concentration on abstract theories from general rules. This emphasis on empirical nature of the law allows decisions of judges to be measured by a variety of factors such as their personalities; their social environment; their background in relation to economic and business trends. The realists claim that these highly personalised factors could shape judges' decisions and in doing so create law.

While it may be said that the scepticism with which the realist approached traditional doctrines about law was healthy, a criticism that may be levelled against them is that there is more law outside the arena of disputes. Furthermore, their insistence that a rule is only formed once it is pronounced upon by a court means that any decision ceases to become a rule until it is subject to further interpretation in the future by becoming embodied in another decision. This means law is always

in a process of becoming but never does become. This leaves the law in a perpetual state of flux.

4.1.3 The pure theory of law

The pure theory of law was put forward by Hans Kelsen. It stated that law consisted of a set of norms or oughts. A norm was a proposition stated in hypothetical form — "if X happens then Y ought to happen." He postulated a series of norms or ought-propositions which formed a hierarchy with each norm deriving its validity from another norm until the ultimate and fundamental norm was reached. He called the basic norm the Grundnorm. The Grundnorm was the foundation of the hierarchy and it was the most abstract of the norms and the descent in norms involved concretisation and called it a "stepwise construction of the law." The derivation of validity of the norms from each other until the Grundnorm was reached was not meant to be a logical inference. Rather it meant the validity of the norm stemmed from the fact that the latter norm was created in a manner provided for in the former norm. -This dynamic system of norms began with the Grundnorm whereby a certain authority was established or acknowledged. This authority could then vest norm-creating power in another authority, and so on. In summary, this created an inverted collapsible pyramid with the Grundnorm as the foundation rock. If the Grundnorm is taken away, the system collapses for lack of support.

An important aspect of Kelsen's theory was the principle of effectiveness which was the extent to which the Grundnorm was obeyed. The Grundnorm required a minimum support in order to make it acceptable. This did not mean that it was always obeyed but it was generally obeyed. Once it lost support, it was ineffective and ceased to be the Grundnorm. A good example of this is a revolutionary situation such as a coup d'etat where the existing Grundnorm is disobeyed and a new one set up in its place. The case of Sallah v Attorney-General illustrates how the Grundnorm of the legal system may be disobeyed with its attendant consequences. The plaintiff in that case was appointed a manager at the Ghana National Trading Corporation (GNTC), a statutory corporation, in October 1967. The GNTC was originally set up by an executive instrument issued under the

Statutory Corporations Act, 1961 (Act 41). In 1964, a new Statutory Corporations Act, 1964 (Act 232) was passed and a new legislative instrument was issued under this Act to continue the existence of the GNTC as a body corporate. At the time of the military coup d'etat on 24 February 1966, the GNTC was in existence as a legal entity.

On 21 February 1970 the plaintiff received a letter from the Presidential Commission which informed him that his appointment as manager with the GNTC had been terminated in accordance with section 9 (1) of the transitional provisions of the 1969 Constitution. The said section provided as follows:

"Subject to the provisions of this section, and save as otherwise provided in this Constitution, every person who, immediately before the coming into force of this Constitution, held or was acting in any office established by or in pursuance of the Proclamation for the constitution of a National Liberation Council for the administration of Ghana and for other matters connected therewith dated the twenty-sixth day of February, 1966, or in pursuance of a Decree of the National Liberation Council, or by or under the authority of that Council, shall, as far as is consistent with the provisions of this Constitution, be deemed to have been appointed as from the coming into force of this Constitution to hold or to act in the equivalent office under this Constitution for a period of six months from the date of such commencement, unless before or on the expiration of that date, any such person shall have been appointed by the appropriate appointing authority to hold or to act in that office or some other office."

The plaintiff challenged his dismissal on the ground that by the literal meaning of the above provisions, his post did not fall within any of the above three categories of section 9 (1) of the transitional provisions of the 1969 Constitution. Consequently, he was not subject to dismissal by the government. To counter this argument, the Attorney-General invoked the Kelsen's theory of the legal effect of revolution and coup d'etat on the legal system to support a submission that the word "establish" in section 9 (1) of the transitional provisions of the 1969 Constitution should be given a "technical meaning" of "deriving legal validity from." He argued that in Kelsenite terms, the February 1966 coup d'etat destroyed the Grundnorm of the previously existing legal order, namely the 1960 Republican Constitution, and, by so doing, destroyed the whole of the old legal order.

Consequently, he submitted that with the suspension of the 1960 Constitution, the Act that established the GNTC should be regarded as having been abrogated. Its validity was only reinstated by the Proclamation of 26 February 1966 which established the National Liberation Council (NLC). In the light of this analysis, he submitted that the meaning of "established" in section 9 (1) of the transitional provisions of the. 1969 Constitution should be "deriving legal validity from."

The majority of the court was not impressed by the Attorney-General's jurisprudential analysis, describing it as highly artificial, irrelevant and misleading. However, the rejection of the analysis was not based on an appraisal of the merits of Kelsen's theory but rather on the scant respect it held for jurisprudence and legal philosophy so far as their utility in the judicial task of interpretation was concerned. The majority held that the literal meaning of section 9 (1) of the transitional provisions of the 1969 Constitution did not include the post of the applicant and hence he cannot be dismissed in terms of the section. The minority on the other hand, while being persuaded by the Attorney-General's submission, did not expressly refer to Kelsen's theory in coming to the conclusion that with the February 1966 coup d'etat, the old legal order founded on the 1960 Constitution gave way to a new legal order under an omnipotent, eight-member military-cum police sovereign. Consequently, all public offices established under the old legal order were automatically abolished.

It has been observed that the Attorney-General's argument raised two distinct issues: the first related to the legal effect of a coup d'etat on a country's pre-existing legal system; the second was whether such legal effect was relevant to the interpretation of section 9 (1) of the transitional provisions of the 1969 Constitution. With respect to the first issue, which is germane in the context of this discussion, it has been said that any disagreement with the Attorney-General's argument should have been based on an analysis of the legal effect of a coup d'etat which indicates that legal systems survive coups d'etat and that, juristically speaking, there is no break in the continuity of legal systems upon the occurrence of such event. Regrettably the opportunity was missed by the majority.

While it is generally acknowledged that Kelsen created an impartial and universal science, in his quest for this ideal, he ignored many factors which do play a role in legal theory. As pointed out by Bodenheimer, "We have to recognise that law

cannot survive in a hermetically sealed container and that it cannot be blocked off from the non-legal life around it without harmful consequences for the legal system."

4.1.4 Law as an economic instrument

Karl Marx, the German philosopher, postulated that law is the expression primarily of economic forces in a capitalist society. Law was one of the ways by which the capitalist minority (bourgeoisie) sought to preserve and increase their power and those who have property sought to protect it from those who do not have (proletariat). The State and law in capitalist societies, therefore, form an apparatus of compulsion wielded by the minority to oppress and exploit the working majority. This will lead to a revolution which will eradicate the causes of class distinction. The result would be a classless society, without either law or State (the withering away of the State and the law). There will be a communal property, and equality and justice would exist together.

The former Soviet Union tried to put this theory into practice with some measure of success but as later history indicates, the collapse of the Union gave a lie to this theory. Currently, the dominant remnant of the Union, Russia, has embarked on capitalist economic reforms with its attendant reliance on law as known in the rest of Europe.

The above examples of various means of ascertaining the nature of law demonstrate how complex a phenomenon law is. This notwithstanding, law, in the words of the distinguished Nigerian jurist, the late Prof Elias, is:

"...the body of rules which are recognised as obligatory by its members. This recognition must be in accordance with the principles of their social imperative, because operating in every community is a dynamic of social conduct, an accepted norm of behaviour which the vast majority of its members regard as absolutely necessary for the common weal. This determinant of the ethos of the community is its social imperative."

He, however, recognised that the definition is imperfect saying that it could be criticised on many grounds but added that it will be found to possess the merit of

enabling a discussion of African legal ideas as but an integral part of the general theory of law.

Glanville Williams summed up the problem thus:

"The only intelligent way to deal with a verbal question like that concerning the definition of the word law is to give up the thinking and arguing about it."

4.1.5 Law and morality

The relationship between law and morality has been the subject of vigorous debate among jurists over the years. Some of the questions that have featured in the debate are: To what extent should legal rules mirror the morality of the society in which they exist? Are immoral laws still laws that should be obeyed? Two main views can be identified from the debate, namely those who argue that unless law conforms with morality, it is not law in the true sense of the term and may therefore be disobeyed, and those who hold the view that law is a totally neutral instrument of social control and that all that matters is whether it satisfies the requirements of form which identify it as law. Unjust laws may therefore be condemned on moral grounds, but they remain law nonetheless. The proponents of the first view are usually referred to as the "natural law school." Natural law theories hold that there is some "ideal system" to which all law should aspire. This may be called the law of God (if the theory in question is religious or theologically inclined) or it may be called the "inherent order of human society" (which will allow natural law theory based on biological or other "scientific" grounds). A natural lawyer measures law against moral yardstick. By contrast, those who hold the view that law is a neutral instrument take the approach that the validity of law is independent of its moral content. A law may be a bad law in the sense that it offends against certain moral principles, but it is law nonetheless and, it may be argued, it confuses the issue to bring in considerations of morality.

Despite the obvious divergence of these views, one will admit that there are some areas where they converge. Some laws are based on the presumed morality of society. For example, the Criminal Offences Act, 1960 has a number of sections dealing with offences against morality. This is an attempt to instil morality into the

interstices of the criminal law. Furthermore, it has been said that law in action is not merely a system of rules, but involves the use of certain principles, such as that of equitable and the good. By the skilful application of these principles to legal rules, the judicial process distils a moral content out of the legal order, though it is admitted that this does not permit the rules themselves to be rejected on the general ground of their immorality.30 It is fair to say that morality and law do overlap. There are many moral principles which have no legal force. Likewise, there are a large body of laws which has no moral connotation whatsoever. Between these two spheres is a fringe area, the boundaries of which are constantly changing, where acts are both immoral and illegal. The expansion or restriction of this common area is invariably determined by the legislature.

4.2 THE FUNCTIONS OF LAW

4.2.1 Law maintains social order

The maintenance of social order is the most obvious function of law in society. Law operates to regulate social life. It does this by (1) creating institutions which are responsible for defining the limits of acceptable behaviour so as to prevent anarchy; and (2) through legal rules, a legal system is created which carries out multifaceted roles of social control. For example, law may be used as a coercing agent; that is, it may be used to force people to behave in a particular way. Society will be seriously undermined if its laws do not operate in this manner. However, the view that law maintains social order does not allow us to fully understand the purposes and functions of law in society. Further clarification must be sought in a functional analysis of the effects of legal rules in the society.

Law is also used to control public order through the protection of civil liberties and human rights. However, the protection of these rights may sometimes undermine the preservation of public order. For example, in times of emergency and widespread public unrest, attempts to bring the situation under control may involve the restriction of civil liberties. In fact the 1992 Constitution recognises this fact and has made provisions for curtailment of civil liberties within well-defined limits. Ultimately, the extent to which law performs the function of preserving social and public order depends on the circumstances of a particular society.

4.2.2 Law protects interests

Law protects both the interest of the State and the interest of the individual within the State. This is a broadly defined function of law. The State's interests are protected by the criminal law. For example, the State has an interest in the preservation of public order and tranquillity and to this end the criminal law is used to ensure order. The State also has an interest in compelling its citizens to do certain things and the law may be used to achieve this end. Thus, in order to provide the various services which citizens expect from the government, taxes must be paid and law is the means by which this is done. Many workers have taxes deducted from their wages/salaries before they receive them. Those who evade the payment of taxes are punished.

The law protects the individual's interest against encroachment by the State. For this purpose, except in totalitarian States, the law will be used to prevent the State from abusing its powers. Thus, article 33 of the 1992 Constitution allows anybody who alleges that his/her fundamental rights, inter alia, have been infringed to go to the High Court to seek redress. The law may also be used to protect the property of the individual from being expropriated without payment of adequate compensation except in accordance with the law itself. The law also protects the individual's interest against encroachment by other individuals. Thus, one is not allowed to take another's property without that other's consent or to violate, the person of another without legitimate excuse.

4.2.3 Law protects rights of property

The law protects what you own. By recognising ownership, the law of property prevents other people from interfering with your possessions. , For example, if you buy a car, the law gives you legal title to that car. You have exclusive right to use the car without anyone interfering with that use. If anyone does interfere with your use of the car, you can seek the help of the law to stop him. The law will even protect this use after your death by giving effect to the provisions of your will as to its disposition.

4.2.4 Law protects rights in respect of your person

These rights include the right to your reputation. Consequently, if someone says or publishes some matter about you, which you consider derogatory to your reputation, you can seek redress in the law of tort, which will enable you to sue for damages. Similarly, if I assault you and you had to be hospitalised as a result, you will be able to recover damages from me to recompense you for the expenses of the treatment.

4.2.5 Law regulates transactions

The law allows people to enter into private transactions amongst themselves and a contract is then prepared in certain circumstances to intervene in order to give effect to the rights which the transaction has created.38 Thus, if I agree to sell my car to you for GH₵5,000 and you agree to buy it at that price, a contract comes into being between us. If you then drive off in the car and do not pay for it, I can sue you for the GH₵5,000. In enforcing my claim, the court is giving effect to my right, which was created by the coming into existence of the contract between us.

4.2.6 How the law protects rights and interests

The legal system provides for the protection of the interests of the individual members of society by creating a system of courts in which these rights and interests can be vindicated. If I think someone has infringed my right, I can go to a lawyer and ask him to commence an action against that person. The case will come to court and a judge will adjudicate the matter. If the judge decides that I have made out a strong case, he will give judgment in my favour. That judgment must be complied with by the other party, failing which the State provides a means of forcing him to do so. If, for example, he is ordered to pay me a sum of money, his failure to do so may lead to his own property being seized and sold on my behalf to pay for the judgment debt.

4.2.7 How does the court work?

In order to regulate the way in which the court operates; rules have been formulated to govern its operation. These rules are called "rules of procedure." Every litigant must observe them and the judge acts as a referee to make sure of fair play. The court is usually concerned with two types of issues, namely questions of fact and questions of law. Questions of fact are concerned with what actually happened. To find this, evidence will be given by the parties to the dispute. Witnesses may be called to give their version of the events or documents may be produced before the court to back up the claims of the respective parties. Each party will try to prove or disprove something. The rules for this part of the court's work are called the "rules of evidence." Questions of law are concerned with the legal problems raised by the facts as narrated to the court by the parties. The court interprets the rules of law and applies them to the facts before it and then comes to a conclusion one way or the other.

4.3 CLASSIFICATION OF LAW

Law may be classified in various ways but it must be borne in mind that these classifications overlap in some cases and should not be treated as being in watertight compartments. The following are the main classes into which law may be put.

4.3.1 National and International Law

National (municipal) law is the law operating within the boundaries of a particular State; what Blackstone called "the rule of civil conduct prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong." In this sense, all the classifications to be discussed below will be deemed national law. A sub-branch of national law is private international law (conflicts of laws), which sets out which national law governs a case with a foreign element. Thus, if Kwabena, a Ghanaian, enters into a contract with Agovi, a Togolese, in Lome to supply eggs to a company in Abidjan and Agovi failed to supply the eggs the question may arise which law will govern the contract. If Kwabena were to sue Agovi in Ghana, the court in this country will have to determine by the rules of

private international law which law Ghana, Togo or Cote de voir is to be applied. Infrequently, more detailed laws giving practical effect to international treaties and protocols are enacted into national laws. The provisions of the Convention on the Rights of the Child have been largely incorporated in the Children's Act of 1998 and the Juvenile Justice Act of 2003. The Refugee Law of 1993 enacts the provisions of the African and UN Refugee Conventions and the Human Trafficking Act of 2005 conforms to the UN Protocol to prevent, suppress and punish trafficking in persons.

Public international law on the other hand, comprises a system of rules and principles that govern the international relationship between sovereign states and other institutional subjects of international law such as the United Nations and the African Union.49 The norms of international law have their source in either custom (consistent state practice) or conventional agreements, ie treaties.50 International law is created primarily by States, either for their own purposes or as a means of facilitating the functions of organisations of which they are members. The practice of international law is intrinsically bound up with diplomacy, politics and the conduct of foreign affairs. Thus, for example, there are rules governing diplomatic immunity, trade, and carriage of goods and passengers by air. Because of the weakness of the enforcement mechanism of international law when compared to that of national law, it is sometimes argued that it is not "true" law. However, recent trends in international law seem to be addressing this perceived weakness by the establishment of enforcing mechanisms.

It must be pointed out that in the relationship between public international law and national law, Ghana subscribes to the dualist approach as opposed to the monist approach. In terms of the dualist approach, international conventions and treaties do not assume automatic operation in Ghana. They must first be incorporated into national legislation by Parliament before they can have force and effect in Ghana; examples of such incorporation have been given above. The monist approach involves automatic incorporation of international legal instruments into national law.

4.3.2 Civil and Criminal Law

Civil law governs the relationship between private persons or bodies and defines their rights inter se. Thus, if Kofi commits a tort against Ama by negligently backing up his car against her, the State, as such, has no interest in taking Kofi to court to sue for damages on behalf of Ama. Ama may sue Kofi for damages but may choose not to do so. It is her prerogative. Criminal law is a sub-division of public law and is that part of the law which characterizes certain kinds of conducts as offences punishable by the State. It is concerned essentially with the definition, trial and punishment of those acts and omissions which are known as "crimes." Such act or omission need not necessarily violate any private right of an individual. The same wrongdoing may constitute a crime as well as a civil wrong (tort). For example, the crime of assault may also constitute a tort necessitating the bringing of both criminal and civil actions against the perpetrator. This may give rise to the question of which of the two wrongs should be first brought before the court. Generally speaking, criminal prosecution will be brought before civil proceedings can be undertaken.

The main distinction between civil and criminal law is that the object of criminal proceedings is generally to punish the offender whilst that of civil proceedings is to compensate the person whose right has been infringed. In criminal proceedings, the State is primarily concerned and it seeks redress on behalf of society in general. In civil proceedings, the State is not primarily concerned, it is the individual whose right has been violated who seeks redress.

4.3.3 Public and Private Law

This class overlaps with the above class because civil law is sometimes referred to as private law as distinct from public law of which criminal law forms a part. Public law deals with the relationship between the State and the individual and also between the various State organs. Private law concerns itself with regulating the relationship between individuals.

The main branches of public law are constitutional law, administrative law, criminal law and adjectival Law. Constitutional law regulates the structure, functions and relationship of the principal organs of government, such as the Executive, Judiciary and the Legislature. In most countries with a constitution embodied in a written

document, the constitution stands legally above all other types of law, public or otherwise. Administrative law regulates the functions of governmental and administrative agencies. Adjectival law prescribes rules by which litigation is conducted and allegations proved in a court of law.

The main branches of private law are family law, the law of succession, the law of contract, the law of property and the law of torts. Family law regulates family relationships, such as marriage and divorce. The law of succession deals with the manner of disposition of a deceased's estate. Law of contract deals with situations where one person has a right to a performance and another person has a duty to render that performance in terms of a legally enforceable agreement. It also determines whether a promise is legally enforceable and what are its legal consequences. The law of property determines the nature and extent of rights, which a person may enjoy over things such as land. Thus, ownership, pledges and mortgages form part of this law. The law of tort represents the means whereby individuals may protect their private interests and obtain compensation from those who violate them. It includes such wrongs as negligence, nuisance and defamation (libel and slander).

4.3.4 Substantive and Adjectival

Substantive law deals with the determination of the rights and duties of persons. This branch of law will include most of the contents of the above classifications. For example, criminal law is part of substantive law because it defines criminal conduct and the various punishments for the infringement of such conduct. Adjectival or procedural law determines the ways and means by which the rights determined by substantive law are enforced. This consists of civil and criminal procedure and the law of evidence. This distinction may be criticised because procedural law to some extent determines the rights of litigants and may therefore be appropriately classified as part of substantive law.

4.3.5 Common Law and Equity

This particular classification is peculiar to English law. It describes the law that was developed by the old common law courts in England from the mass of customary rules existing within the King's realm. At the time of the Norman conquest of England in 1066 there was no system of law common to the whole of England. Local Manorial courts applied rules of local custom. To improve the system the King sent Royal Commissioners on tour of different parts of England to deal with crimes and civil disputes. These commissioners, who often heard their cases with the assistance of a local jury, at first, applied the local customary law of the locality. On their return from the tour the commissioners sat in the royal courts in London to try cases there. In time, the commissioners in their judicial capacity developed rules of law, selected from the different local customs which they had encountered on their tours of the country, as a common law which they applied uniformly in all trials throughout England.

As the years went by, the common law became rigid and technical. Most litigants were unable to get redress for their grievances in the common law courts. They, therefore, petitioned the King to obtain relief by direct royal intervention. These petitions came to the King-in-Council and by custom were referred to his chief minister called the Chancellor, who was usually a cleric. In dealing with each petition, the Chancellor's concern was to establish the truth of the matter and then to impose a just solution without undue regard for the technicalities or procedural points of the common law courts. Because the principles on which the Chancellor decided cases were based on fair dealing between the parties as equals, they became known as equity (synonymous with the rules of natural justice and conscience). Thus, maxims such as "Equity will not suffer a wrong to be without remedy", "Equity follows the law", and "He who comes to equity must come with clean hands" were applied by the Chancellors. This system of equity was not a new system, rather it was a means to add to and improve on the common law, and it provided a gloss on the law. However, because the Chancellor did not follow any rigid rules and procedure for deciding cases, the principles were criticised as "varying with the length of the Chancellor's foot." Subsequently, the principles crystallised into predictable processes similar to those applied in the common law courts.

Later developments in the two types of law culminated in their amalgamation by the Judicature Acts of 1873-75. These Acts provided that both systems were to be

obtained in one court and where there was a conflict between a common law rule and a rule of equity, the rule of equity was to prevail.

The term "common law" in the context of Ghana's legal system means:

"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."

As indicated in Chapter 1, ante, this was the result of the reception of the English common law and the doctrines of equity under section 14 of the Supreme Court Ordinance, 1876.

Chapter 5

SOURCES OF GHANA LAW

5.1 MEANING OF SOURCE OF LAW

The expression "source of law" is said to have several meanings. It may mean that which gives the law its formal validity (formal source), for example, the Constitution. Secondly, it may also mean the direct means by which law is made or comes into existence (legal source), for example, legislation and judicial precedent. Thirdly, it may mean the written materials from which we obtain knowledge of what the law is. or was at any given time (literary source), for example, Sarbah's Fanti Customary Laws and Rattray's Ashant Law and Constitution. Fourthly, it may mean factors that have influenced the development of the law, and from which the content of the law may be traced (historical or material source). Consequently, "sources" may be said to be those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform and above all compulsory.

Article 11 of the 1992 Ghana Constitution states that:

the laws of Ghana shall comprise:

a. this Constitution;
b. enactments made by or under the authority of the Parliament established by this Constitution [legislation];
c. any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution [subsidiary or subordinate legislation];
d. the existing law [or the written and unwritten laws of Ghana that existed immediately before the coming into force of the 1992 Constitution]; and
e. the common law [the English common law, English doctrines of equity, and the rules of customary law].

5.2 THE CONSTITUTION

5.2.1 Historical background

Since independence, three military coups d'etat have overthrown the Constitution in force. The first coup d'etat took place on 24 February 1966 with the overthrow of the 1960 First Republican Constitution. The Second Republican Constitution of 1969 was abrogated through a military coup on 13 January 1972. The Third Republican Constitution of 1979 suffered a similar fate on 31 December 1981.

5.2.2 The First Republic

In 1960 the 1957 Ghana Independence Act was repealed and Ghana was declared a sovereign unitary Republic. The President was the head of State vested with the executive power of the State. He was also the head of the government. A cabinet consisting of the President and not less than eight ministers appointed by the President, wholly from among members of Parliament was established. A Parliament consisting of the President and the National Assembly was also established and vested with unlimited legislative powers. The Constitution also vested special legislative powers in the first President. Judicial power was vested in the superior courts, these consisted of the Supreme Court and the High Court and the inferior courts established by law.

5.2.3 The Second Republic

The 1969 Constitution vested executive power in the President who exercised the power directly through subordinate officials. The legislative authority was vested in the National Assembly which did not include the President. Judicial power was vested solely in the Judiciary headed by the Chief Justice.

5.2.4 The Third Republic

The Constitution of 1979 ushered in the Third Republic. It re-introduced the presidential system of government. The executive power was vested in the President assisted by the Vice-President and a cabinet which determined the general policy of the government. The cabinet consisted of the President, the Vice-President and not less than ten and not more than nineteen Ministers of State. The Ministers of State were appointed by the President with the prior approval of Parliament from among persons qualified to be elected as members of Parliament. A person so appointed as a minister had to resign as a member of Parliament. The legislative power was vested in Parliament consisting of 140 members. The Judicial power was vested in a Judiciary headed by the Chief Justice.

5.2.5 The Fourth Republic

The Fourth Republic was ushered in by the 1992 Constitution. The evolution of the 1992 Constitution dates back to 1984 when the ruling PNDC set up the National Commission on Democracy (NCD) to study ways for the establishment of participatory democracy in Ghana. The commission issued a "Blue Book" in July 1987 outlining modalities for district-level elections, which were held in late 1988 and early 1989, for newly created District Assemblies. In 1990 the NCD organised forums in all the 10 regions of the country at which Ghanaians of all walks of life advanced their views as to what form of government they wanted. These views were collated and analysed by the NCD whose final report indicated that the people wanted a multi-party system of government. This led to the appointment of

a Committee of Experts to draw up constitutional proposals for the consideration of a Consultative Assembly. The committee was enjoined by law inter alia, to take into account the Report of the NCD ("Evolving a True Democracy"); the abrogated Constitutions of 1957, 1960, 1969 and 1979 and any other constitutions. The committee submitted its proposals to the PNDC on 31 July 1991. The PNDC accepted the proposals and established a Consultative Assembly, made up of members representing geographic districts as well as established civic or business organisations to prepare a draft Constitution based on the proposals submitted to it by the committee. The Consultative Assembly convened in late 1991 and completed its work in 31 March 1992. The government inserted a controversial amendment indemnifying officials of the PNDC from future prosecution for all acts of commission and omission during their term in office. In a national referendum held on 28 April 1992, the Constitution was approved by 92.5 per cent of voters in a low turnout (58 per cent of those eligible).

The 1992 Constitution came into force on 7 January 1993. The executive power of the State is vested in the President assisted by the Vice-President. There is a cabinet consisting of the President and the Vice-President and not less than ten and not more than nineteen ministers of state who assist the President in determining the general policy of the government. The President appoints the Ministers of State from among members of Parliament or persons qualified to be elected as members of Parliament, except that the majority of the ministers should be appointed from among the members of Parliament with the prior approval of Parliament. Article 93(2) of the 1992 Constitution provides that the legislative power of the State shall be vested in Parliament elected under that Constitution and article 125(3) of the 1992 Constitution provides that judicial power shall be vested in the Judiciary and that no other body apart from the Judiciary shall have or be given final judicial power.

5.2.6 The Constitution as a source of law

The Constitution 1992 is the supreme law of Ghana today and this is expressly stated by article 1(2) of the 1992 Constitution. The said provision provides as follows:

"(2)This 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."

This constitutional provision unequivocally and authoritatively establishes a doctrine of supremacy of the 1992 Constitution in the Ghanaian jurisdiction. This doctrine implies that the supremacy of Parliament is limited and Parliament's enactments and those of previous legislatures are subject to the supremacy of the Constitution.

Thus, in New Patriotic Party v Attorney-General (31st December Case) Aikins JSC said:

"In my view, even though Parliament has the right to legislate, this right is not without limit, and the right to enact a law that 4 June and 31 December should be declared public holidays cannot be left to linger in the realm of public policy. Such legislation must be within the parameters of the power conferred on the legislature, and under article 1(2) of the Constitution, 1992 any law found to be inconsistent with any provision of the Constitution (the supreme law) shall, to the extent of such inconsistency, be void."

This dictum reiterates the fundamental nature of the Constitution. All laws derived their validity from the Constitution and although there were laws in existence prior to the coming into effect of the Constitution, article 36(2) of the transitional provisions of the 1992 Constitution expressly provides that such laws shall, in so far as they are not inconsistent with the provisions of the Constitution, continue in force as if enacted, issued, or made under the authority of the Constitution.

5.3 LEGISLATION

Legislation occupies a central role among the sources of law. It can create not only new laws but also alter or repeal existing laws as well as affect the existence and content of other sources of law. The legislative power of Ghana is today vested in Parliament and is exercised in accordance with the provisions of the 1992 Constitution. Parliament is therefore not supreme in so far as the exercise of its legislative powers is subject to the provisions of the Constitution.35 This is

expressly stated in articles 1(2) (set out above) and 2(1) of the 1992 Constitution which provides as follows:

"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."

In Mensima v Attorney-General the effect of article 2(1) was considered by the Supreme Court. The plaintiffs, members of a registered cooperative union, broke off from the union and formed a limited liability company. The object of the company was to distil a locally manufactured gin called akpeteshie. They were prevented from distilling the said gin by the officers of the co-operative union; they were also harassed and their products were impounded by the officers on the grounds, inter alia, that they did not belong to any registered distiller's co-operative union; and also for having no licence as required by regulation 3(1) of the Manufacture and Sale of Spirits Regulations, 1962,37 which provided that: " Every applicant for the issue of a distiller's licence shall be a member of a registered Distiller's Co-operative." The plaintiffs brought an action in Supreme Court under article 2(1) of the 1992 Constitution for a declaration, inter alia, that regulation 3(1) of LI 239, which made it mandatory for an applicant "for the issue of a distiller's licence" to belong to a registered distiller's cooperative, was inconsistent with the letter and spirit of the 1992 Constitution, particularly the exercise of their fundamental right of freedom of association guaranteed under article 21 (1) (e) of the 1992 Constitution. The defendants, however, contended, inter alia, that the regulations and its parent Act, the Liquor Licensing Act, 197039, were existing laws within the meaning of article 11(5) of the 1992 Constitution, consequently, Act 331 and the regulations made under it, had not been specifically repealed and must, therefore, be complied with. A majority of the Supreme Court rejected this contention and upheld the plaintiffs' claim in relation to regulation 3(1) of LI 239.The court declared regulation 3(1) of LI 239 null and void for being inconsistent with the letter and spirit of the 1992 Constitution, particularly article

21(1) (e) thereof because of its mandatory requirement for an applicant for a distiller's licence to belong to a registered distiller's cooperative. On the specific issue of the continued application of the impugned legislation, the majority of the Supreme 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-a-vis a provision of the Constitution is challenged, the duty of this court is to examine the relevant law and the Constitution as a whole to determine the authenticity of the challenge. And in this regard, the fact that the alleged law has not specifically been 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 [regulation] 3(1).. .of LI 239 [has] not specifically been repealed, and [is] therefore valid, misconceives the effect and potency of article 1(2), and thereby underrates the supremacy of the 1992 Constitution."

To further emphasise the lack of legislative supremacy of Parliament, the dictum of Aikins JSC in the case of New Patriotic Party v Attorney-General is apposite. The learned judge said:

"In my view, even though Parliament has the right to legislate, this right is not without limit, and the right to enact a law that 4 June and 31 December should be declared public holidays cannot be left to linger in the realm of public policy. Such legislation must be within the parameters of the power conferred on the legislature, and under article 1(2) of the Constitution, 1992 any law found to be inconsistent with any provision of the Constitution (the supreme law) shall, to the extent of such inconsistency, be void."

Parliament's legislative power is further limited in other respects. Its powers do not extend to the making of a law to alter the decision or judgment of any court; nor may it create a law which operates retroactively. Parliament has no power to

legislate for the creation of a one-party state, nor can it make laws relating to chieftaincy without having referred the draft to the National House of Chiefs for advice. Finally, Parliament cannot make laws relating to financial and budgetary matters "unless the Bill is introduced or the motion is introduced by, or on behalf of, the President."

5.3.1 The legislative process

The legislative process starts with the publication of a bill which will eventually be transformed into an Act of Parliament. No bill, other than that dealing with the settlement of financial matters, shall be introduced in Parliament unless:

it is accompanied by an explanatory memorandum setting out in detail the policy and principles of the bill, the defects of the existing law, the remedies proposed to deal with those defects and the necessity for its introduction; and it has been published in the Gazette at least fourteen days before the date of its introduction in Parliament.

A bill affecting the institution of chieftaincy shall not be introduced in Parliament without prior reference to the National House of Chiefs.

A bill, will generally pass through the following stages on its way to becoming an Act of Parliament.

5.3.1.1 Introduction and first reading

Parliament receives the proposed bill from the required state institution through its representative, usually the sector minister. This stage is often referred to as Introduction of Bills. When the bill is introduced to the floor of the House there is laid down parliamentary procedures that need to be followed. For example, a formal notice may be required and the sector minister may give a speech. The Clerk or presiding officer also reads the title of the bill; this is termed the first reading.

5.3.1.2 Committee stage and second reading

After the first reading, a bill may be referred immediately to the appropriate committee of Parliament. It is at the committee stage that most of the detailed work is carried out. The committee may involve the public in this process to varying degrees. The general public and institutions may be asked to send inputs, and a public hearing may be held. This is also the stage where committee members have the opportunity to make proposals for amending the bill. After deliberating on the bill, the committee then presents its report to the House. Debates on the acceptance or rejection of the committee's report commence at the second reading of the bill. The principles and the rational of the bill as well as the defects the new bill is meant to cure are discussed.

5.3.1.3 Consideration and third reading

The consideration stage is the stage where the whole House discusses the bill in detail. Debate on the bill is carried out clause by clause, proposed amendments are debated, arguments are then made to either support the proposals or to reject them, new suggestions can also be made to amend a clause. The process for debate on the floor of the House at this time might allow members to speak more than once to a question proposed by the chairperson. The committee report on the bill forms a crucial background that informs this debate. To make this process effective, Parliament will often give a particular timeline that must elapse between the committee stage and the consideration stage. Under the standing orders the bill is taken through the consideration stage at least forty-eight hours after the second reading. The consideration stage is very important because it gives other members of Parliament the opportunity to introduce amendments to the bill. The third reading with a motion that the bill is now read for the third time then follows the consideration stage. This stage is often very short with no debate.

5.3.1.4 Presidential assent

The Clerk of Parliament is responsible for ensuring that the bill reflects all the relevant amendments and recommendations. This is then printed and certified as a true copy. The required numbers of copies are then presented to the President. Presidential seals are affixed and the President assents to the bill by placing the signature under the pre-agreed text, eg "I hereby signify my assent to this bill." The bill then becomes an Act of Parliament. The Act does not come into force until it has been published in the Government Gazette.

Where the President does not agree with portions or some clauses of the bill, he may refuse to assent to the bill. In the unlikely event of the President refusing to assent to a Bill, he shall inform the Speaker in a memorandum within fourteen days of such refusal, any specific provisions of the bill which in his opinion should be reconsidered by Parliament, including his recommendations for amendments, if any. Alternatively, he shall inform the Speaker that he has referred the bill to the Council of State for its consideration and comments as permitted by article 90 of the 1992 Constitution. In either event, Parliament shall reconsider the bill taking into account the comments of the President or the Council of State as the case may be. After such deliberation, if the bill is passed by a two-thirds majority of members, the President shall assent to it within 30 days of the passing of the resolution.

Bills dealing with the settlement of financial matters in terms of article 108 of the 1992 Constitution and accordingly certified as such by the Speaker or those determined by an appropriate parliamentary committee that they are urgent, are exempted from the full parliamentary procedure as described above. When such bills are presented to the President, he must assent to them without any quibble.

All legislation passed by Parliament under the 1992 Constitution, as well as those passed by previous Parliaments under the 1960, 1969 and 1979 Constitutions, are designated as "Acts." Legislation passed under the military regimes was labelled as "Decrees" except, for that under the regime of the Provisional National Defence Council (PNDC), which was referred to as "Laws." Colonial legislation was styled as "Ordinances." These differences in terminology do not have any practical consequence, as after all they all constitute law of general or specific application in the time frame in which they were enacted. All laws continue to apply to the extent that they are not expressly repealed or abrogated. All "Acts" are numbered

sequentially with no break in the run. "Decrees" and "Laws", although numbered sequentially, did break down with each new military regime starting its own am.

4.3.2 Subsidiary legislation

Subsidiary legislation, also known as delegated or subordinate legislation, is one made by a subordinate body, such as a District Assembly or a Minister of State, under the authority of Parliament or the Constitution, usually through the delegation of the legislative power in a statute. As stated above, article 11 of the 1992 Constitution include any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution as part of the sources of Ghana law. In terms of article 11(7) of the Constitution, subsidiary legislation, when made, shall be laid before Parliament, published in the Gazette and will come into force after twenty-one sitting days of Parliament, unless two-thirds or more of members of Parliament vote to annul it.

Parliament thus lacks the power to amend any such subsidiary legislation except to annul it or allow it to come into effect.

Subsidiary legislation may come in different forms, such as:

1. Statutory Instruments (SI) which are instruments made, either directly or indirectly, under a power conferred by an Act of Parliament or a Decree or a Law. For example, section 158 of the Local Government Act 199365 gives the Minister of Local Government and Rural Development the power to make regulations for the purpose of carrying the Act into effect. Any regulation made by the Minister in pursuance of this power will be called a statutory instrument. The form of a statutory instrument is governed by the provisions of the Statutory Instruments Rules 196066 and when made must be laid before parliament in accordance with article 11(7) of the Constitution. Statutory instruments are basically of two kinds, namely: (i) legislative instrument and (ii) executive instruments.
2. Legislative Instruments (LI), comprise statutory instruments which are legislative in character or those made under powers expressed to be exercisable by legislative instrument. Generally, such an instrument will

determine or alter the law, rather than applying it to a particular case and has a direct or indirect effect affecting privilege or interest, imposing an obligation, creating rights, or varying or removing an obligation or right. An example of a legislative instrument is the Civil Proceedings (Fees and Allowances)(Amendment) Instrument, 1992 and Legal Profession (Professional Conduct and Etiquette) Rules, 1969

3. Executive Instruments (EI) are instruments which are neither legislative instruments nor instruments of a judicial character. The Executive arm of State is usually empowered to issue such instruments. For example, section 4 of the Public Order Act 1994 empowers the Minister of Interior, by executive instrument to impose a curfew on any part of the country if the circumstances warrant it. In pursuance of this power the Curfew (Bawku Municipality) Instrument 2008 was made. Other examples of an executive instrument are State Lands (Asankragwa Site For Radio Repeater Station) Instrument, 1997 made under section 1(1) State Lands Act, 196274 and Appointment of Public Prosecutors Instrument, 2004 made under section 56 of the Criminal and Other Offences (Procedure) Code I960.
4. Constitutional Instruments (CI) which are instruments made under a power conferred by the Constitution. For example, the Commission of Inquiry [Ghana @ 50] Instrument, 2009 which appointed a Commission of Inquiry under article 278 of the Constitution to inquire into the operations of the Ghana @ 50 National Planning Committee, the Ghana @ 50 Secretariat and matters incidental to the Ghana @ 50 celebrations. There is currently no Act of Parliament which provides for the form and other requirements for constitutional 'instruments. Nevertheless, in practice, constitutional instruments have followed statutory instruments with respect to format and other drafting style. Constitutional Instruments, like statutory instruments, are subject to Parliamentary scrutiny under article 11(7) of the Constitution. Constitutional Instruments must be construed as one with the Constitution.

5.4 EXISTING LAW

Article 11(4) of the 1992 Constitution provides that the existing law shall, except as otherwise provided in article 11(1) of the 1992 Constitution, comprise the

written and unwritten laws of Ghana, as they existed immediately before the coming into force of the Constitution, and any Act, Decree, Laws or statutory instrument issued or made before that date, which is to come into force on or after that date.

Article 11(5) of the 1992 Constitution states that the existing law "shall not be affected by the coming into force" of the Constitution and that under article 11(6) of the 1992 Constitution, the existing law "shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of the Constitution." In Ellis v Attorney-General, the Supreme Court upheld the Hemang Lands

(Acquisition and Compensation) Law, 1992, as an existing law. The plaintiff claimed that PNDCL294 had unlawfully expropriated his lands and brought an action for a declaration that the law was a nullity for being inconsistent with or contravening the 1992 Constitution. The Supreme Court rejected the claim, holding that PNDCL 294, as an enactment, had been passed and the plaintiff's lands had been acquired and vested in the Republic before the coming into force of the 1992 Constitution on 7 January 1993. Atuguba JSC said82:

"PNDCL 294 relates to matters concluded by it both in terms of the vesting of the plaintiffs' land in the PNDC on behalf of the Republic and as to the quantum of compensation for the same. As these matters do not fall to be done on or after the coming into force of the 1992 Constitution, that Law, even if it is regarded as an operative existing law within the meaning of article 11(5), is incapable of infringing the 1992 Constitution."

In Kangah v Kyere, the Supreme Court held that the Chieftaincy Act, 1971 (Act 370) should be construed as an existing law in so far as it was not inconsistent with any provision of the 1979 Constitution.

5.5 COMMON LAW AND CUSTOMARY LAW

5.5.1 Common law

By article 11(2) of the 1992 Constitution, the common law of Ghana "comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity84 and the rules of customary law including those determined by the Superior Court of Judicature." The terms "common law" and "customary law" as envisaged in article 11(2) of the 1992 Constitution were explained in the context of the Courts Act, 1960 as follows:

"They are the English common law as assimilated to the circumstances of Ghana through the years that justice has been administered according to the English law, and the customs that have passed the test861 have already described and are contained in the body of case law on the subject."

Thus, the common law of Ghana consists of the received English common law and the doctrines of equity as adapted and applied in Ghana as well as customary laws that have been developed by the courts. The Ghana common law has thereby acquired a meaning far removed from the English common law received into Ghana after the Bond of 1844. The object of English common law is said to be:

"...to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of fact abnormal as well as usual. It must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law."

This dictum was made in a case in which the court extended the common law doctrine of agency by necessity to cover a case of sale of goods purchased by an agent on behalf of a principal where unforeseen emergencies arise.

The contents of the above dictum have not been lost on the Ghana courts. They have fashioned the received common law and the equitable doctrines to meet the changing needs of Ghanaian society. Thus, in Re Abotsi; Kwao v Nortey for example, the Court of Appeal held that the equitable rules developed in England, particularly in the context of the case, the equitable rule that a trustee is in a fiduciary capacity vis-a-vis a beneficiary and consequently accountable to him, are applicable in Ghana. In the context of the case, the court held that the patrilineal family of the deceased were fiduciaries vis-a-vis the appellant, an infant, and were therefore accountable to him.

5.5.2 Customary law

Article 11(3) of the 1992 Constitution provides that "customary law" means "the rules of law which by custom are applicable to particular communities in Ghana." Section 18 (1) of the Interpretation Act, 1960 defined customary law as comprised in the laws of Ghana as consisting "of rules of law which by custom are applicable to particular communities in Ghana, not being rules included in the common law under any enactment providing for such assimilation of such rules of customary law as suitable for general application." Two learned writers have commented that no rules have been included in the common law of Ghana under the various enactments which from time to time have provided the means for such assimilation. Consequently, "the authoritative definition of customary law is in practice: rules of law which by custom are applicable to particular communities in Ghana."

Under section 55(1) of the Courts Act, 1993, any question as to the existence or content of a rule of customary law is a question of law for the court and not a question of fact. Thus, under this provision judicial notice is taken of customary law. However, in view of the unwritten nature of customary law, it is further provided that if the court entertains any doubt as to the existence or content of the customary law in any proceedings, it may, after consulting such reported cases, textbooks and other sources as might be appropriate, adjourn the proceedings to enable it hold an inquiry, attended by persons possessing knowledge of the customary law.

Like the English common law, customary law has a flexible characteristic99 and is capable of being adapted to the changing circumstances in which Ghana finds itself. Thus, in Attah v Esson the Court of Appeal held that a customary principle which allowed a customary landlord to enter onto agricultural land granted under customary tenancy to gather the fruits of economic trees was outdated and has ceased to be law. In the words of Amissah JA:

"No proposition would be more out of accord with the hopes and aspirations of Ghanaians today than that a landlord who has spent no effort whatsoever towards that end should enter and collect at will the fruits of the labour of his tenant...We

cannot imagine an arrangement more ruinous of agricultural enterprise, subversive of expansion and consequently prejudicial to national development than that."

Over the years, it has become a well-articulated and sophisticated body of principles catering for the needs of a contemporary society.102 This is due in no small measure to the superior courts' willingness to critically examine and analyse existing customary authorities whenever it became necessary to apply these to new cases with a view to ensuring that customary legal rules and norms are laid upon sound and secure foundation for the future.

5.5.3 Islamic Law

Islamic law in Ghana is not of general application; it is confined only to adherents of Islam and is regarded as a variant of customary law. This is evident from the following dictum from Kwakye v Tuba:

"In the eyes of our law, a marriage by a Mohammedan according to Mohammedan law is at its best a marriage by customary law and does not affect succession to his estate, unless the said marriage is registered under the Ordinance. Therefore if a Mohammedan died not having married or if married not having had his said marriage registered under the Marriage of Mohammedans Ordinance, the only law which can regulate succession to his estate is his personal law, i.e. the customary law of the tribe to which he belonged."

5.6 JUDICIAL PRECEDENT

Judicial precedent forms an important part of the common law as received in Ghana. It describes the tendency on the part of the courts to follow earlier decisions where the facts in the instant case are similar to one already decided. This practice is expressed in the maxim, stare decisis et non quiet a movere which means, stand by past decisions and do not disturb things at rest. As part of the common law it plays an important role within the legal system. The basic pre-requisites for the efficient operation of the doctrine is a settled hierarchy of courts, that is, the position of the courts in relation to each other in the legal system, and a

regular and reliable system of law reporting. The doctrine consists of the rules and principles stated and acted upon by judges in giving decisions in individual cases. Once a matter of principle has been decided by a higher court it becomes a precedent. A judge in a subsequent case to which the same principle is relevant should normally have regard to it in reaching his decision. Precedent in Ghana, like most common law countries is used strictly in the sense that it forms part of the authoritative sources of law. Consequently, as will be seen below, judges are generally bound to follow previous decisions.

5.6.1 Binding element of a decision - Ratio decidendi

It is strictly not correct to state that a previous decision is binding on a court. The only part that is binding is the part that stated the rule of law upon which the decision was based."0 This is the part referred to as the ratio decidendi (reason for the decision, usually referred to in short as ratio). The status of the court has a significant effect on whether its decision will be binding, persuasive or disregarded. Thus, it is constitutionally provided that decisions of the Supreme Court are binding on all other courts in Ghana.1" Every legal decision contains the following elements:

a. Finding of material facts, direct and inferential. An inferential finding of fact is the inference, which the judge draws from the direct or perceptible facts. For example, from the direct facts of the speed of a car, the skid marks and the state of the road, a judge may infer negligence on the part of the driver.
b. Statements of the principles of law applicable to the legal problems disclosed by the facts.
c. Judgment based on the combined effect of (a) and (b) above.

As far as the parties are concerned, element (c) above is the material element in the decision. That is what finally determines their rights and liabilities in relation to the subject matter of the legal action. The judgment is binding on the parties and nobody else and depending on the appeal system, finality to the issue(s) determined must be imposed when the appeal process comes to an end. This requirement of finality is provided for by the doctrine of res judicata (the matter has been decided). For the purpose of the doctrine of precedent, however, element

(b) is the vital element in the decision. This is the ratio decidendi which has been described as:

"any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."

It is this that forms the binding element, which a court in a subsequent case may/must follow depending on the later court's position in the hierarchy of the courts. Thus, the material facts of the case plus the decision thereon, are what constitute the precedent. The material facts will depend on the facts of a particular case. For example, if Kofi were to drive his car negligently on High Street in Accra as a result of which Kwabena was injured, the fact that Kofi had a bald head, a beard and that the accident happened on a Monday morning will be immaterial. This is because the rule of law on which the decision may be based will be equally applicable to other persons who do not have the characteristics of Kofi and to accidents, which occur on other days of the week. On the other hand, the fact that Kofi drove his car at 180 kph in a 60 kph zone as a result of which Kwabena was injured are material and a decision on such facts in favour of Kwabena will be an authority for the preposition that a person is liable for damage caused through negligent driving in a built-up area. The identification of the material facts depends on the appropriate level of generality, or abstraction. The more general or abstract the statement of the facts is, the greater the number of subsequent cases which will fall within the principle which is being formulated, and therefore the wider the ratio will be. An example of this is illustrated by the famous English case of Donoghue v Stevenson. The House of Lords held that a manufacturer of ginger beer could be liable to the ultimate consumer if the ginger beer became contaminated during the manufacturing/bottling process by the presence of a dead snail and the consumer became ill as a result of drinking the ginger beer. Formulating the principle in terms of ginger beer will produce a very narrow ratio, whereas formulating it in terms of food and drink will produce a relatively wide ratio. A formulation of the principle in terms of manufactured goods will produce a still wider ratio.

It must be pointed out that it is sometimes not easy to determine what the ratio of a case is. This is especially so where the previous decision was made by the Supreme

Court or the Court of Appeal which courts are usually constituted by more than one judge. When a court speaks from different mouths a ratio must be sought by reconciling the different judgments, which led to the same order, by finding a lowest common denominator basis for the decision. Different approaches have been suggested and it has been said that it is impossible to assert with confidence that there is any one method of approach which is invariably adopted by judges. However, in determining the ratio of a case, a court will usually consider any one of the following factors:

1. the reason stated by the trial judge as being the basis of his decision;
2. the principle of law stated by the trial judge as that on which the decision was based;
3. the actual decision in relation to the material facts; and
4. the interpretation of the case in any later case determined before the instant case.

As indicated above, the identification of the appropriate level of generality or abstraction at which the earlier case should be looked at is important in determining the ratio.

5.6.2 Obiter dictum

Apart from the ratio decidendi of a case, other statements of law made in the judgment are not binding on a later court. These other statements are referred to as obiter dicta (or dictum' singular). This phrase means, "Something said by the way or a chance remark." The obiter dictum may be of two kinds, namely:

1. a statement of law based upon the facts which either were not found to exist or if found to exist were not found to be material; and
2. statements of law which, although based on the facts as found, did not form the basis for the court's decision.

For example, in the hypothetical illustration of Kofi and Kwabena above, if the judge had said that "Kofi's liability would have been different if he was driving a victim of an accident to hospital", this statement would have been an obiter dictum because such a fact was not found to exist. Thus, in the English case of Rondel v

Worsley the House of Lords stated an opinion that a barrister could be held liable for negligence when he or she was not acting as such, and that a solicitor would be immune from action when acting as an advocate. Since the case actually concerned the liability of a barrister when acting as a barrister, these opinions were obiter dicta. Obiter dicta may have a very persuasive effect, especially when they are made by the highest court in the hierarchy, but a later court is not bound to follow them. One such obiter which came to have this effect was the one made in the English case of Hedley Byrne & Co Ltd v Heller & Partners Ltd. The facts of the case were that HB, advertising agents, were anxious to know whether they could safely give credit to a company, EP, on whose behalf they had entered into various advertising contracts.

They sought bankers' references and their bankers approached HP, EP's bankers, who on two occasions gave favourable references about EP which were said to be "confidential. For your private use..." and which was stated to have been given "without responsibility." These were passed on to HB who relied upon them and incurred expenditure on EP's behalf which were not met when EP went into liquidation. The House of Lords decided that in principle, there could be liability in negligence for a misstatement resulting in financial loss. However, on the facts of the case, all that the court needed to have done was to say that, even if liability existed in principle, the disclaimer would be effective to prevent HB from claiming against HP. Consequently, on the material facts of the case, there was no need for the court to decide whether the liability did actually exist in principle, and it can therefore be said that the statement to that effect was an obiter dictum. The court nevertheless made a comprehensive analysis of the issue of principle and because of that later courts took it as an authoritative statement of the relevant principle. For example, in the English case of Anderson (WB) & Sons Ltd v Rhodes Cairns J said the following about the Hedley Byrne's case (supra):

"When five members of the House of Lords have all said, after close examination of the authorities, that a certain type of tort exists, I think that a judge of first instance should proceed on the basis that it does exist without pausing to embark on an investigation of whether what was said was necessary to the ultimate decision."

Consequently, the degree of persuasiveness attached to an obiter dictum will depend on factors such as the status of the court that made it, the reputation the judge concerned and the intellectual rigour with which he/she analysed the facts of the case. In the Ghanaian context, obiter dicta of the Supreme Court must be treated with similar reverence where it has exhaustively looked at a matter and has pronounced on it, albeit by an obiter dictum.

5.6.3 Mechanism for avoiding a ratio decidendi

5.6.3.1 Distinguishing the facts

A judge can avoid being bound by a ratio of a previous case by distinguishing the facts of that previous case from the case before him. This means that the judge must find that the facts of the present case are materially different from those of the previous case. Facts are never identical although lawyers sometimes say* "this case is on all fours" with a previous case. If the differences are significant, the judge will "distinguish" the earlier case on the facts and thereby avoid following it as a precedent. Distinguishing an earlier case does not usually imply criticism of the correctness of the earlier decision in relation to its own peculiar facts. Furthermore, it does not derogate from its binding effect in other cases. However, if a later court were to express the view that the earlier decision should be "confined to its own facts" this may imply doubt as to the correctness of the earlier decision.

5.6.3.2 The Per incuriam doctrine

Another way of avoiding following a ratio of a previous case is to hold that the previous case was decided per incuriam (through lack of care). This will occur where, for instance, the previous decision was made without taking into account some relevant precedent or statutory provision, which would have affected the decision made in the previous case. Such a decision will not be binding on later courts. As explained by Donaldson MR in the English case of Duke v Reliance Systems Ltd:

".. .the doctrine of per incuriam only applies where [a court] has reached a decision in the absence of knowledge of a decision binding on it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision.. .I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion."

5.6.3.3 The changed circumstances doctrine

This doctrine involves the later court in coming to a conclusion that the reason for the ratio has become untenable in the light of changed circumstances. This is reflected in the maxim cessante ratione, cessat ipsa lex (with the ceasing of the reason for the existence of a legal rule, the legal rule itself ceases to exist). This may be a useful device to adopt by the Supreme Court in deciding whether to follow or depart from its own previous decision.

A precedent may also be avoided by the court declaring it to be too wide or because it has been subsequently overruled by a higher court or been overturned by statute.

5.8 Operation of Judicial Precedent in the courts

5.8.1 The Supreme Court

The Supreme Court is not bound to follow the decisions of any other court. Whilst this is the legal position, decisions of English courts are to be treated with respect, especially where a Ghanaian law which is in issue before the court was modelled on an English statute. The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so. This creates a flexible rule "to save the Supreme Court in embarrassing situations and to enable it to re-examine its own previous decision, to correct or differ from it when it finds such decision to be either manifestly wrong, not only because it was given per incuriam but because of inconsistency with some principle of law or custom and is therefore a decision which for good reason or

other should not be followed." All other courts are bound to follow the decisions of the Supreme Court on questions of law.

5.8.2 The Court of Appeal

The Court of Appeal is bound to follow the decisions of the Supreme Court on questions of law. It is also bound by its own previous decisions. Are there any circumstances in which the Court of Appeal may depart from its own decisions? In other words, are the exceptions to the principle established in the English case of Young v Bristol Aeroplane Co Ltd applicable to the Ghana Court of Appeal? In that case, the English Court of Appeal whilst affirming that it was bound by its own previous decisions established three exceptions the existence of which it may depart from its previous decisions. These were (1) where the previous decision was given per incuriam', (2) where the court was faced by previous conflicting decisions of the court it may choose which one to follow; and (3) where a previous decision of the court although not expressly overruled, cannot stand with a subsequent decision of the House of Lords, the decision of the House of Lords must be followed. The wording of article 136(5) of the 1992 Constitution which makes provision for the court to be bound by its own previous decision is imperative in nature. It uses the phrase "shall be bound by its own previous decisions." Consequently, there is no discretion to depart from previous decisions and as such the exceptions to the principle in Young's case (supra) are inapplicable to the court. But is this rigid adherence to its previous decisions a good thing? It may be argued that in most routine cases this court invariably constitutes a final court of appeal for most litigants and so there is a need for some flexibility in following its previous decisions. Furthermore, the haphazard state in which law reporting is makes it desirable to have such flexibility. It is submitted that the language used in article 136(5) of the 1992 Constitution creates an undesirable rigidity which may cause conflicting decisions and possible injustice to litigants.

5.8.3 The High Court

The High Court is bound to follow the relevant precedents of the Supreme Court and the Court of Appeal on questions of law. In an obiter dictum in Amponsah v Appiagyei (Consolidated) it was suggested that the High Court should refuse to follow a binding decision of the Court of Appeal where that decision is demonstrably wrong. It is submitted that if such a suggestion gains currency it will dislocate the operation of judicial precedent. In this regard, the dictum of Lord Hailsham in the English case of Cassel & Co Ltd v Broome is apposite. His Lordship said:

".. .in legal matters, some degree of certainty is at least as valuable a part of justice as perfection. The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers."

The Court of Appeal in Botswana has expressed similar sentiments on the issue which is worth mentioning. In State v Nkani, Hayfron-Benjamin CJ, at first instance, refused to accept that belief in witchcraft could be an extenuating circumstance in a murder case, despite the existence of Court of Appeal authorities to that effect. The Chief Justice said:

"I do not, of course, readily accept these authorities as binding on me in this case, as in none were the question considered whether conduct which is prohibited by statute can ever be an extenuating factor."

On appeal, Maisel P's reaction to this dictum was that:

"...a proper course for a judge sitting in the High Court, consistent with what was said by Lord Hailsham L.C. [quoted above] would be to follow the decision of the Court of Appeal, but in any case in which he felt the decision or decisions were open to criticism or were incorrect in any way, draw the attention of the Court of Appeal to the error in law which ought to be corrected by the court. The trial judge so doing would not merely have the right but also the duty to do so."

Applying this advice to the context of the suggestion in Amponsah' s case (supra), it is submitted that a High Court judge who finds himself/herself in the situation

described in that case should follow the decision albeit he/she will be at liberty to express his/her reservation.

In the case of inconsistent decisions by the Court of Appeal or the Supreme Court, the High Court may, in its discretion elect to follow one or the other. A High Court judge may refuse to follow a judgment of another High Court judge, being a judge of co-ordinate jurisdiction. However, in order to maintain certainty of judicial decisions, this refusal to follow a previous judgment of a colleague will normally be resorted to where there is a compelling reason for doing so.

5.8.4 Regional Tribunals

The Regional Tribunals, like the High Court, are bound by decisions of the Supreme Court and the Court of Appeal on questions of law.

5.8:5 Lower courts

These courts are bound to follow the decisions of all courts above them in the hierarchy of courts, that is the Regional Tribunals, the High Court, the Court of Appeal and the Supreme Court.

5.8.6 Advantages and disadvantages of judicial precedent

Judicial precedent may be said to have the following advantages and disadvantages:

a. It lends consistency to the law. The rationale of following binding precedent is that the law is decided fairly and predictably. Consequently, in theory, it is possible to avoid litigation because one can predict the outcome of a dispute. In practice, however, judges are sometimes forced to make illogical distinctions to avoid unfair results in particular cases. This combined with the numerous reported and unreported cases, have tended to complicate the law.

b. Following only the reasoning in the ratio of previous cases should lead to the application of general principles. Practical reality though is to the contrary. The same judgment may contain prepositions which appear inconsistent with each other or with the precedent which the court purports to follow and this may lead to uncertainty.
c. It provides the much needed flexibility to the law. Judicial precedent being based on actions brought before the courts is able to change with the circumstances of society. The other side of this is that it tends to inhibit the judge's discretion in that by following a binding precedent an unfair result sometimes occurs. Legislation then becomes the only way to rectify the attendant injustice.

5.9 Law Reporting

A regular, efficient and systematic law reporting is indispensable to the operational efficiency of the doctrine of precedent. However, the history of law reporting in Ghana has been, to say the least, sporadic. It was described some years ago as pathetic and the situation has since not improved to any significant extent. The Ghana Law Reports were first published in 1959 through the auspices of the General Legal Council, a body set up under the Legal Profession Act, 1960, to provide legal education in Ghana. The legal basis for the publication of the reports was doubtful as there was no express provision in Act 32 for their publication. It has been suggested that the General Legal Council may have assumed that the publication of such reports was a necessary incident of their mandate. Before 1959, only seventeen volumes of reports of cases decided in Ghana existed. Out of these, only two volumes were prepared by local lawyers, namely Sarbah's Fanti Law Reports and Danquah's Cases in Akan Law. There were three other sets of law reports covering cases in other British territories in West Africa and containing cases decided in Ghana. These were Renner's Cases in the Courts of the Gold Coast Colony and Nigeria, Selected Judgments in the West African Court of Appeal and West African Law Reports.

In 1972 the Council for Law Reporting Decree, 1972 established the Council for Law Reporting charged with the "responsibility for the preparation and publication of the "Ghana Law Reports" containing the judgments, rulings and opinions of the superior courts of judicature and may also effect any other publications that in the opinion of the Board could conveniently be effected together with the preparation and publication of the reports." The 1972 Decree legitimised the Ghana Law Reports which as indicated above came into existence on a dubious legal foundation. Unfortunately, the formalisation of law reporting did not improve the frequency at which the reports are published as the necessary resources have not been made available over the years to the Council to carry out its mandate. Currently, there is a huge back log of cases which have not been reported.

Existing law reports, with date of (first) publication, include the following:

a. Current Cases. Accra: Council for Law Reporting, 1968.
b. Ghana Law Reports. Accra: Council for Law Reporting, 1959 (also available online through Data Centa Ltd by paid subscription).
c. Ghana Law Reports Digest. Accra: Council for Law Reporting, 1980.
d. Judgments of the Full Courts, held at Accra and Cape Coast, September 1920 and March-April 1921. Accra: Council for Law Reporting, 1980.
e. Judgments of the Full Courts held at Accra and Sekondi: with the Divisional Court Judgments Appealed from March and April, 1922. Accra: Council for Law Reporting, 1985.
f. Law Reports. A Selection from the Cases Decided in the Full Courts of the Gold Coast Colony, the Colony of Lagos and the Colony of Southern Nigeria. Lagos, Nigeria: Federal Government Printer, 1929-1951.21 vols, (also referred to as Nigeria Law Reports).
g. Selected Judgments of the Divisional Courts of the Gold Coast Colony, 29th June 1921 to 31st December, 1925. Accra: Council for Law Reporting, 1926.
h. Selected Judgments of the Divisional Courts of the Gold Coast, 1st April, 1931 to 31st December, 1937. Accra: Council for Law Reporting, 1926.
i. Selected Judgments of the Full Courts. Accra: Gold Coast Government Printer, 1900s.
j. West African Court of Appeals. London: Sweet & Maxwell, 1961-1962. 15 vols, (covering cases decided between 1930 and 1956)

k. West African Law Reports. Achimota: West Africa Law Publishing, 1956-1958.3 vols, (covering cases decided 1956 to 1958).
l. Ghana Law Reports. Published by the General Legal Council.
m. Supreme Court of Ghana Law Reports. Published by Advanced Legal Publications since 1996. It forms part of the New Series of Private Law Reporting.
n. Ghana Bar Association Law Reports. Published by the Ghana Bar Association since 1992.152

CHAPTER 6

ADMINISTRATION OF JUSTICE: THE COURT SYSTEM

As rightly observed by the Report of the Committee of Experts (Constitution), 1991, courts are necessary institutions in any democratic society. They provide an impartial forum in which disputes between individual citizens or institutions and disputes between citizens and the State can be peacefully resolved. They also play the important role of declaring the rights of citizens and of providing reliefs and remedies for the protection of human rights. Thus, according to the constitutional commission set up to make proposals for the 1969 Constitution,

"...Law Courts of Ghana shall be the custodian and the bastion of the liberty and dignity of Ghanaians, the guardian of the Constitution, in short, the citadel of justice. The independence of Judges is an essential prerequisite to the attainment of this objective, and it can be achieved only under certain accepted conditions."

In order for this vision to be translated into practical reality, there must be an untrammelled access to the courts. This is said to be the core value underlying the provision in article 125(5) of the 1992 Constitution, which provides that the Judiciary shall have jurisdiction in all matters civil and criminal, including matters relating to the Constitution, and such other jurisdiction as Parliament may, by law, confer on it. Consequently, the Judiciary, through the courts, has a responsibility to preserve this access in the interest of good governance and constitutionalism. So strong is the Judiciary's conviction of the fundamental value of this responsibility

that even under the yoke of military dictatorship, Edusei J (as he then was) declared in Labone Weavers Enterprises Ltd v Bank of Ghana that:

"I am of the view that every person has an unimpeded access to the law courts of this country, and this basic and fundamental right can only be taken away by express provision of a Decree or an Act of Parliament if that Act does not run counter to any provisions of the Constitution that the country may have."

In this chapter, the various courts set up under the 1992 Constitution and related legislation to administer justice will be discussed.

6.1 STRUCTURE OF THE COURTS

As mentioned in chapter two, the Courts Act, 1971 (Act 372), created a unified court system consisting of (1) the superior courts of judicature made up of the Supreme Court, the Court of Appeal and the High Court of Justice; and (2) inferior courts made up of the circuit court, district court grades I and II and juvenile courts and such other traditional courts as might be established by law.

The Courts (Amendment) Decree, 1972 however varied the unified system set up by Act 372. A full bench of the Court of Appeal was created to replace the Supreme Court at the apex of the unified court system. In 1979 the unified court system, as it operated under Act 372, was restored. Article 114(5) of the 1979 Constitution defined the court system as comprising the superior and inferior courts with the Supreme Court as the final court of appeal.

In 1981 the Provisional National Defence Council (Establishment) Proclamation, 1981 created a dual court system made up of (a) the regular courts, being all the courts in existence immediately before 31 December 1981, namely the superior and inferior courts established under article 114(5) of the then suspended Constitution, 1979; and (b) a system of public tribunals consisting of the National, Regional, District and Community Public Tribunals. The public tribunals established under the Proclamation operated independently of the regular courts for the trial and punishment of offences specified by law. The administration of the public tribunals was vested in the Public Tribunals Board consisting of not less than five members and not more than fifteen members of the public; appointed by the Provisional

National Defence Council (PNDC). Under the Public Tribunals Law, 1984 appeals from the decisions of the community, district and regional public tribunals, went to the National Public Tribunal subject to the right of aggrieved parties to apply to that tribunal to review its own decision. The regular courts did not have jurisdiction to entertain an appeal from the decisions of the public tribunals. Furthermore, decisions of the public tribunals could not be questioned by any of the prerogatives orders such as certiorari and mandamus issued by the High Court. The operation of the tribunal system was described by Africa Watch, an international human rights organisation, in the following words:

"Revolutionary or not, in practice the Public Tribunals in Ghana are a mockery of justice. Ostensibly established to facilitate the administration of justice, and to make it more accessible to ordinary people, they have in fact become an arm of the government. They have undermined respect for the judicial system as an impartial body that is capable of promoting justice and respect for the rule of law."

On the coming into effect of the 1992 Constitution, the unified court system was reinstated. The combined effect of article 126 of the 1992 Constitution and the Courts Act, 1993 as amended by Courts (Amendment) Act, 2002 is to create a court system comprising the following:

a. the superior courts comprising the Supreme Court, the Court of Appeal, the High Courts and the Regional Tribunals; and

b. lower courts and tribunals comprising circuit courts and tribunals; district courts; the judicial committees of the National House of Chiefs, regional houses of chiefs and traditional councils and such other lower courts or tribunals as might be established by law.

6.2 THE SUPERIOR COURTS

The Supreme Court

Jurisdiction of the Supreme Court

By article 129 of the 1992 Constitution, the Supreme Court is the final court of appeal in Ghana. Article 130(1) of the 1992 Constitution grants the Supreme Court

exclusive original jurisdiction in all matters relating to the enforcement or interpretation of the Constitution; and all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under the Constitution. This jurisdiction is subject to the jurisdiction of the High Court in the enforcement of the fundamental human rights and freedoms as provided by article 33 of the 1992 Constitution. Article 2(1) and (2) of the 1992 Constitution gives the court the power to make a declaration on the constitutionality or otherwise of any act or enactment and to make the relevant orders in enforcement of its decisions. The combined effect of articles 2 and 1(2) which establishes the supremacy of the Constitution is that the court has power to declare void any law found to be inconsistent with the Constitution. In Sam (No 2) v Attorney-General the court declared that:

"It is clear then that the jurisdiction under article 2(1) is a special jurisdiction available to citizens of Ghana only, irrespective of personal interest."

The court has appellate jurisdiction from the Court of Appeal, as well as appellate jurisdiction, to the exclusion of the Court of Appeal, "to determine matters relating to the conviction or otherwise of a person for high treason or treason by the High Court." The court also hears appeals from the National House of Chiefs. Supervisory jurisdiction is conferred on the court over all courts in the country whilst it has the final say in matters relating to the production of official documents in court. Finally, the court can review its own decision on such grounds and subject to such conditions as may be prescribed by rules of court. Rule 54 of the Supreme Court Rules, 1996 (CI 16) provides for two grounds upon which the Supreme Court may review its previous decision, namely (a) proof of exceptional circumstances resulting in a grave miscarriage of justice; and (b) discovery of new matter or evidence that has come to light after the decision which with all due diligence had not been within the applicant's knowledge or could not be produced by him earlier, that is at the time when the decision was made. In re Krobo Stool (No 2); Nyamekye (No 2) v Opoku the court held that the lists of matters which might constitute exceptional circumstances were not exhaustive or closed; that mere repetition of grounds of appeal which had been dismissed, was no justification for the granting of the review and that an applicant must show the existence of some fundamental and basic error affecting his substantial rights.

6.2.3 Appeals as of right

Article 131(1) (a) of the 1992 Constitution and section 4(1) (a)-(c) of Act 459 specify the circumstances in which an appeal lie to the Supreme Court as of right. The said article 131 provides that:

"131. An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court"

(a) as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction..."

Section 4(1) (c) of Act 459 additionally provides that an appeal shall lie from a judgment of the Court of Appeal to the Supreme Court as of right, in any case or matter relating to the issue or refusal of writ or order of habeas corpus, certiorari, mandamus, prohibition or .

6.2.4 Appeals by leave

Appeal by leave is provided by article 131(1) (b), (2) and (4) of the 1992 Constitution and section 4(1) (b), (2) and (4) of Act 459. The contents of these provisions are the same. By the former provision, an appeal to the Supreme Court by leave of the Court of Appeal shall lie in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest. Furthermore, the Supreme Court may entertain an application for special leave to appeal to the court in any cause or matter, civil or criminal, and may grant leave accordingly and the court may also hear an appeal by leave granted by it or the judicial committee of the National House of Chiefs from a decision of that house.

6.2.5 Composition of the Supreme Court

The Supreme Court consists of the Chief Justice and not less than nine justices of the Supreme Court. The court is ordinarily duly constituted for the exercise of its jurisdiction by not less than five Supreme Court Justices except when reviewing its own decision when it must be constituted by not less than seven justices of the court. In Tsatsu Tsikata v Chief Justice & Attorney-General? the plaintiff brought an action against the Chief Justice and the Attorney-General under articles 2(1) and 130(1) of the 1992 Constitution, for a declaration, inter alia, that the Practice Direction (Practice in the Empanelling of Justices of the Supreme Court) issued on 10 January 2001 by the Acting Chief Justice, was in conflict with articles 125(4) and 128(2) of the 1992 Constitution and therefore null and void. The plaintiff raised a preliminary objection on the ground that it was against the rule of natural justice and the principle of nemo judex in causa sua (no one should be a judge in his own case) for the Chief Justice, being a party to the action, to empanel the court which was to hear the action. The Supreme Court unanimously dismissed the preliminary objection on the grounds that: (i) the allegation of bias, in the circumstances of the case, could not disable the Chief Justice from performing his functions under article 144(6) of the 1992 Constitution; (ii) the Chief Justice had the prerogative of empanelling the Supreme Court and was thus vested, under article 128(2) of the 1992 Constitution, with the discretionary power to administratively empanel all or the available Justices of the Supreme Court to sit on a case; (iii) the Chief Justice had the discretion under article 133(2) of the 1992 Constitution to empanel justices of uneven number but not less than seven to sit on a review application brought before the Supreme Court; (iv) the Practice Direction was not binding on the court or any person neither did it in any way infringe articles 125(4) and 128(2) of the 1992 Constitution; and (v) in exercising his discretion generally, the Chief Justice was required under article 296 (a) and (b) of the 1992 Constitution to be fair and candid, not capricious or biased by either resentment, prejudice or personal dislike and the discretion should be exercised in accordance with the due process of law.

The Chief Justice shall preside at sittings of the court and in his absence, the most senior of the justices of the court as constituted, shall preside. Qualification for membership of the court is based on high moral character and proven integrity in addition to a minimum of not less than fifteen years standing as a lawyer.

6.3 The Court of Appeal

6.3.1 Jurisdiction of the Court of Appeal

The Court of Appeal has no original jurisdiction. It exercises only appellate jurisdiction. The court has jurisdiction throughout Ghana to hear and determine, subject to the provisions of the Constitution, appeals from a judgment, decree or order of the High Court and the Regional Tribunals and such other appellate jurisdiction as may be conferred on it by the Constitution or any other law. In In re Parliamentary Election for Wulensi Constituency; Zakaria v Nyimakan? the Supreme Court held that the Court of Appeal is the final court of appeal in election petitions, to the exclusion of the Supreme Court.

6.3.2 Appeals as of right

An appeal to the court lies as of right from a judgment, decree or order of the High Court and the Regional Tribunal unless the contrary is provided for by the Constitution. The court can also hear appeals from any judgment of the circuit court. In exercising its jurisdiction, the court is given all the powers authority and jurisdiction vested in the court from which the appeal is brought.

6.3.3 Appeals by leave

A person aggrieved by any interlocutory order or decision made or given by the circuit court may appeal to the Court of Appeal against the order or decision with the leave of the circuit court. If such leave is refused by the circuit court, the aggrieved party can still appeal to the Court of Appeal with the leave of that court.

6.3.4 Composition of the court

The Court of Appeal is composed of the Chief Justice and at least ten other justices. Any three justices may constitute the court for the conduct of its business.[41] To qualify for membership of the court, a person must be of high moral character and proven integrity and must have at least twelve years' standing as a lawyer.

6.3.5 Powers of the Court of Appeal in criminal cases

Section 13 of Act 459 gives the Court of Appeal the following special powers in criminal cases:

13.(1) If it appears to the Court of Appeal that an appellant, though not properly convicted on some count or part of the indictment or charge, has been properly convicted on some other count or part of the indictment or charge, the Court may either confirm the sentence passed on the appellant at the trial, or pass a sentence in substitution for it as it thinks proper and as may be warranted in law by the verdict on the count or part of the indictment or charge on which the Court considers that the appellant has been properly convicted.

2. Where an appellant has been convicted of an offence and the Judge, the jury or panel who tried him, could on the indictment or charge have found him guilty of some other offence, and on finding of the Judge, jury or panel it appears to the Court of Appeal that the judge. jury or panel must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing the appeal, substitute for the verdict found by the Judge, jury or panel a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence.

3. Where on the trial of the appellant, the jury or panel have found a special verdict and the Court of Appeal considers that a wrong conclusion had been arrived at by the Court before which the appellant was convicted on the basis of that verdict, the Court of Appeal may instead of allowing the appeal, order such conclusion to be recorded as appears to the Court of Appeal to be in law required by the verdict, and make such other order as may be warranted in law.

4. Where after the trial of the appellant a special verdict has been found and the Court of Appeal is satisfied that the special verdict was wrongly found the Court of Appeal may set aside the verdict and substitute an order of conviction or acquittal or may make such other order as may be warranted in law.

5. If on any appeal it appears to the Court of Appeal that although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the Court may set aside the sentence passed at the trial and order the appellant to be kept in custody as a criminally insane person in a place and in such manner as the Court shall direct until the pleasure of the President is known and the President may give orders for the safe custody of the appellant.

6. Where the Court of Appeal is of the opinion that the proceedings in the trial court were a nullity either through want of jurisdiction or otherwise, the Court of Appeal may order the appellant to be tried by a court of competent jurisdiction.

7. If the Court of Appeal is satisfied that owing to exceptional circumstances the interest of justice requires that there should be a re-trial, the Court may order a re-trial on such terms and conditions as it thinks fit.

6.4 The High Court

6.4.1 Jurisdiction of the High Court

The High Court has original jurisdiction in all civil and criminal matters and such original, appellate and other jurisdiction as may be conferred on it by the Constitution or any other law. It also has jurisdiction to enforce the fundamental human rights and freedoms enshrined in chapter 5 of the Constitution.

It has appellate jurisdiction over all criminal matters emanating from the Circuit courts, and all appeals from the district courts, juvenile courts and family tribunals. The High Court exercises supervisory jurisdictions over all lower courts and in

exercising this jurisdiction may grant declaratory judgments and orders where appropriate. The question whether the common law jurisdiction of the High Court to issue the prerogative orders of certiorari, mandamus and prohibition, survives under the Constitution or has-been supplanted by its provisions has been raised in some cases that have come before the courts. In Republic v High Court, Denu: Ex parte Kumapley, for example, Twum JSC addressed the issue as follows

"In this country, the common law prerogative basis of the supervisory jurisdiction of our High Court was jettisoned in favour of the constitutional provision contained in article 114 of the 1969 Constitution. By this, the High Court was given supervisory jurisdiction over all inferior and traditional courts in Ghana and any adjudicating authority. The 1979 Constitution revised that jurisdiction to read over all inferior courts in Ghana and any adjudicating authority. The current formula is to be found in article 141 of the 1992 Constitution. The jurisdiction is to be exercised over lower courts and any other lower adjudicating authority. It is clear that this supervisory jurisdiction has been deliberately rehashed to delimit its ambit. From the way learned counsel for the interested party argued, he appears to have been temporarily oblivious of the fact that the common law power has been "overlapped" by article 141. In any event, article 1(2) of the 1992 Constitution is still extant, which provides that the Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of the Constitution is to the extent of that inconsistency, void."

In Republic v High Court (Fast Track Division). Accra; Ex parte CHRAJ (Anane, Interested Party however. Date-Bah JSC expressed the view that the supervisory jurisdiction of the High Court, derived from the received common law, to issue prerogative writs or orders was part of the existing law as stipulated under article 11 of the 1992 Constitution and posed the question whether article 141 of the 1992 Constitution was incompatible with the continued existence of the common law supervisory jurisdiction of the High Court. He disagreed with the view expressed in Ex parte Kumapley (supra) which, upon a close analysis of it, he thought did not form part of the ratio decidendi of that case and consequently, he was at liberty not to follow that view. He answered the question as follows:

"In my view, the common law on the prerogative writs and orders continues in force as existing law alongside that constitutional provision, which merely endorses

a part of that law and buttresses it constitutionally, without setting aside the other parts with which it does not expressly deal. Article 141 of the current 1992 Constitution is accordingly engrafted on to the pre-existing common law on the prerogative writs and orders, since they are not inconsistent one with the other. In other words, there is no implied abolition of the common law supervisory jurisdiction of the High Court, since article 141 is not incompatible with it. This was in effect, the view taken unanimously by the Supreme Court in Republic v High Court, Accra: Ex parte CHRAJ (2003-2004) SCGLR 312."

It can therefore be said without equivocation that article 141 of the 1992 Constitution is supplemented by the existing common law on the prerogative orders.

In 2002, the Chief Justice, in accordance with the power conferred on him by article 139(3) of the 1992 Constitution, created a division of the court clubbed as "Fast-track" court with special procedures to quicken the hearing of cases before the court. The distinguishing feature of the Fast Track High Court is that the court is equipped with sophisticated technological devices. It uses computer-based record transcription system in contra-distinction to the traditional system of recording court proceedings by the very tedious long-hand writing by the trial judge. The purpose of the computer-based record transcription system "is therefore geared to efficient case management and speedy disposal of cases." According to the guidelines on the Fast Track Court issued by the Chief Justice, the court is to have jurisdiction to try cases "directly involving: investors and investments, banks, specified commercial and industrial disputes, election petitions, human rights, prerogative writs and national revenue (of substantial) value and brought by or against government departments or agencies." It also apparently has criminal jurisdiction, judging from the case brought by the State against Mr. Tsatsu-Tsikata before the court on a charge of causing financial loss to the State contrary to section 179A(3)(a) of the Criminal Code, 1960, as amended by the Criminal Code (Amendment) Act, 1993.

The legitimacy of this court was challenged in Tsatsu Tsikata (J) v Attorney-General (I). The Supreme Court initially ruled by a majority of five to four that the "fast-track" court was unconstitutional, because they were created by guidelines issued by the Chief Justice rather than by legislation and consequently,

cannot be a division of the High Court in terms of article 139(3) of the 1992 Constitution. However, upon a review by the same court, the earlier decision was overturned by a majority of six to five. In delivering the leading opinion of the majority, Acquah JSC (as he then was) said:

"The majority's (of the ordinary bench) insistence on putting words into article 139(3) of the 1992 Constitution, when such words are not in the article, with a view to imposing restrictions on the exercise of the Chief Justice's discretion, is not a permissible exercise of the judicial function... If the repealed colonial laws of this country and the archaic English law and practice, required Acts of Parliament or constitutional or statutory instruments for the establishment of divisions in the High Court, the 1992 Constitution of modern Ghana does not say so in its article 139(3)."

Thus, the majority held that the fundamental declaration by the ordinary bench of the Supreme Court to the effect that a division of the High Court could not be established except by an Act of Parliament or a constitutional or statutory instrument was "palpably erroneous and unconstitutional."

There is also a Commercial Division of the High Court mandated to deal exclusively with matters of a commercial nature as provided for under Order 58 of CI 47. An innovation introduced by these commercial courts is the use of "pre-trial settlement conferences" aimed at the resolution of disputes by mediation or other dispute resolution mechanisms other than litigation. Order 58(14) of CI 47 has a schedule of fees at the commercial court that is higher than fees chargeable at the ordinary courts. While the idea behind the "fast-track" and commercial courts is a good one - that of speeding up the administration of justice - it also creates a two-tier court system which denies speedier access to justice to the poor who cannot afford the high fees charged.

Currently, the High Courts operate in distinct geographical jurisdictions rather than a single court throughout the country with branches in the regional capitals. This has resulted in confusion as to where suits are to be filed, and for the opportunity to appeal based on argument that the case was initially filed in the wrong region and has also resulted in suits being brought in two places.

6.4.2 Composition of the High Court

In terms of article 139 of the 1992 Constitution, the High Court is composed of the Chief Justice and not less than twenty justices of the High Court. For the conduct of its business, the court is constituted by a single judge or by a single judge and a jury; or by a single judge and assessors; or by three judges for the trial of offences of high treason or treason as required by article 19 of the 1992 Constitution.[59]

6.5 Regional Tribunal

6.5.1 Jurisdiction of the Regional Tribunal

In terms of article 143(1) of the 1992 Constitution, the Regional Tribunal has jurisdiction to try such offences against the State and the public interest as Parliament may by law prescribe. Under section 24(1) of Act 459, the Regional Tribunal has jurisdiction to try offences arising under the Customs, Excise and Preventive Service Management Law, 1993[61]; Income Tax Decree, 1975[62]; Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990[63] and "any other offence involving serious economic fraud, loss of state funds or property." [64] The tribunal lacks jurisdiction to try a criminal offence if the trial requires the participation of a jury or assessors.[05] Its appellate jurisdiction was extinguished by section 21 of Act 459, as amended by sections 3 and 5 of Act 620.

In exercising its jurisdiction, the Regional Tribunal has all the powers conferred on the High Court by Act 459 or any other enactment and has the power to issue in criminal matters any order or impose any sentence which the High Court may issue or impose.

6.5.2 Composition of the Regional Tribunal

The Regional Tribunal consists of (a) the Chief Justice; (b) one Chairman; and (c) such members who may or may not be lawyers as shall be designated by the Chief Justice to sit as panel members of the tribunal and for such period as may be specified in writing by the Chief Justice. The tribunal is duly constituted by a chairman and not less than two and not more than four other panel members. When

exercising its appellate jurisdiction, it is duly constituted by the chairman and any four members. A person shall not be appointed as chairman of the Regional Tribunal unless he is qualified to be appointed as a High Court judge. A panel member shall be a person of high moral character and proven integrity.

6.6. THE LOWER COURTS

6.6.1 Circuit Court

6.6.2 Jurisdiction of a Circuit Court

By section 41 of Act 459, a circuit court has the following original jurisdiction, that is to say, jurisdiction in civil matters:

"(i) in all personal actions under contract or tort or for the recovery of any liquidated sum, where the amount claimed is not more than GH₵10,000;

(ii) in all actions between landlord and tenant for the possession of land claimed under lease and refused to be delivered up;

(iii) in all causes and matters involving the ownership, possession, occupation of or title to land;

(iv) to appoint guardians of infants and to make orders for the custody of infants;

(v) to grant in any action instituted in the Court, injunctions or orders to stay waste, or alienation or for the detention and preservation of any property the subject matter of that action or to restrain breaches of contract or the commission of any tort;

(vi) in all claims for relief by way of interpleader in respect of land or other property attached in execution of a decree made by a Circuit Court;

(vii) in applications for the grant of probate or letters of administration in respect of the estate of a deceased person, and in causes and matters relating to succession to property of a deceased person, who had at the time of his death a fixed place of abode within the area of jurisdiction of the Court and the value of the estate or property in question does not exceed GH₵10,000..."

It also has any other jurisdiction conferred on it by Act 459 or any other enactment. In this regard, where the amount claimed or the value of any land or property exceeds GH₵10,000 the court will nevertheless have jurisdiction to hear the case if the parties agree that it should do so.

The court now exercises the criminal jurisdiction hitherto exercised by the circuit tribunals which were abolished by section 6(5) of Act 620.

6.6.3 Composition of a Circuit Court

The court is composed of a single judge. This notwithstanding, the Chief Justice, any Justice of the Superior Court of Judicature or a Chairman of a Circuit Tribunal nominated by the Chief justice may sit as a Circuit Court Judge.

6.7 Crime Tribunal

The crime tribunals which used to have original jurisdiction in all criminal matters other than treason, offences tried on indictment and offences punishable by death were abolished by section 6(5) of Act 020. This jurisdiction is now exercised by the circuit court.

6.8 District Court

6.8.1 Jurisdiction of a District Court

The jurisdiction of the district courts is limited to cases with a value of up to GH₵5000. It also has summary jurisdiction in criminal matters for offences punishable by a fine not exceeding 500 units or for a term not exceeding two years. Every district court shall have such other functions as may be conferred or imposed by any other enactment.

6.8.2 Composition of a District Court

The district courts are presided over by magistrates. Depending on their schedule, a magistrate would be assigned to two or more courts.

6.9 Juvenile Court

6.9.1 Composition of a Juvenile Court

The Juvenile Justice Act, 2003 empowers the Chief Justice to designate a district court as a juvenile court. A juvenile court is composed of a magistrate and two other persons, one of whom shall be a social welfare officer. For cases arising under the Children's Act, 1998, the court is constituted by a panel consisting of a chairman and between two and five other members, including a social welfare officer. The court sits either in a different building or room from that in which sittings of other courts are held or on different days from those on which sittings of other courts are held. The rationale behind this provision will seem to be an attempt to decriminalize proceedings of the court and to remove the intimidating characteristics of a criminal trial. No person shall be present at any sitting of the court except (a) members and officers of the court; (b) parties to the case before the court, their lawyer and witnesses and other persons directly concerned in the case; and (c) such other persons as the court may specially authorize to be present.

6.9.2 Jurisdiction of a Juvenile Court

The court has power to hear and determine any matter, civil or criminal, that involves a person of less than 18 years of age. In addition, every district court can sit as a "family tribunal" to hear and determine any action arising under Act 560, including such issues as those concerning parentage, custody, access and maintenance of children. In criminal trials, a case brought against a juvenile shall be dealt with expeditiously. If the case is not completed within six months of the juvenile's first appearance in court, the juvenile shall be discharged and will not be liable for any further proceedings in respect of the same offence.

6.10 National /Regional Houses of Chiefs

The Constitution provides that matters affecting chieftaincy are to be determined by the National House of Chiefs, the regional houses of chiefs and the traditional councils. These institutions are to settle such disputes in accordance with the appropriate customary law and usage.

6.10.1 National House of Chiefs

The National House of Chiefs is made up of five paramount chiefs from each region of the country. The function of the National House of Chiefs is to advise any person or authority on matters affecting chieftaincy, codify customary law and undertake an evaluation of traditional customs aimed at eliminating outmoded customs. A judicial committee, consisting of five members appointed by the house from among its members, performs the judicial functions of the National House of Chiefs. It has original jurisdiction in any case affecting chieftaincy, which lies within the competence of two or more regional houses of chiefs and in any case which is not properly within the jurisdiction of a regional house of chiefs, or which cannot otherwise be dealt with by a regional house of chiefs.

The National House of Chiefs has appellate jurisdiction in any cause or matter affecting chieftaincy which has been determined by the regional house of chiefs. Appeals lie as of to the Supreme Court in cases decided by the National House of Chiefs in its original jurisdiction and by leave in cases decided in appellate jurisdiction.

6.10.2 Regional House of Chiefs

There is a regional house of chiefs in each of the ten regions of the country. The regional houses of chiefs advise persons and authorities on chieftaincy matters, make recommendation for the early resolution of chieftaincy disputes and undertake the compilation of the customary laws and lines of succession applicable to each stool or skin in the region. The juducial committee of a regional house of chiefs, consisting of chiefs appointed by the House from among its members, has original jurisdiction in all matters relating to a paramount stool skin or the occupant of a paramount stool or skin, including a queenmother to a paramount stool or skin. It

also has jurisdiction to determine appeals from the traditional councils in the region in respect of the nomination, election, selection, installing of a person as a chief.

Traditional councils have jurisdiction to hear and determine chieftaincy matters within their areas not being a matter which the Asantehene or a paramount chief is a party. Section U (1) of the Chieftaincy Act, 2008[92] makes provision for the establishment of judicial committees of divisional councils to hear matters relating to chieftaincy.

CHAPTER 7

JUDICIAL PERSONNEL

Justice, according to article 125(1) of the 1992 Constitution, emanates from the people of Ghana and shall be administered in their name by the Judiciary which shall be independent and subject only to the Constitution. Consequently, article 125(3) of the 1992 Constitution vests the judicial power of Ghana in the Judiciary and excludes the President, Parliament and any organ or agency of the President or Parliament from having a final judicial power. Thus, the judiciary has exclusive power to determine all justifiable disputes. This is in consonance with the doctrine of separation of powers as it applies to the relationship between the Judiciary and other branches of government. If the other branches of government were to exercise concurrent judicial powers over the same persons and the same matters as the Judiciary, this will not only render the doctrine meaningless but it will also undermine the independence and standing of the Judiciary. In this chapter, the judicial personnel who carry out this constitutional mandate will be considered. Their appointment, tenure, independence and ancillary matters will be discussed.

7.1 JUDICIAL COUNCIL

The majority of judicial appointments are made on the advice of the Judicial Council, a constitutional body set up under article 153 of the 1992 Constitution, with a mandate to carry out the following functions:

"(a) to propose for the consideration of Government, judicial reforms to improve the level of administration of justice and efficiency in the Judiciary;

(b) to be a forum for consideration and discussion of matters relating to the discharge of the functions of the Judiciary and thereby assist the Chief Justice in the performance of his/her duties with a view to ensuring efficiency and effective realization of justice; and

(c) to perform any other functions conferred on it by or under this Constitution or any other law not inconsistent with this Constitution."

The Council has 19 members, including the Chief Justice, the Attorney-General, one justice each from the Supreme Court, the Court of Appeal and the High Court, two representatives of the Ghana Bar Association, and other members of the legal profession, as well as four non-lawyers appointed by the President.

7.2 JUDGES OF THE SUPERIOR COURTS

7.2.1 Appointment of the Chief Justice

In terms of article 144(1) of the 1992 Constitution, the Chief Justice shall be appointed by the President acting in consultation with the Council of State and with the approval of Parliament. To qualify for such appointment, article 128(4) of the 1992 Constitution provides that a person shall be of high moral character and proven integrity and must be of not less than fifteen years' standing as a lawyer. In Ghana Bar Association v Attorney-General the Supreme Court was asked to rule on the constitutionality of the appointment of Justice I K Abban as the Chief Justice. The facts of the case were that the President on 15 February 1995, acting in pursuance of articles 91(1) and 144(1) of the 1992 Constitution, and in consultation with the Council of State, nominated Justice IK Abban, a Supreme Court judge, for approval by Parliament as the new Chief Justice of Ghana in succession to Justice Archer, the incumbent Chief Justice, who was soon to retire. Parliament granted the approval under a certificate of urgency and Justice Abban was duly appointed by the President on 22 February 1995. The plaintiffs, invoking the original jurisdiction of the Supreme Court under articles 2(l)(a) and (b) and 130(1) of the 1992 Constitution, brought the instant action against the Attorney-General as first

defendant and Justice Abban as second defendant. The plaintiffs asked the court to grant them the following reliefs:

1. A declaration that on a true and proper interpretation of articles 2(1) (a) and (b), 91(1) and (2), 128(4) and 144(1) of the 1992 Constitution, the President of the Republic should not have nominated and appointed the second defendant Mr. Justice Isaac Kobina Abban, to the office of Chief Justice since he is not a person of high moral character and proven integrity.

2. A declaration that the appointment on or about 22 February 1995 by the President of the second defendant, Mr. Justice Isaac Kobina Abban, as Chief Justice as well as the advice by the Council of State and the approval by Parliament of his nomination to such office were each made in contravention of articles 91(1) and (2), 128(4) and 144(1) of the 1992 Constitution, and are therefore null and void.

3. An injunction restraining the second defendant from acting - or purporting to act in the office of Chief Justice of Ghana.

4. A declaration that the warrant of appointment of the second defendant by the President is null and void, and an order that the second defendant deliver up same to this honourable court for cancellation and that the same be duly cancelled.

The court unanimously dismissed the action on a preliminary objection to the jurisdiction of the court raised by the defendants. The court held, following an earlier similar decision, that the reliefs claimed by the plaintiffs would have the effect of indirectly removing the second defendant as the Chief Justice without complying with the mandatory special procedure for removing the Chief Justice set out under article 146 of the 1992 Constitution. In support of the decision of the court, Bamford-Addo JSC said that what the plaintiffs, in actual fact, were seeking from the court was the removal of the Chief Justice from office since an injunction and a cancellation of his warrant of appointment would result in his removal. The fact that reliefs (3) and (4) were not couched in that mode, made no difference to the true nature of the claim. The learned justice of appeal emphasized that it was the duty of the court to decide on the true nature of a claim, however camouflaged or disguised in another form, in order to decide whether or not the court was clothed

with the requisite jurisdiction to entertain a case under article 130 and other provisions of the 1992 Constitution. The effect of the decision is that no procedure other than that laid down by the 1992 Constitution in terms of article 146 for removing justices of the Supreme Court would be resorted to and enforced.

Thus, the opportunity for the court to interpret the phrase "high moral character and proven ability" as stated in article 128(4) of the 1992 Constitution was lost.

7.2.2 Appointment of Justices of the Supreme Court

Article 144(2) of the 1992 Constitution provides that justices of the Supreme Court (apart from the Chief Justice) shall be appointed by the President "on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament." In terms of article 128(4) of the 1992 Constitution, a person shall qualify to be appointed to the Supreme Court if he/ she is of high moral character and proven integrity and has at least fifteen years' standing as a lawyer.

7.2.3 Appointment of Justices of the Court of Appeal/High Court/Chairmen of Regional Tribunals

These judges are appointed in terms of article 144(3) of the 1992 Constitution by the President acting on the advice of the Judicial Council. By article 136 (3) of the 1992 Constitution, to qualify to be appointed to the Court of Appeal, one needs to be of high moral character and proven integrity and has at least twelve years' standing as a lawyer. Similarly, a person qualifies to be appointed to the High Court/Chairman of the Regional Tribunal if he/she is a person of high moral character and proven integrity and is of at least ten years' standing as a lawyer.

A glaring fact that can be seen from the above constitutional provisions is that there is a very strong executive influence in the appointment of judges of the superior courts. The provisions do not provide a rigorous check on executive power. References to the Council of State and the Judicial Council for "advice" do not add the required rigour to the appointment process. In the appointment of the

Chief Justice, for example, the Council of State, an advisory body, a majority of its members being appointed by the President, is to be consulted but one wonders the extent of the "consultation." It has been said in the Ghanaian political context,

"consultation" can merely mean "informing." This coupled with the fact that parliamentary approval of the appointment is by a simple majority, which is likely to be obtained if the President's party has a clear majority in Parliament, makes the provisions for the appointment of the Chief Justice subjected to undue influence of the executive. In the case of the appointment of other superior court judges, the "advice", whatever that will entail, of the Judicial Council has no binding effect on the President. There is a clear need to increase the independent input in the appointment process of judges to the superior bench. The President may, for example, establish a convention by which the Judicial Council nominates candidates for judgeship and the President then makes the appointment from those nominated. This will to some extent enhance the independence of the appointment process. However, the ideal solution will be to establish a Judicial Service Commission which will consider and make recommendation to the President for the appointment of superior court judges.

Another criticism that can be leveled against the appointment process of superior court judges is that the 1992 Constitution does not put an upper limit to the number of judges that may be appointed to the Supreme Court. Article 128(1) of the 1992 Constitution only provides that the Supreme Court shall consist of the Chief Justice and not less than nine other justices of the court. This provision may be susceptible to political manipulation of the membership of the court. A hint of such use of article 128(1) of the 1992 Constitution may be gleaned from the appointment of Justice Afreh to the Supreme Court in March 2002. His appointment was made immediately prior to the Supreme Court's review of the Tsatsu-Tsikata v Attorney-General (No 1) in which the constitutionality of the "fast-track" court was in issue. The President's promotion of Justice Afreh from the Court of Appeal to the Supreme Court increased the membership from 10 to ll. When the case was finally reviewed, the earlier decision of the ordinary bench was overturned by a majority of 6 to 5 in favour of the State and coincidentally, Afreh JSC was among the majority. This act on the part of the President was perceived by the public as amounting to executive attempt to influence the decision of the court.

It should also be noted that apart from the qualification set out in the various articles of the 1992 Constitution for the appointment of judges, no formal training is required for such appointments. However, the Judicial Training Institute set up under the Judicial Service Act, I960, offers continuing legal education for judges as well as orientation training.

7.3 APPOINTMENT OF PRESIDING OFFICERS OF LOWER COURTS

Magistrates or other presiding officers over the lower courts, as well as the registrars or judicial secretaries of the superior courts (collectively known as judicial officers) are appointed by the Chief Justice acting on the advice of the Judicial Council, and subject to the approval of the President.

7.4 THE JUDICIAL FUNCTION

The judicial function is the core of the legal system and it involves judges exercising the judicial power of the State as provided for by article 125(3) of the 1992 Constitution. Judicial power has been defined as follows:

"The words 'judicial power'.. .mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

The onerous nature of the exercise of judicial power was stated by Chief Justice Marshall of the United States Supreme Court as follows:

"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful.

With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise

of jurisdiction which is given, than to usurp that which is not given. The one or the other is treason to the Constitution."

Judicial power has as its necessary attribute, the ability of the tribunal which made the decision to take action so as to enforce that decision in the event of its disobedience. Thus, as aptly put by Apaloo JA (as he then was) in Akainyah v The Republic:

"It would seem therefore that an essential attribute of judicial power is not only the power to decide on the claims of parties in accordance with established principles of law, but also the power to enforce those decisions."

The judicial function, therefore, requires judges to adjudicate upon disputes by objectively and impartially applying established rules of law to the facts of particular cases and arriving at a decision warranted by the justice of the case. It also involves making declarations on the legal rights of litigants as well as reviewing decisions that have already been taken. This is what has been described as "the disinterested application of known law" and it takes up a greater part of the judicial function. However, there is more to it than meets the eye. The position of judges is such that they do preside over a variety of factual situations the vast majority of which are accommodated by the law but there are few of them which, however hard they strive to bring them within the known law, they are unable to do so, thereby leaving the litigants without a remedy. In this latter circumstance, the question has been asked whether they should seek opportunities creatively to develop the law or even reform the law, or should they leave law reform to the legislature? The general answer to this question is twofold: (1) judges should broadly remain passive, that is they should interpret the law and leave reform to the legislature; and (2) judges should be active in reforming the law, that is they must be innovative in interpreting the law. As to which of these answers our judges should subscribe to, one needs to be reminded that the doctrine of separation of powers underpins our Constitution. This doctrine ensures that each arm of State in the performance of its duties within the framework of the Constitution acts independently and should not be obstructed in the exercise of its legitimate duties or be duly interfered with. It also ensures the smooth administration of the judicial,

legislative or executive governance of the State whilst checks and balances are provided to ensure strict observance by each arm of State of the provisions of the Constitution. In the light of our Constitution, therefore, it will seem appropriate that the first answer should prevail in our circumstances. However, in dispensing justice, judges are often called upon to balance a variety of interests and in so doing they must be creative in the way they interpret the law. This may sometimes lead to judicial legislation which may be criticized as usurping the legislative role of the legislature. As Wood CJ reminded judges in Republic v High Court (Fast Track Division), Accra; Ex parte CHRAJ (Anane, Interested Party), the function of a court is to interpret legislation and give effect to it, even if where the terms appear unpalatable. Care must therefore be taken to avoid legislating under the guise of interpretation. That said, one of the greatest American judges, Oliver Wendell Holmes once said:

".. .1 recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[24]

The question therefore is how does a judge know where interpretation ends and legislation begin? The doctrine of separation of powers under the Constitution is a sure guide to an answer to the question. However, in the exercise of their functions, judges must not be timorous souls but be bold spirits; they must respect both the traditions of the past and the convenience of the present and reconcile liberty and authority; the whole and its parts. In doing all these they may wittingly or unwittingly cross the boundaries of interpretation into the realm of legislation. If and when this occurs in a genuine attempt to advance the public interest it must be accepted as an unavoidable consequence of the exercise exercise of judicial power. What should not be countenanced though is for them, in the name of doing justice to take shelter under institutional self-righteousness and act in a way that will upset the delicate balance between the three arms of State.

7.4.1 Extra-judicial functions

Judges are sometimes appointed to perform functions which fall outside their normal judicial functions. Under the National Liberation Council (NLC) regime, for example, a number of commissions/committees of inquiry chaired by judges

were set up to probe certain aspects of the Nkrumah regime. There was the Justice Azu Crabber's Commission to inquire into the activities of Nadeco, a company which was used by the Convention People's Party (CPP), the governing party to finance its activities; the Justice Apaloo's Commission which inquired into the extent of Nkrumah's properties; the Justice Ollennu's inquiry under the Corrupt Practices (Prevention) Act, 1964 (Act 23D) into irregularities and malpractices connected with the issuance of import licences; the Justice Jiagge's and Manyo Plange's Assets Commissions which investigated the assets of ministers, party functionaries and some named individuals connected to the Nkrumah regime. Recent commissions of inquiry set up to investigate various matters and headed by judges include: The Commission of Inquiry into Ghana Water Company (Justice Adade's Commission); the Yendi Skin Affairs (Justice Wuaku's Commission) and the Justice Duose's Commission of Inquiry into the activities of Ghana @50 Secretariat.

Whilst it may be politically expedient to appoint judges to chair these commissions, this may throw them into the arena of politics thus compromising their integrity and partiality, especially where they are still sitting on the bench. In the latter case, there is also a risk, however remote, that a judge's performance in these extrajudicial functions may be influenced By an expectation of being rewarded by an appointment to a higher judicial office. There is also the risk that a sitting judge who has presided over a commission may, upon the resumption of his judicial functions, adopt a position that will affirm or defend the position he took when chairing the commission thus undermining his independence and impartiality. Consequently, if judges are to be used for these extra-judicial functions, their number should be confined to those who have retired from the bench. It is gratifying to note that successive governments have generally adhered to this practice.

7.4.2 Administrative functions

Judges may also perform administrative functions. For example, under article 148 of the 1992 Constitution, the Chief Justice is designated the appointing authority for judicial officers, that is persons presiding over lower courts or tribunals, the

Judicial Secretary or registrars of the superior courts.[27] These appointments are made on the advice of the Judicial Council. The Chief Justice also has power under section 104 of Act 459 to transfer a case from one judge or tribunal to any other judge or tribunal. Furthermore, the Chief Justice is given power by section 108 of Act 459 to select the court or tribunal to hear any cause or matter where there is doubt. By the same token, a judge of the High Court in civil matters can transfer a case from one district court to another or from a district court to a circuit court.

7.5 SECURITY OF JUDICIAL OFFICE

7.5.1 Tenure of office

The security of judicial tenure is a fundamental prerequisite to the independence of judges. It contributes substantially to the insulation of judges from external pressures be it from the executive, the legislature or any other organized group or individual within civil society. In this connection, the 1992 Constitution provides relatively long periods for the tenure as a judge. Article 145(1) of the 1992 Constitution provides that a justice of a superior court or a chairman of the Regional Tribunal may retire at anytime after attaining the age of 60 years. By article 145(2) of the 1992 Constitution a justice of a superior court or a chairman of Regional Tribunal shall vacate his office

"(a) in the case of a Justice of the Supreme Court or the Court of Appeal, on attaining the age of seventy years; or

(b) in the case of a Justice of the High Court or a Chairman of a Regional Tribunal, on attaining the age of sixty-five years; or

(c) upon his removal from office in accordance with article 146 of this Constitution."

Notwithstanding that a judge has attained the age at which he is required to vacate his office, article 145(4) of the 1992 Constitution provides that a person holding office as a justice of a superior court or chairman of the Regional Tribunal may continue in office for a period not exceeding six months after attaining that age, as may be necessary to enable him to deliver judgment or do any other thing in

relation to proceedings that were commenced before him previous to his attaining that age.

From the above provisions, one will say that in practical terms, judges have substantial security of tenure to perform their duties. But as it will be seen presently, this is subject to their being of good behaviour and performing their duties to an accepted level of competence.

7.5.2 Removal from office

The procedure for the removal of a judge from office is expressly set out in article 146 of the 1992 Constitution. The said article provides as follows:

"146. (1) A Justice of the Superior Court or a Chairman of the Regional Tribunal shall not be removed from office except for stated misbehaviour or incompetence or on ground of inability to perform the functions of his office arising from infirmity of body or mind.

(2) A Justice of the Superior Court of Judicature or a Chairman of the Regional Tribunal may only be; removed in accordance with the procedure specified in this, article.

(3) If the President receives a petition for the removal of a Justice of a Superior Court other than the Chief Justice or for the removal of the Chairman of a Regional Tribunal, he shall refer the petition to the Chief Justice, who shall determine whether there is a prima facie case.

(4) Where the Chief Justice decides that there is a prima facie case, he shall set up a committee consisting of three Justices of the Superior Courts or Chairmen of the Regional Tribunals or both, appointed by the Judicial Council and two other persons who are not members of the Council of State, nor members of Parliament, nor lawyers, and who shall be appointed by the Chief Justice on the advice of the Council of State.

(5) The committee appointed under clause (4) of this article shall investigate the complaint and shall make its recommendations to the Chief Justice who shall forward it to the President.

(6) Where the petition is for the removal of the Chief Justice, the President shall, acting in consultation with the Council of State, appoint a committee consisting of two Justices of the Supreme Court, one of whom shall be appointed chairman by the President and three other persons who are not members of the Council of State, nor members of Parliament, nor lawyers.

(7) The committee appointed under clause (6) of this article shall inquire into the petition and recommend to the President whether the Chief Justice ought to be removed from office.

(8) All proceedings under this article shall be held in camera, and the Justice or Chairman against whom the petition is made is entitled to be heard in his defence by himself or by a lawyer or other expert of his choice.

(9) The President shall, in each case, act in accordance with the recommendations of the committee.

(10) Where a petition has been referred to a committee under this article, the President may

(a) in the case of the Chief Justice, acting in accordance with the advice of the Council of State, by warrant signed by him, suspend the Chief Justice;

(b) in the case of any other Justice of a Superior Court or of a Chairman of a Regional Tribunal, acting in accordance with the advice of the Judicial Council, suspend that Justice or that Chairman of a Regional Tribunal.

(11) The President may, at any time, revoke a suspension under this article."

These provisions are designed to ensure transparency and due process before a judge is removed from office. In Ghana Bar Association v Attorney-General the Supreme Court held that the provisions of article 146 of the 1992 Constitution are the only legitimate means by which a judge may be removed from office. Any other procedure, the end result of which will lead to the removal of such a judge, will not be countenanced. It follows from this that it is only when the processes set out under article 146 of the 1992 Constitution have been gone through and a recommendation made to and accepted by the President will a judge be removed from office. Article 146 of the 1992 Constitution therefore ensures a strong system

of judicial tenure "at the back end-the removal end" of a judge's tenure on the bench.

However, the unsatisfactory nature of the provisions for the removal of the Chief Justice was revealed by the case of Agyei Twum v Attorney-General & Akwetey. The second defendant filed a petition with the President under article 146(6) of the 1992 Constitution for the removal from office of the then Chief Justice, Justice Kingsley Acquah. In the petition he alleged certain improprieties on the part of the Chief Justice in particular, victimization of certain judges for refusal to take instruction from the Chief Justice with regard to cases they were handling, and called on the President to set up a committee to investigate the said improprieties. The President duly appointed the committee but whilst the committee was carrying out its investigations, the plaintiff brought an action in the Supreme Court under article 2(1) of the 1992 Constitution challenging the President's decision to set up the committee to investigate the alleged improprieties of the Chief Justice. The plaintiff sought, inter alia, a declaration to the effect that the President's appointment of the committee to investigate the alleged acts of impropriety on the part of the Chief Justice was interference of judicial independence as provided by article 127(1) and (2) of the 1992 Constitution and that article 146(6) of the 1992 Constitution should be construed concurrently with article 146(3) and (4) of the 1992 Constitution which requires a prima facie case to be established before a committee is set up to investigate allegations against a judge of the superior court of which the Chief Justice was part.

In the lead judgment read by Date-Bah JSC, the Supreme Court held that that the President's appointment of a committee to investigate the alleged acts of impropriety on the part of the Chief Justice was unconstitutional as no prima facie case had been made. The court was of the view that it would have undesirable consequences and affect the balance of power if the gap in article 146(6) of the 1992 Constitution was not filled to imply a prima facie case as a prerequisite to the setting up of a committee to investigate alleged wrong doing of the Chief Justice. He added that the duty of determining a prima facie case should rest with the Council of State which, he recommended, should establish a convention of engaging independent and reputable lawyers to advise them on the evidence. On the petition sent to the President, Modibo Ocran JSC expressed the view that its contents were second and third generation allegations with little evidence of first

hand knowledge and lacked the sort of seriousness that ought to be attached to such an action and as such it was difficult to characterize it as a petition within the ambit of article 146 of the 1992 Constitution. Asiamah JSC described it as "mere speculating musings and conjecture" which, if entertained by the courts, would fuel mistrust in the judiciary and institute procedural terrorism in the administration of justice.

This purposive interpretation of article 146 of the 1992 Constitution, though welcome, demonstrated the short comings of the provision for the removal of the Chief Justice which is less stringent than that for the removal of a judge of the superior court. As article 146(6) of the 1992 Constitution stands, it is easier to remove the Chief Justice from office as the provision does not expressly provide for a prima facie case to be made before the process of removing the Chief Justice is set in motion. It is this anomaly that the Supreme Court sought to address by reading into the provision the requirement for the establishment of a prima facie case by the Council of State before a committee can be set up to investigate allegations against the Chief Justice. Thus, interpreted article 146(6) of the 1992 Constitution has been synchronized with article 146(3) and (4) of the 1992 Constitution with regard to the removal of a judge of the superior court.

7.5.3 Judicial independence

A great deal has been written on the topic of judicial independence but in spite of this effort there is no general agreement of what judicial independence means. The main cause of this lack of definitional unanimity is the fact that the concept is relative and not absolute. It does not refer to a single type of relationship or something that a judicial system "has" or "does not have", but rather it may have "more of it" or "less of it." Notwithstanding the lack of definitional unanimity, it has been asserted that there is broad consensus among scholars that an independent judiciary must have these three attributes, namely (1) it must be impartial; from undue influence. A possible fourth attribute may be that it must be capable of rendering justice on all issues of substantial legal and constitutional importance. Based on these attributes, a possible definition of judicial independence will be one that is free to render justice on all issues of substantial legal and constitutional

importance, fairly, impartially, in accordance with the law, without threat, fear of reprisal, intimidation or any other undue influence or consideration. There have been many studies that have underlined the value of judicial independence and the general conclusion that emerges from these studies in the context of judicial independence in African countries is said to be that "the constitutionalisation of a credible framework that ensures the independence of the judiciary signifies a clear pre-commitment to certain minimum standards of civilised behaviour for the respect for constitutional norms and the rule of law in a way that will likely promote democratic consolidation."

The 1992 Constitution contains detailed provisions aimed at promoting and ensuring the independence, integrity and impartiality of the judiciary. Article 125(1) of the 1992 Constitution provides that justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to the Constitution. This is buttressed by article 125(3) of the 1992 Constitution which provides that the judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power. Furthermore, article 125(5) of the 1992 Constitution states that the Judiciary shall have jurisdiction in all matters civil and criminal, including matters relating to the Constitution, and such other jurisdiction as Parliament may, by law, confer on it. In order to further cement judicial independence, article 127(1) of the 1992 Constitution provides that in the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be subject to the control or direction of any person or authority. In this regard, the administrative expenses, including all salaries, allowances, gratuities and pensions payable to persons serving in the Judiciary are, in terms of article 127(4) of the 1992 Constitution, charged on the Consolidated Fund. It is further provided by article 127(5) of the 1992 Constitution that such salaries, allowances and other privileges and conditions of service attached to the office of a judge shall not be varied to the disadvantage of the incumbents.

The cumulative effect of the above constitutional provisions is that a strong theoretical framework has been established to ensure that the Judiciary remains truly independent in the execution of its constitutional mandate of exercising the

judicial power of the State on behalf of the people of Ghana. However, the practical question one may ask is whether the de facto reality of judicial independence mirrors its de jure counterpart? Surveys conducted in 2003 indicated that there were still perceptions among the public that the Judiciary is subject to executive influence. "In particular, the structural independence of Ghana's judges is undermined by weaknesses in the appointments process. Of particular concern is lack of guaranteed independent input into the choice of judges.

Unlike several other African countries, including South Africa, Malawi and Nigeria, Ghana does not have a Judicial, Service Commission or an equivalent body that has a strong role in judicial appointments. The consultative nature of the Judicial Council established under article 153 of the 1992 Constitution gives the president almost complete discretion as the appointing authority for the Chief Justice and other superior court judges. Magistrates and circuit court judges are appointed by the Chief Justice. Although the practice in recent years has been for a more regularized and merit-based process, with examinations and interviews by the Judicial Council, this is not guaranteed by any legally binding instrument."

To further strengthen the provisions on judicial independence, it has been suggested that the Constitution and legislation should be amended to ensure that the system for appointment of the Chief Justice (and other superior court judges) meets the minimum threshold requirements set by the International Bar Association for the involvement of the Judicial Council. Ghana should follow the Nigerian example where the Judicial Council makes a recommendation on the Chief Justice to the President. Furthermore, the mechanisms put in place for the removal of the Chief Justice should also be strengthened, along the lines set for other justices of the superior courts, such as the establishment of a prima facie case of misconduct before the process can be initiated.[43] Approval by Parliament of judges of the superior courts should be by a super, as opposed to a simple, majority.

The overall impression one gets of the constitutional provisions on judicial independence is that they currently work fairly well in practice although there is some evidence that in past administrations there were cases of intimidation and arbitrary dismissals of judges by the executive. The practical danger to the continuance of judicial independence is either to take it for granted and not strive to maintain it or the Judiciary itself compromises its independence by bending to

the will of vested interests be it the executive or otherwise. Fortunately, the Judiciary seems to be alive to the latter danger as exemplified by the dictum of Atuguba JSC in his dissenting opinion in Tsatsu Tsikata (No 1) v Attorney-General (No 1) in which he said:

"The judiciary itself cannot waive its independence under articles 125 (1) and 127 (1) of the 1992 Constitution by acquiescing in the administration of justice in the name of the President or other authority or person, rather than the Republic."

This awareness of possible judicial acquiescence in undermining judicial independence is also seen from the dictum of Kpegah JSC in Agbevor v Attorney-General. The learned Justice of the Supreme Court said:

".. .the [Judicial] Council, in effect, recommended to the President to do an act which is in clear violation of article 127(1), which guarantees, in very robust language, the independence of the Judiciary in its administrative matter."

This was a case in which the Judicial Council ostensibly recommended the dismissal of the Deputy Judicial Secretary to the President who, based on that recommendation, dismissed the said secretary. The Supreme Court unanimously held that the dismissal of judicial officers, a term applicable to the plaintiff, is solely vested in the Chief Justice in terms of article 151 (1) of the 1992 Constitution on grounds only of stated misbehaviour, incompetence or inability to perform the functions of the office arising from infirmity of body or mind. If any of these grounds is proved against a judicial officer, it must be supported by the votes of not less than two-thirds of all the members of the Judicial Council. The flagrant disregard of the constitutional provisions in this case by the Judicial Council was stigmatized as not only undermining its own authority under article 151(1) of the 1992 Constitution but also undermining the Chief Justice as the disciplinary authority of judicial officers.

One may comment that such robust judicial pronouncements on attempts to compromise their independence is commendable and if they prevail will go a long way to ensure the continuance of the constitutionally guaranteed independence of the Judiciary. That said, the recent vitriolic attack on the Chief Justice following the discharge of the accused persons in the Ghana @ 50 trial, sets a worrisome precedent which if not checked may seriously undermine judicial independence.

The sustenance of judicial independence should be a shared responsibility by which the executive, the legislature, the Bar, the Judiciary itself and the citizenry should play a constructive role in jealously fostering and maintaining its continuous existence. Any calculated attempt to undermine judicial independence, irrespective from which quarter it emanates, should be roundly condemned by all and sundry.

7.5.4 Judicial immunity

Judicial immunity involves the granting of immunity from both civil and criminal proceedings to judges whilst carrying out the duties of their office. The immunity is designed to encourage judges to act in a fair and just manner, without regard to the possible extrinsic harms their acts may cause outside of the scope of their work and also to protect them from harassment from those whose interests they might negatively affect. Historically, judicial immunity was associated with the English common law idea that "the King can do no wrong." Judges, as the King's delegates for dispensing justice, accordingly "ought not to be drawn into question for any supposed corruption, for this tends to the slander of the justice of the King." There is no gainsaying that judicial immunity enhances judicial independence. In recognition of this fact and in providing for judicial independence under article 127 of the 1992 Constitution, article 127(3) of the 1992 Constitution provides that a Justice of the Superior Court, or any person exercising judicial power, shall not be liable to any action or suit for any act or omission by him in the exercise of the judicial power. The essence of this provision is to confer on judges the requisite constitutional immunity to enable them to do their work without being inhibited by external threats of legal proceedings.

It must be observed that the ambit of article 127(3) of the 1992 Constitution is limited to things said and done in the exercise of judicial power and is not personal to the judge. Thus, this immunity may not be invoked where a judge acts in a personal or administrative capacity. Furthermore, it must be said that judicial immunity also extends to participants of the legal process. Thus, the House of Lords held in R v O'Connor and R v Mirza (conjoined appeals) that the jury is invested with judicial immunity. They have full judicial privilege and are not accountable for anything said or done in the

discharge of their duties. The appeals raised the question whether evidence about the deliberations of a jury, which reveal a lack of impartiality on the part of the jury, is always inadmissible under the common law secrecy rule however compelling the evidence may be and however grave the circumstances of the lack of impartiality may be. Certain jurors had complained publicly about the deliberations of the jury in the two trials in which majority verdicts of 10:2 had been returned. The house expressed the view that there was a strong rebuttable presumption that the jury was impartial[52] and several cases have held that it was never permissible to admit evidence of what happened during the deliberations of the jury. The only exception was that where there had been, or may have been, an irregular occurrence of an extraneous nature, which may have compromised the impartiality of the jury the evidence may be admitted. On the facts, the house held that the presumption has not been displaced and consequently dismissed the appeal.

7.6 CONTEMPT OF COURT

Contempt of court serves the primary function of protecting the integrity of court proceedings. At common law, it is recognised that judges have an inherent power to exercise authority and control over judicial proceedings and punish conduct which brings the judicial process into disrepute. Article 19(11) of the 1992 Constitution provides that no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law. Article 19(12) of the 1992 Constitution however, makes an exception by providing that clause (11) of article 19 of the 1992 Constitution shall not prevent a Superior Court from punishing a person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty is not so prescribed. It is clear from these provisions that it is constitutionally permissive for a superior court to punish for this type of offence.

Contempt of court occurs when someone disobeys a court order, shows disrespect for the judge, or disrupts judicial proceedings. There are two types of contempt, namely (1) civil contempt; and (2) criminal contempt. In addition, contempt can be either direct, in cases where it occurs in the presence of the judge and disrupts the court proceedings (in facie curiae) or indirect, where it occurs outside the immediate presence of the judge (ex facie curiae), for example, where a newspaper intentionally publishes a story

about court proceedings which are pending of imminent or are on-going which is likely to undermine the fair trial of the accused. Thus, in Republic v Mensa Bonsu; Ex parte Attorney-General, a newspaper columnist, an editor and the printer/publisher were prosecuted for publishing a letter accusing a judge of making wrong attributions and changing the orders that had earlier been dictated in open court. The majority of the Supreme Court ruled that “imputation of lack of impartiality by the judge and statements describing him as a liar and one guilty of criminal behaviour amounted to scurrilous abuse imputing improper motive... It was therefore contempt of the Supreme Court when scurrilous abuse was directed even at one member."

7.6.1 Civil contempt

Civil contempt occurs when a person refuses to obey a court order or breaches an undertaking given to the court either directly or by necessary implication. The contemnor can "purge" his contempt by obeying the court order or performing the undertaking given to the court. The usual punishment imposed by the court for civil contempt is a fine, imprisonment or both. These are meant to coerce compliance with the court's order rather than to punish the person in contempt. In Republic v High Court, Tema; Ex parte Kofi[60] it was held that failure to obey an order made in civil proceedings was not a crime. Consequently, an appeal from the order punishing the contempt was not a "criminal cause or matter." The civil division of the Court of Appeal is the proper forum for the appeal.

7.6.2 Criminal contempt

Criminal contempt may take a variety of forms but they all have one thing in common, namely they are designed to interfere with the due administration and dispensation of justice either in an ongoing case or generally.[61] It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the court.[62] In the Botswana case of Maame Baffour-Awuah v The State[63] the appellant, an attorney, together with a journalist and editor of the Mmegi were cited for contempt on

account of an interview she gave to the newspaper titled "Murder case to make history" in which she revealed the defence which the accused she was representing was going to put up at her trial. The trial judge took the view that the article pre-empted the right of the court to decide the facts of the case which were in dispute and that it constituted an interference with the proper administration of justice and convicted her. Amissah P, allowing the appeal, held that the mens rea is a requisite element of the offence of contempt. The article, looked at in its proper context, stated the facts which the accused person and her counsel proposed to prove in support of the supposed defence of a battered woman's syndrome. His lordship added that a statement of one side of an argument to be put to a judge for a decision cannot be said to prejudice the argument, especially when made clear that it would be the task of the side stating the argument to convince the judge of its validity.

With criminal contempt, the act of contempt has been completed and the contempt cannot be "purged." Like civil contempt, criminal contempt is punished by a fine or imprisonment or both. The punishment is imposed to vindicate the authority of the court.

CHAPTER 8

INTERPRETATION

The interpretation of a legal text is largely "a journey of discovery" by which the courts determine the meaning of the text for the purpose of applying it to a given set of facts. This process must be distinguished from the construction of a legal text, which is the process by which the court resolves uncertainties or ambiguities in a text. These two processes, though technically different, are in practice indistinguishable because disputes normally occur when there is some uncertainty about or ambiguity in a text. In resolving these, the court will inevitably give meaning to the words of the text. Thus, the two processes normally go hand in hand.

8.1 INTERPRETATION OF STATUTES

The primary function of a judge in interpreting a statute is to ascertain the intention of the lawmaker, that is Parliament. What constitutes the "intention of Parliament" is not easy to define. The phrase is said not to make any sense unless it is recognised that it is used by way of an analogy and is in no way synonymous with the intention of an individual concerning the general or particular effects of a document he prepares or signs. In the words of Lord Watson in the English case of Salomon v Salomon & Co Ltd

" 'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

In other words, the intention to be given to Parliament is to be determined from the objective words used rather than from any subjective intention, which were not expressed. As one learned writer put it, the question of legislative intention is not about the historical or hypothetical views of legislators, but rather concerns the meaning of words used in a particular context. The objective is not to reconstruct a psychological model of Parliament or the promoters of a bill, or even the draftsman, and then to use it to determine what was meant by them when they used certain words. or what would have been provided had a particular eventuality been envisaged at the time of the drafting or enactment. Because of the difficulty of ascertaining the intention of Parliament, the courts have evolved, over the years, rules of interpretation to help them to determine it. These rules, which will be discussed below are supplemented by the provisions of the Interpretation Act, 2009 as well as the definition sections of statutes, which define certain words and phrases used in the said statutes.

8.2 MAIN GUIDING RULES OF INTERPRETATION AND CONSTRUCTION OF GENERAL STATUTES

There are three main guiding rules which the courts use in interpreting and construing statutes. These are the literal rule, the golden rule and the mischief rule. Before these are discussed, a note of warning must be sounded to the effect that these rules are not binding precedents properly so called, but serve as aids, ground rules, guide posts, or a road map to the art and science of interpretation. As put by Date-Bah JSC in Asare v Attorney-General:

"'Rules' of interpretation are not to be understood as binding courts in the same way as the ratio decidendi of a case is binding on subsequent courts. The so-called 'rules' of interpretation are merely guides or aids to judges in deciphering the meaning of words they are required to interpret. As Lord Reid said in Maunsell v Olins [1975] 1 All ER16 at 18, HL:

'They are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction: presumptions or pointers. Not infrequently, one "rule" points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to be attached to any particular "rule."'

Thus, the application of these general rules of interpretation will depend on a variety of factors usually involving the balancing of competing interests, the culminate object being to ascertain the intention of the legislature in using a particular word(s) in the overall context of the statute under scrutiny.

8.2.1 The Literal Rule

The court usually starts its interpretation of a statute by applying the literal rule. This rule is to the effect that the intention of Parliament must be found in the plain, ordinary or grammatical meaning of the words used in the statute regardless of whether the result is sensible or not. The meaning of what is meant by giving a word

its ordinary meaning was explained by Brobbey JSC in Republic v Fast Track Court, Accra; Ex parte CHRAJ (Anane, Interested Party) as follows:

"It is not the meaning that a person will find by a research into technical books or arcane sources. That will be far beyond the comprehension of the ordinary man. The ordinary meaning will be the meaning which any ordinary man on the street will understand by that word or the sense which he/she will attribute to that word which is the sense in which it will be used by that ordinary man. In the normal run of affairs, the ordinary man will approach the dictionary for the meaning if he has any doubt about the meaning of the word."

The court is not concerned with the propriety of the legislation; its duty is to administer and interpret and give effect to the statute even if the terms appear unpalatable. In this regard, the maxim

judicis est jus dicere sed non dare (it is the function of the judge to apply the law, not to make it) applies. As put by Kludze JSC in Republic v Fast Track High Court, Accra; Ex parte Daniel:

"Even in the area of statutory interpretation, we cannot amend a piece of legislation because we dislike its terms or because we suppose that the lawgiver was mistaken or unwise. Our responsibility is greater when we interpret the Constitution. We cannot and must not substitute our wisdom for the collective wisdom of the framers of the Constitution."

Words should be construed in the same literal sense wherever they appear in the statute. The court will rely on standard dictionaries to help it in finding the literal meaning of a word. The literal rule of interpretation is paramount, and all other rules, principles or presumptions are subordinate to it.

An example of the use of the literal rule can be seen in Tuff our v Attorney-General. The Supreme Court in that case had to decide the meaning of the phrase "shall be deemed" in article 127(8) of the 1979 Constitution in relation to the appointment of Justice Apaloo as the Chief Justice. In construing the phrase, the court opted for the natural meaning of the words in the phrase and held that it meant a thing that is said to be something else with its attendant consequences when in fact it was not. In order to reach this conclusion, the court referred to the

use of the phrase in other contexts of the Constitution. For example, in section 1(1) of the transitional provisions to the 1979 Constitution the word "deemed" had been used to mean that although the first President had not been appointed under the Constitution, he should for all purposes exercise all the functions of the President as if he had been so appointed. Also the same phrase had been used in section 2(1) of the transitional provisions to the 1979 Constitution in relation to the election of members of Parliament. They were considered to have been elected under the Constitution even though they had not been so elected. Consequently, the court held that the phrase "shall be deemed" in article 127(8) of the 1979 Constitution should have the same meaning as those attributed to the phrase in sections 1(1) and 2(1) of the transitional provisions of the 1979 Constitution. That being the case, article 127(8) of the 1979 Constitution should mean that a justice of the superior court of judicature holding office immediately before the coming into force of the Constitution should continue in office as if he had been so appointed. It follows from this that Justice Apaloo, being the head of the superior court of judicature before the coming into effect of the 1979 Constitution became the Chief Justice by virtue of article 127(8) of the 1979 Constitution and there was no need for him to have been vetted by parliament for the purpose of approving him as the Chief Justice.

In Kwakye v Attorney-General a majority of the Supreme Court held that the phrase "judicial action taken or purported to have been taken" in section 15(2) of the transitional provision to the 1979 Constitution, must be given its ordinary, literal dictionary meaning. The court construed the phrase to mean an action which was not a judicial action properly so-called but which looked like, was intended to be, or which had the outward appearance of a judicial action.

Another example can be seen from the South African case of Ebrahim v Minister of Interior. Section 15 of that country's Citizenship Act, 1949 provided that a South African national would lose his nationality if he acquired a foreign nationality "whilst outside the Union." The appellant, a South African seaman, applied for British citizenship in order to secure better employment. He falsely claimed to be ordinarily resident in the United Kingdom when in fact he was living in Durban. British nationality was formally conferred upon him when he was on his ship, which was within South African territorial waters. The appellate division held that he did not lose his South African citizenship because the foreign nationality was

acquired when he was in South Africa (the country's territorial waters being part of the country). The court said that if the words of a statute are clear and unambiguous, then effect should be given to their ordinary, literal and grammatical meaning.

In technical statutes, words will be read in their technical and not in their ordinary meaning. An example of the application of this principle is the English case of Fisher v Bell where the expression "offer for sale" in section 1(1) of the Restriction of Offensive Weapons Act 1959 was held to apply to the placing of a flick-knife in a shop window. The court had a choice between the technical meaning of that term as used in the law of contract (invitation to treat) and the popular meaning according to which goods placed in a shop window are offered for sale. The court chose the former meaning of an invitation to treat, that is an invitation to the public to make offers for the goods displayed.

Where the statute is not dealing with a particular science or art it will prima facie be presumed to use words in their popular sense as they are understood in common language. As Pollock B pointed out in the English case of Grenfell v Inland Revenue Commissioner if a statute contains language which is capable of being construed in a popular sense, such "...a statute is not to be construed according to the strict or technical meaning of the language contained in it, but that it is to be construed in its popular sense..."

The plain meaning approach to interpretation of statutes was criticized in Asare v Attorney-General where Date-Bah JSC said:

"What interpretation is to be given the words should depend upon the court's perception of the purpose of the provision and the context of the words, rather than on their dictionary meaning. The 'plain meaning' approach to judicial interpretation is not necessarily the most apposite. In my view, words hardly ever have a meaning in vacuo. Words take on meaning in association with the other words in whose context they are used. Therefore the interpretation of words almost invariably means doing more than finding their mere dictionary (or 'literal' or 'plain') meaning."

The plaintiff brought an action seeking (1) a declaration that upon a true and proper interpretation of article 60(11) of the 1992 Constitution, the purported

swearing-in of the Speaker as President of Ghana, on or about Monday, 24 February 2002, is inconsistent with, or is in contravention of the said provision of the Constitution and is therefore unconstitutional, void and of no effect; and (2) a perpetual injunction to restrain the Speaker of Parliament and any other person succeeding to the Office of Speaker of Parliament, from performing the functions of President of the Republic of Ghana except in the event of the President and the Vice-President being unable to perform the functions of the President. Article 60(11) of the 1992 Constitution provides that:

"(1 l)Where the President and the Vice-President are both unable to perform the functions of the President, the Speaker of Parliament shall perform those functions until the President or the Vice-President is able to perform those functions or a new President assumes office, as the case may be."

In interpreting the phrase "unable to perform the functions of the President" in the above article, the court held that a purposive interpretation was to be given to article 60(11) of the 1992 Constitution and that where both the President and the Vice-President were absent from Ghana, they were to be regarded as "unable to perform the functions of the President" and thus the Speaker was obliged to perform those functions. As the Court put it:

"...The purpose of the framers of the Constitution was to ensure that whoever exercises the functions of the President is physically present in Ghana. This has to do with the framers' assessment of the empirical conditions in Ghana and the efficacy with which executive power may be exercised in Ghana from abroad. There are insufficient counterbalancing considerations from the core values and underlying scheme of the Constitution to justify interpreting the words of article 60(11) in a way which overrides this framers' purpose. The framers' assumption that the President or, in his absence the Vice-President, needs to be — present in Ghana in order to perform the functions of the President effectively has not been rebutted."

8.2.2 The Golden Rule

As seen from the discussion of the literal rule, that rule deals with cases where the language of a statute is free from equivocation or ambiguity. But language is rarely

as free from ambiguity as to be incapable of being used in more than one sense. Consequently, strict adherence to the literal rule of construction would in many cases miss the real meaning of the words in a statute. Where the language of a statute is ambiguous, the golden rule may be used to interpret it in order to ascertain the intention of the legislature.

The golden rule allows for a departure from the literal rule when the application of the statutory words in their ordinary sense would be repugnant to or inconsistent with some other provision in the statute, or will lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature as shown by the context or by some other considerations as the court is justified in taking into account. The usual consequence of applying the golden rule is that words, which are in the statute, are ignored or words, which are not there, are read into it. Thus, in Ababio v The Republic the court was to interpret paragraph 5A of the Chieftaincy (Amendment) (No 3) Decree, 1967 (NLCD 203). The said paragraph provided, inter alia, that:

"(1) Any person who contravenes any provision of this Decree shall be guilty of an offence.

(2) Without prejudice to the generality of the foregoing.. .a person shall be deemed to have contravened the provisions of this Decree if

(a) he refuses or fails to recognize the relationship referred to in paragraph 2 of this Decree or refuses or fails to pay such allegiance as flows from the existence of such relationship;

(b) without reasonable excuse (the proof of which shall be on him) he fails to attend meetings of the Traditional Council..."

The court in interpreting "any person" in the above paragraph held that the phrase cannot bear its ordinary literal meaning as person in general because such a meaning would create an absurd situation where any person, not necessarily a chief, could be prosecuted under the Decree if he failed, for example, to honour an invitation to attend a meeting of a traditional council. The court interpreted the phrase to mean persons who had been demoted as paramount chiefs and whose stools had been specified in the schedule to the Decree. This meaning was to aid the cure of the

mischief, ie the displacement of customary allegiance to traditional paramount chiefs which earlier legislation had given rise to, which the amendment Decree was enacted to deal with. In CFAO v Zacca the Court of Appeal had to interpret the words "shall be deemed to be an appeal pending before the Supreme Court" as set out in section 13(2) of the transitional provisions to the 1969 Constitution. The ordinary meaning of "pending" in relation to a cause or matter connotes such cause or matter having been physically filed before the court. The majority of the court, however, held that in the context of the section, "review pending" must be benevolently construed to mean all pending applications for review whether filed or not.

In the English case of Re Sigsworth the golden rule was used to deny a murderer from inheriting on the intestacy of his victim although he was, as her son, her "sole issue" on the literal interpretation of section 46 of the Administration of Estates Act 1925.

There are two possible approaches to the use of the golden rule. The first, a narrow approach, provides that only where the language of the statute is ambiguous can the court construe it so as to avoid an absurd result. The Zimbabwean appellate division reiterated this approach in State v Robinson as follows:

"Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient; words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded.

The duty of the court is to expound the law as it stands, and to leave the remedy (if one be resolved upon) to others."

In General Cold Industry Ltd v Standard Bank Ghana Ltd, the plaintiff company was registered under the Companies Code, 1963 as "General Cold Industry Ltd." A bank account of a company called "General Cold Co Ltd" was frozen by the State under the schedule to the Assets and Bank Accounts Decree, 1972, as amended by the Assets and Bank Accounts (Schedule) (Amendment) (No 15) Instrument, 1979. In

addition to this, shares of the same company "General Cold Co Ltd" were confiscated and transferred to the State under the Transfer of Shares and Other Proprietary Interests Decree, 1979. The court had to decide whether the plaintiff company, "General Cold Industry Ltd" was the same as "General Cold Co Ltd", the subject of the frozen bank account and the confiscation of shares. It was argued that on the proper construction of the enactments, there seemed to have been a mistake on the part of the draftsman who omitted the word "industry" thereby not correctly identifying the plaintiff company as the company the enactments referred to. The court was therefore urged to delete the word "company" and substitute the word "industry" in order to avoid an absurdity of the two enactments freezing and confiscating the assets of a non-existing company. The court rejected this argument holding that the enactments could not be construed to affect the plaintiff company as it was no where mentioned in them. In the court's view, even if there was an omission, this could not be corrected by the court. The remedy lie, not with the court, but with the legislature which was at liberty to amend the enactments to reflect its intention. As matters stood, the court's duty was to ascertain the intention of the legislature from the words of the statute and on that basis the words did apply to the plaintiff company.

The second, a wider approach, permits a departure from the clear, unambiguous language of a statute, if to do otherwise would lead to a glaring absurdity obviously never contemplated by the legislature. This approach is represented by the dictum of Denning L J (as he then was) in the English case of Francis Jackson Developments Ltd v Hall. He said:

"If the literal interpretation of a statute leads to a result which Parliament can never have intended, the courts must reject that interpretation and seek for some other interpretation, which does give effect to the intention of Parliament."

A similar view was expressed in the South African case of New Rietfontein Estate Gold Mines Ltd v Misnum where Innes ACJ said:

"The fact, however, that a particular construction of a statute would have the effect of crippling its operation, or would result in inconvenience or absurdity, is not in itself a sufficient reason for refusing to give effect to such construction if it follows inevitably from the language used. But if such language an be fairly and properly read so as to lead to a conclusion which is not

inconvenient, inept, or absurd, then that reading is the one which a court should adopt, even though it may not at first sight appear to be the obvious one."

In Sasu v Amua-Sekyi the Court of Appeal had to construe section 3(2) of the then Courts Act, 1971, as inserted by the Courts (Amendment) Law, 1987. The section provides as follows:

"Where a decision of the Court of Appeal confirms the decision appealed against from a lower court, an appeal shall lie against such decision of the Court of Appeal which may on its own motion or on an oral application made by the aggrieved party decide whether or not to grant such leave, and where the Court of Appeal refuses to grant the leave to appeal the aggrieved party may apply to the Supreme Court for such leave."

This provision was examined in the light of other provisions of the amendment Act and the court came to a conclusion that there was an obvious omission of the words "with the leave of the Court of Appeal." In the court's view, without these words the subsection would be rendered unintelligible and as such they should be inserted immediately after the words "an appeal shall lie against such decision of the Court of Appeal." The insertion of those words may not only make the subsection intelligible but would also give effect to the intention of the legislature.

The absurdities for which the golden rule can be used to avoid are illustrated by the following cases. In the English case of R v Allen the court was called upon to interpret section 57 of the Offences Against the Person Act 1861. That section provides that "whosoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of an offence of bigamy." The word "marry" permits of alternative meanings. It may be construed to mean "contracts a valid marriage" or "goes through a ceremony of marriage." Since the former meaning would produce an absurd result the court adopted the latter meaning. In the Zimbabwean case of R v Takawira, the statute concerned made it an offence to be in possession of subversive material. It made no qualification or exception. If the statute is interpreted literally this would mean that the policeman who took possession of the subversive statement, the public prosecutor who tendered it as evidence, the judicial officer who examined it at the trial would all be guilty of offences. The result of this literal interpretation would be that it would be impossible to secure a conviction under the statute. Consequently, the intention of

the legislature would be completely frustrated. The court, therefore, qualified the literal meaning of the clause by reading into it the words "without lawful authority" so that officials who came to be in possession of the material in the course of their work would not infringe the statute.

8.2.3 The Mischief Rule

This rule is also known as the rule in Heydon's case or the "purposive rule of interpretation."[46] It enables the court to adopt an interpretation which is likely to give effect to the purpose or reform, which the statute is intended to achieve. In Heydon's case, it was said that four things must be considered before the rule is applied. These are:

(a) What was the common law before the making of the Act?

(b) What was the mischief and defect for which the common law did not provide?

(c) What remedy has Parliament prescribed to remedy the defect?

(d) The true reason of the remedy.

Having considered the above, the court is enjoined to construe the statute so as to suppress the mischief, advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief.

These four things were reformulated by Lord Diplock in the English case of Jones v Wrotham Park Settled Estates as follows:

a. It must be possible to determine from the consideration of the Act as a whole precisely the mischief that it was the purpose of the Act to remedy.

b. It must be apparent that the draftsman and Parliament had inadvertently overlooked, and so omitted to deal with the mischief, an eventuality that required to be dealt with if the purpose of the Act was to be achieved.

c. It must be possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had the omission been drawn to their attention.

Bennion has also reformulated the rule as follows:

"A purposive construction of an enactment is one which gives effect to the legislative purpose by

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this code called purposive -and- literal construction) or

(b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in this code called a purposive - and -strained construction)."

This rule is usually used to resolve ambiguities in cases in which the literal rule cannot be applied. In the Ghanaian context, it has gained prominence in the interpretation of the provisions of the Constitution. Thus, in Republic v Fast Track Court, Accra; Ex parte CHRAJ (Anane, Interested Party) Wood CJ said:

"In my respectful view, in any constitutional interpretative dispute, involving the use of ordinary words or expressions, where no technical words or expressions of art have been employed, and where the Constitution is completely silent on the meaning to be assigned to those words or expressions, the first rule that should be invoked is the ordinary or plain meaning rule. Legitimate questions that must necessarily follow its application include the following: does it" the ordinary meaning" advance or defeat the purpose of the legislation or does it lead to a result at variance with the main purpose of the provision, or to some unjust, scandalous, incongruous, absurd, strange or extraordinary results...If the interpretation substantially advances the legislative purpose, the matter ought to end there. Certainly, where the modern purely 'strained' purpose-oriented approach (subjective approach) would rather work injustice or lead to absurd, weird or extraordinary results, the rule must altogether be avoided. The established principle, quite understandably, is that if there are two competing interpretations,

one promoting injustice and the other not, we must favour the construction that advances the cause of justice."

Kludze JSC in Asare v The Attorney- General expressed the purposive construction rule as follows:

"I agree that we' must adopt a purposive construction of the constitutional provisions. That means that we do not construe words in the abstract but within the context in which they are used. Language is a tool for expressing the wishes of the speaker, author or writer. Therefore, regardless of the theoretical classification of the methodology of construction, the fundamental rule is for the court to construe every enactment with the purpose of effectuating the true intent of the law-maker, in this case the intent of the framers of the 1992 Constitution. All other canons of construction have the ultimate purpose of achieving this goal. I do not think the mere recourse to dictionaries of the English language will resolve the issues which confront us or render any easier the task we are called upon to perform."

Examples of the use of the mischief rule can be seen from the following cases:

In Smith v Hughes section 1 of the English Street Offences Act 1959 provided as follows.

"It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution."

The appellant solicited men from a balcony by lapping on the balcony railing with some metal object and by hissing to them as they passed in I he street beneath her. She was convicted for contravention of the above section i f the Act. In dismissing her appeal. Lord Parker C J said:

"... I approach the matter be considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window...in each case her solicitation is projected to and addressed to somebody. For my part, I am content to base my decision on that ground and that ground alone."

The other two judges of the court agreed with the Lord Chief Justice.

Similarly, in Gardiner v Sevenoaks RDC the Celluloid and Cinematograph Film Act l922 provided for the safe storage of inflammable cinematograph film wherever it might be stored on "premises." A notice was served on the plaintiff, who stored film in a cave, requiring him to comply with the safety rules. The plaintiff argued that "premises" did not include a cave and so the Act had no application to his case. The court held that the purpose of the Act was to protect the safety of persons working in all places where film was stored. In so far as the film was stored in a cave, the word "premises" included the cave.

In the South African case of Harris v Minister of Interior Centlivres CJ quoted the rule in Heydon's case and said:

"Prior to the Statute of Westminster the 'mischief', as is clearly shown by the reports of the Imperial Conferences of 1920 and 1930, was that the Dominions were not in the eye of the law 'autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs.'

In law the Parliament of the United Kingdom was still supreme. The suppression of the 'mischief of the supremacy of that Parliament was the prime object of the Statute of Westminster; another "mischief" was that ii was not considered that a Dominion Parliament had any power to make laws having extra-territorial operation. Both these 'mischiefs' were removed by the Statute of Westminster."

The question at issue in the case was whether what were known as the entrenched clauses of the South Africa Act 1909 were, in view of the passing of the Statute of Westminster 1931, still entrenched or whether Parliament sitting as a bicameral legislature was free by a bare majority in each house to amend any section of the Constitution even though such a section may originally have been entrenched. The appellate division was of the view that to answer the question it was legitimate to refer to the legal position before the enactment of the Statute of Westminster.

It must be emphasized that the mischief rule is not a cane blanche for rewriting legislation and should never be used as a ruse, a cloak or guise to do so.

8.3 INTERNAL AIDS TO INTERPRETATION OF GENERAL STATUTES

There are two types of material aids to the interpretation and construction of statutes, namely internal and external aids. The internal aids relate largely to the use of parts of a statute as aids, as well as the rules of language or the linguistic canons of construction.

8.3.1 Parts of a statute

A statute may be divided into various pans some of which may or may not be useful in interpreting the statute. The following parts may be identified:

8.3.1.1 The title

All statutes have a long title and a short title. The long title is set out at the head of the statute and gives a fairly full description of the general purpose of the Act. For example, the long title of the Courts Act, 1993 is:

"An Act to incorporate into the law relating to the courts, the provisions of chapter eleven of the Constitution; to provide for the jurisdiction of Regional Tribunals; to establish lower courts and tribunals, provide for their composition and jurisdiction to consolidate and re-enact the Courts Act, 1971 and to provide for connected purposes."

The long title is an important part of the statute and may be referred to for the purposes of ascertaining its general scope and to throw light upon its construction. An illustration of how a long title of an Act may be used for interpretational purpose can be seen from the English case of Brown v Brown. The point at issue in that case was the meaning of section 2(1) of the Matrimonial Causes Act, 1963. That subsection provides as follows:

"Adultery...shall not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months...if it is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation."

The issue the court had to resolve was whether this provision covered cases where the continuation or resumption of cohabitation was in consequence of reconciliation or whether it only covered cases where the continuation or resumption of cohabitation was with a view to reconciliation? The court referred to the long title of the statute, which showed that the purpose of the statute was to facilitate reconciliation of married couples and held that to adopt the first view "would be withdrawing the sanction and support of the law from reconciliation."[60] Consequently, the court adopted the second meaning as this was in accord with the intendment of the long title. The court expressed the view that the statute did not create a three months' period during which a spouse who has been reconciled with his partner could renege on his decision.

The short title is usually given for easy reference. For example the Courts Act, 1993 is the short title of that Act. It is, so to speak, the nickname of the statute. It is not to be considered when a statute is being interpreted.

8.3.1.2 Marginal Notes

These are notes often found printed at the side of sections in a statute. They purport to indicate the effect of the particular section. They were not considered to be part of the statute under section 4 of the Interpretation Act, 1960 and therefore they were of no use as an aid to the interpretation of the statute. However, in light of section 15 of the Interpretation Act, 2009, which is said to be the comparative section to section 4 of the 1960 Act, these may be used as an interpretation aid. Thus, decisions such as Smith v Smith' where the High Court held that the marginal note attached to section 2 of the Married Women's Property Ordinance should be disregarded in interpreting the section in line with the provisions of section 4 of the Interpretation Act, 1960, which provides that such notes are intended for ease of reference and do not form part of an enactment, will not now be followed. However, decisions such as Osei v Siribuor II where the Supreme Court relied on the marginal notes to section 15(1) of the Chieftaincy Act, 1970 in holding that the National House of Chiefs erred in coming to a conclusion that a suit for a declaration that the plaintiff was a royal of the Juaben stool of Ashanti was "a cause or matter affecting chieftaincy" and could be maintained at any time

irrespective of whether the stool is vacant or not and Republic v High Court, Accra; Ex parte Adjei where Taylor JSC in his dissenting opinion relied on the marginal note to section 19 of the PNDC

(Establishment) Proclamation Law, 1982 which dealt with the composition and exercise of jurisdiction by the Supreme Court will be consistent with the spirit of section 15 of Act 792."

8.3.1.3 Headings

Headings are usually prefixed to group of sections in a statute. For example, sections 1-38 of Act, 459 are grouped under the heading "PART 1 SUPERIOR COURTS OF JUDICATURE." Headings do not form part of the statute and so cannot control the plain words of the statute. They are intended for convenience of reference only.

8.3.1.4 Schedule

This is a statement detailing certain aspects of a statute and is found at the end of the statute. It is considered as part of the statute and may be referred to in the interpretation of the provisions contained in the body of the statute. Similarly, provisions contained in the schedule will be interpreted and construed in the light of what is provided in the sections of the Act in the Botswana case of State v Mosala, Gyeke-Dako J. adopted the following dictum of Lord Stendale MR in the English case of Inland Revenue Commissioners v Gittus vis an appropriate guide to the use of schedules as an interpretation tool:

"It seems to me that there are two principles or rules of interpretation which ought to be applied to the combination of Act and schedule. If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the schedule in question shows that it is prima facie at any rate devoted to that purpose, then you must read the Act and the schedule as though the schedule were operating for that purpose, and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if in spite of that you find

in the language of the schedule words and terms that go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by the heading of that part of the schedule or by the purpose mentioned in the Act for which the schedule is prima facie to be used. You cannot refuse to give effect to clear words simply because prima facie they seem to be limited by the heading of the schedule and the definition of the purpose of the schedule contained in the Act."

Applying these principles to the facts of that case, Gyeke-Dako J held that although the specimen charge for burglary as framed in Form 9 of the third schedule to the Criminal Procedure and Evidence Act 1938 is inconsistent with section 129(2) of the Act, until the legislature amends the specimen charge, it shall, by virtue of section 131(iv) of the Act, not be open to objection on the grounds of duplicity.

In Ababio v The Republic, in construing the word "person" in paragraph 5A of the Chieftaincy (Amendment) Decree, 1966, the court took into account the first schedule to the Decree and held that the word did not apply to all and sundry but was confined to a chief who had been reduced from his previous status as a paramount chief. Again in Kuenyehia v Archer the Supreme

Court, relying on the wording in the forms of oaths dealing with oath of allegiance and the judicial oath as set out in the second schedule to the 1992 Constitution, held that the Chief Justice had validly sworn in the judges of the Supreme Court and the Court of Appeal as required by section 4(2) of the transitional provisions to the 1992 Constitution.

8.3.1.5 Punctuation

Punctuation forms part of the statute and may be used as an aid to the construction of the statute. In the English case of Hanlon v Law Society the importance of punctuation in the interpretational process was put as follows:

"I consider that not to take account of punctuation disregards the reality that literate people, such as Parliamentary draftsmen, punctuate what they write, if not identically, at least in accordance with grammatical principles. Why should not

other literate people, such as judges, look at the punctuation in order to interpret the meaning of the legislation as accepted by Parliament?"

8.3.1.6 Interpretation section of statutes

Statutes invariably contain an "interpretation section" which seeks to give meaning to certain words used in the statute. It is usually framed as follows: "In this Act, unless the context otherwise requires.. ." In such a section, certain words when found in the statute are to be understood in a certain sense, or are to include certain things which, but for the interpretation section, they would not include. When the word is said to "mean" so and so, the definition is explanatory and usually restricted to that meaning. For example, under section 117(1) of Act 459, "cause or matter affecting chieftaincy" is said to mean "any cause, matter, question or dispute relating to any of the following..." and it goes on to list a number of matters which the section restricts the meaning to. Where the word is said to "include" so and so, the definition is considered extensive but it does not exclude the ordinary meaning of the word. It merely permits it to be applied to some things to which it would not ordinarily be applicable, provided the context or subject matter does not provide anything to the contrary. Thus, in the English case of Dilworth v Stamps Commissioner it was said that:

'The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute;, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."

Again, an example of this can be found in section 117(2) of Act 459 which provides that: "In this Act and in any other enactment a reference to an officer of a court shall, unless the contrary intention appears, include counsel in any proceedings and also any person required to assist in the initiation or conduct of any court proceedings or in the enforcement of any judgment or decree or order of a court but does not include the parties in the case."

Whilst interpretation sections have become standard in legislative drafting, their utility have been criticized on the basis that they give a-non-natural sense to words which are

afterwards used in a natural sense. Despite this criticism, interpretation sections have contributed a great deal to the economy of drafting.

8.3.1.7 Provisos

Provisos are inserted in sections of a statute to create an exception or a qualification of something in the preceding portion of the section which but for the proviso would be within it. They are usually preceded by the words "Provided that." For example, section 51 of the Criminal Code provides as follows:

"Whoever causes the death of another person by any unlawful harm shall be guilty of manslaughter. Provided that if the harm causing the death is caused by negligence he shall not be guilty of manslaughter unless the negligence amounts to a reckless disregard for human life."

The proviso in this section is limiting the manner in which the offence of manslaughter may be committed by excluding the commission of the offence by negligence unless such negligence amounts to a reckless disregard for human life.

The purpose of a proviso is to limit or qualify the enactment in which it appears. It cannot be construed to widen the scope of the enactment when it can be fairly and properly construed without giving to it that effect. Provisos may, however, contain matter which is in substance a new enactment, adding to and not merely qualifying what goes before it.

8.4 Rules of Language (Linguistic Canons of Construction)

8.4.1 Expressio unius exclusio alterius

This maxim means to express one thing is by implication to exclude anything else. Thus, if one or more things in a particular class are mentioned in a statute, it may be regarded as impliedly excluding all other members of the same class. The rule is applied where a statutory preposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples or for some other sufficient reason the rest are taken to be excluded from the

proposition. For example, if there is a bequest in a will to "the children of Asare", this will certainly include Asare's legitimate children and possibly illegitimate children as well. However, if the bequest was to "Kofi, Ama and Abena children of Asare" then all other children of Asare, whether legitimate or not, will be excluded from it.

This maxim was discussed in the Botswana case of Attorney General v Unity Dow where section 15(3) of that country's Constitution was being interpreted. That subsection defines the word "discriminatory" to mean:

"Affording different treatment to different persons, attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour, or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not..."

The State contended that the express mention of certain categories of factors in the definition, about which it is forbidden to make discriminatory laws, does exclude others like "sex", the factor against which, the respondent claims she was being discriminated. Amissah JP expressed the view that the categories stated in the subsection were by way of examples of what the framers of the Constitution thought worth mentioning as potential groups which may be discriminated against. Consequently, "sex" could not be said to have been excluded by the mere failure to mention it in the definition.

The rule, however, is not omnipotent. It may not always solve problems of construction of statutes. As stated by Lopes LJ in the English case of Colquhoun v Brooks:

"It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

Thus, in Republic v Military Tribunal; Ex parte Ofosu-Amaah the applicant had been convicted, inter alia, of (a) conspiracy to commit subversion contrary to section 23(1) of the Criminal Offences Act, 1960 (formerly Criminal Code); and (b) of subversion contrary to section (a) of the Subversion Decree, 1972 which provided

that a person shall be guilty of the offence if he "prepares or endeavours to overthrow the Government by unlawful means." The court had to decide whether the applicant could be charged with the offence of conspiracy to commit subversion when section 1(a) of NRCD 90 did not create such an offence. It was held that having regard to section 5 of the Criminal Offences Act which made the provisions of the Act applicable to any offence created by law, it was unnecessary for the legislature to incorporate the offence of conspiracy into section 1(a) of the NRCD 90. The court added that the fact that the legislature expressly mentioned the offence of conspiracy in section 1(f) of NRCD 90 did not evince an intention to exclude it from the offences created under other subsections of section 1 of the decree. The express reference to conspiracy in section 1(f) NRCD 90 must have been made ex abundanti cautela (from abundant caution) so as to emphasize the punishment for conspiracy under the subsection was death. The trial judge, Abban J (as he then was) said:

"On the whole, it appears NRCD 90 was loosely and hurriedly drawn up with the result that some of its provisions seem to give room for all sorts of interpretations and the maxim that 'the expression of one thing is the exclusion of another' can hardly apply to such a loosely drawn up statute.

8.4.2 Ejusdem generis rule

Where a statute lists a number of specific things and ends the list with more general words, the general words are to be limited in their meaning to other things of the same kind (ejusdem generis) as the specific items, which precede them. In the English case of Powell v Kempton Park Racecourse Co, section 1 of the Betting Act 1853 prohibited the keeping of a "house, office, room, or other place" for betting. The point at issue was whether a tattersal's ring (the area of a racecourse where betting takes place) was an "other place" within the meaning of the section. The House of Lords held that it was not since the words "house, office, room" created a genus of indoor places within which a racecourse, being outdoors, did not fall. Similarly, in Evans v Crossthe appellant was charged with driving his car in such a way as to "ignore a traffic sign" contrary to section 49 of the Road Traffic Act 1930. He had undoubtedly crossed to the wrong side of a white line painted

down the middle of the road. "Traffic sign" was defined by section 48(9) of the Act as "all signals, warning signposts, direction posts, signs or other devices." The question at issue was whether a white line in the middle of a road was "other device" within the meaning of the subsection. The English divisional court held that "other devices" must be limited in their meaning to a category of signs in the list, which preceded them. Thus restricted, they did not include a painted line, which was quite different from that category.

In Jebelle v Norwich Union Fire Insurance Society Ltd an ice cream manufacturing company took out two different insurance policies against business losses. Under the second policy, described as the "Miscellaneous Expenses" policy, the company insured property valued at £800. The property was described as "contents, consisting of stocks of sugar, milk powder, syrup, essence and the like." The factory was destroyed by fire and the company claimed under the second policy property such as bicycles and stock of ice cream. The trial court allowed the claim but on appeal, it was held that the claim for the value of the bicycles should be disallowed as bicycles were not of the same genus as the property described in the second policy. Apaloo JSC (as he then was) said:

"The property insured under this item was described as 'contents consisting of stocks of sugar, milk powder, syrup, essence and the like.' Bicycles cannot be the like of sugar, milk powder, etc. True, bicycles may be used with advantage in the ice cream trade but to say that it is of the same genus as sugar, milk powder and essence, would be doing too much violence to language. I think the two bicycles were not insured and ought to be held excluded from the property insured... by the rule of construction known as the ejusdem generis rule."

As seen from the case of Jebeile (supra), for the rule to apply, it must be possible to create a genus out of the specific words to delimit what is to be considered as "of the same kind." Where this is not possible, the rule is inapplicable. Thus, in the English case of Quazi v Quazi section 2 of the Recognition of Divorces and Legal Separation Act 1971 requires recognition to be given to foreign divorces and legal separations obtained by means of "judicial or other proceedings." The House of Lords held that "other proceedings" was not limited to procedure resembling a judicial proceeding but could apply to "talag" divorces, which are essentially religious ceremonies. This was because the purpose of the statute is to recognise in Britain divorces validly obtained abroad and the English court is not concerned with the method adopted by the foreign court to grant the divorce.

In Republic v Ghana Cargo Handling Co Ltd; Ex parte Moses an employee has been dismissed from the company for alleged insulting conduct. The court had to interpret the terms and conditions of service of the company which provided as follows: "An officer who commits an offence necessitating his dismissal such as stealing, embezzlement of funds or other serious offences shall be made to appear before a ...committee of enquiry."

In challenging the validity of a report of a disciplinary inquiry, it was submitted on behalf of the employee that the specific words "stealing, embezzlement of funds" involve acts causing financial loss to the employer and therefore the meaning of the general words "other serious offences" must be restricted to offences causing financial loss. When so construed, the alleged insulting conduct of the employee, not being an act likely to cause financial loss, could not fall within the ambit of the general words "other serious offences" and hence not a proper subject matter for inquiry under the stated terms and conditions of the company Mensa-Boison J (as he then was) held that:

"What this submission comes to is that the words 'other serious offences' are to mean offences of the same kind as stealing and embezzlement. I think the class or category of offences mentioned do not sufficiently form a genus to admit of 'and other serious offences' being read ejusdem generis"

It must also be noted that generally, a genus is created when more than a single specie is followed by general words.[104] However, the decision in Quazi v Quazi (supra) and other authorities do not support this assertion.[105]

8.4.3 Noscitur a sociis rule

This Latin term literally means, "a thing is known from its associates." Where words or phrases capable of different meanings are associated together they take their meaning from each other and this may exclude meanings which would be possible, if the words or phrases stood alone. In the English case of Attorney-General v Prince Ernest Augustus of Hanover, Viscount Simonds put the rule thus:

".. .words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context."

Similarly, Stamp J said in Bourne v Norwich Crematorium Ltd that:

"English words derive colour from those which surround them. Sentences are not mere collection of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words..."

An example of the application of this rule can be found in Republic v Minister for the Interior; Ex parte Bombelli The applicant was an Italian citizen who was ordered to be deported under an executive instrument issued under section 12(1) (f) of the Aliens Act, 1963. In his challenge of the deportation order, he argued that it contravened article 4(7) of the 1979 Constitution because it was not laid before Parliament for the required 21 days. The court applied the noscitur a sociis rule and held that the word "orders" in article 4(7) meant orders in the nature of rules and regulations and not a command such as the order issued by the Minister of the Interior. Furthermore, it was held that the rule or regulation in the said article connoted legislative order, not an executive order as the one issued by the Minister. Another example of the use of this rule can be seen from the English case of R v Harris.[112] In that case, the Offences Against the Person Act 1861 made it an offence to shoot at or "stab, cut, or wound" any person. The word "wound" was held to be restricted in meaning by the words which preceded it to injuries inflicted by an instrument. Therefore, a bite of a finger or a nose or to burn the face with vitriol was not wound within the meaning of the Act. It must be noted that this rule may be displaced by other considerations. For example, the draftsman may have specified certain terms not so as to give colour to a general phrase but to prevent any doubt as to whether they are included. Consequently, when a statute defines a thing as including specified matters, it is not always appropriate to interpret the general words in the light of the particular instances given.

8.5.1 EXTERNAL AIDS TO INTERPRETATION OF GENERAL STATUTES

An external aid is one which is not found in the Government Printer's copy of the statute. Section 10 of Act 792 permits the use of external aids such as a report of a commission, committee or any other body appointed by government or authorized by Parliament; treaties, agreements, conventions or other international instruments

which have been ratified by Parliament or is referred to in the enactment of which copies have been presented to Parliament or where government is a signatory to a treaty or international agreement. The court may also take cognizance of legislative antecedents of enactments; explanatory memorandum; textbooks and any other work of reference; and the parliamentary debates prior to the passing of the bill in Parliament in resolving ambiguity in the language of the enactment.

Any item outside these external aids is not permissible to be used. Thus, under section 19 of CA 4, the court in In re West Coast Dyeing Industry Ltd; Adams v Tandoh rejected a suggestion that it should consider the view of Professor Gower on section 186(1) (c) of the Companies Code, 1963 as expressed in his Final Report on the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana. The court held that the views of Professor Gower, the draftsman of the Code, could not be taken as the expression of the legislature's intention. In terms of section 10(1) (b) of Act 792, this holding may now be incorrect. The Report was commissioned by the government and hence the court may now refer to it. In New Patriotic Party v Attorney-General (31st December case) Adade JSC, while conceding that debates in the Consultative Assembly were not permissible to be used as an interpretation tool for deciding whether the directive principles of state policy was justiciable, however relied on the parliamentary history of chapter 6 of the 1992 Constitution as traced to chapter 4 of the 1979 Constitution. His lordship came to the conclusion that given its history, chapter 6 of the 1992 Constitution, particularly articles 35(l) and 41 which were relied upon by the plaintiffs were justiciable. Again, in the light of section 10 of Act 792, the matters rejected in this case may now be accepted as legitimate aids to the construction of a statute.

8.5.1:1 Judicial precedent

The application of judicial precedent as an aid to the interpretation of a statute was explained by the Privy Council in Ogden Industries Ltd v Lucas as follows:

"It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in

construing the Act rather than found in the words of the Act itself. No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts, but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the court from its duty in exercising an independent judgment."

Thus, judicial precedent is of limited help in interpreting or construing a statute. However, as stated in the above dictum, it may be that when a higher court has interpreted particular words, phrases or expressions, etc subordinate courts will have no option but to adopt the meaning given to them by the higher court. In Republic v Yebbi & Avalifo for example, the Supreme Court interpreted the phrase "offences against State and public interest" as provided for under article 295(1) of the 1992 Constitution to include theft of property belonging to a political party even though political parties are not state institutions. This interpretation will have to be followed by lower courts.

8.6 PRESUMPTIONS IN THE INTERPRETATION OF STATUTES

In the interpretation of statutes the courts assume, in the absence of anything in the statute to the contrary, the existence of certain rebuttable presumptions which relate to the intention of the legislature and apply them in interpreting the statute in question. Some of such presumptions are as follows:

8.6.1 Presumption against alteration of existing law

Parliament is presumed to know the law; therefore if a statute does not expressly alter the existing law it will be presumed that Parliament did not intend to alter the law beyond that which was expressly stated in, or follows by necessary implication from, the language of the statute in question. This presumption was stated in the English case of National Assistance Board v Wilkinson as follows:

"...a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses that which point unmistakably to that conclusion."

In Ohene-Mensah v Subin Timbers Ltd the plaintiff brought an action for damages against the defendants for negligence arising out of a road accident caused by the defendants' servant. Subsequent to the action, the defendants' assets and bank accounts were vested in the State by virtue of the Forfeiture of Assets and Transfer of Shares and Other Proprietary Interests (Subin Timbers Co Ltd and Central Logging and Sawmills Ltd) Law, 1982 "free of all encumbrances whatsoever". The defendants raised a preliminary objection to the effect that the law must be construed as repudiating their common law liability in tort and thus they could not be sued in negligence. The court overruled this objection holding that the effect of the law was that the State became the sole owner of the defendants' assets free from encumbrances, that is free from all liabilities with regard to property but not to the person owning the property. The court concluded that there was nothing in the law that pointed to the legislature intending to change existing common law that the defendants, as a limited liability company, cannot be liable for the tortuous actions of its servants. Relying on the English case of National Assistance Board v Wilkinson, the court upheld the presumption against a change in the law in the absence of a clear and unambiguous expression to that effect. In Leach v R The provision in section 4(1) of the English Criminal Evidence Act 1898 was in issue. The subsection provided that a spouse of a person charged with an offence under any enactment mentioned in the schedule to the Act may be called as a witness either for the prosecution or for the defence. This provision was held by the House of Lords to make a wife a competent but not a compellable witness against her husband. Lord Atkinson said:

'The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite, and positive enactment, not by an ambiguous one such as the section relied upon in this case."

8.6.2 Presumption in favour of mens rea

In interpreting penal statutes there is a presumption that there must exist on the part of the accused some blameworthy mental condition (mens rea) whether constituted by

knowledge or intention or otherwise, before he can be found guilty. In the English case of Brend v Woods Lord Goddard CJ said:

"It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

Aguda CJ (as he then was) approved this dictum in the Botswana case of State v Mosinyi in construing section 7(1) of the Fauna Conservation Proclamation 1961. The accused persons were charged with hunting in a game reserve contrary to the said section. The question was raised whether if they did not know that they were in a game reserve that will be a good defence to .the charge. The learned Chief Justice referred to the long title of the Act and; adopted the dictum of Bresler J A in the South African case of R v Van der Lin to the effect that:

"If one takes this fact in conjunction with the ease with which the beneficial provisions could he evaded, it does not seem that the legislature intended mens rea as this might easily lead to large scale frustration of the object of the ordinance."

He further referred to the Privy Council decision in Lim Chin Aik v R to the effect that where an Act deals with regulatory activity for the public welfare, it can be and frequently had been inferred that the legislature intended such activity should be carried out under conditions of strict liability. Consequently, he held that the offence created by section 7(1) of the Fauna Conservation Proclamation 1961 is one of strict liability not requiring mens rea on the part of the offender.

8.6.3 Presumption against violation of International Law

Every statute is interpreted, so far as its language will permit, so that it will not be inconsistent with recognised international law and obligations. In the Botswana case of Attorney-General v Unity Dow[x33] Amissah JP stated the presumption as follows:

"I am in agreement that Botswana is a member of the community of civilised states which have undertaken to abide by certain standards of conduct and unless it is impossible to do otherwise,

it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken."

This dictum was made in a case in which the provisions of section 15, in particular subsection (3), of the Botswana Constitution was in issue. Section 15 of the Constitution provides that:

Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

The respondent applied for an order declaring sections 4 and 5 of the Citizenship Act 1982 as amended by the Citizenship (Amendment) Act 1984 ultra vires the Botswana Constitution. The said sections provided that:

"(4) (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth"

a. his father was a citizen of Botswana; or

b. in the case of a person born out of wedlock, his mother was a citizen of Botswana.

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

(5) (1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth"

(a) his father was a citizen of Botswana; or

(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement."

The respondent, a citizen of Botswana, was married to a citizen of the United States of America. Prior to their marriage in 1984, a child was born to them in 1979, and during the marriage two more children were born in 1985 and 1987, respectively. In terms of the law in force prior to the Citizenship Act, the child born before the marriage was a Botswana citizen, whereas in terms of the Act the children born during the marriage were not citizens of Botswana and therefore aliens in the land of their birth. The respondent contended that she was prejudiced by section 4 (1) of the Citizenship Act by reason of her being female from passing citizenship to two of her children; that the law in question had discriminatory effect in that her two children were aliens in her own land and the land of their birth, and they thus enjoyed limited rights and legal protections therein, that she believed that the discriminatory effect of specified sections of the Citizenship Act offended against section 3(a) of the Constitution, and that she believed that the provisions of section 3 of the Constitution had been contravened in relation to herself.[135] The High Court granted the application and declared the said sections of the Citizenship Act ultra vires the Constitution.'[36] In the course of his judgment, Horwitz Ag J said:

"I am strengthened in my view by the fact that Botswana is a signatory to the O.A.U. Convention on Non-Discrimination. I bear in mind that signing the Convention does not give it the power of law in Botswana but the effect of the adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the Convention must be preferable to a 'narrow construction' which results in a finding that section 15 of the Constitution permits unrestricted discrimination on the basis of sex."

One of the main issues for determination of the appeal was whether section 15 of the Constitution allowed discrimination on the ground of sex. The State argued that section 15 of the Constitution permitted the enactment of legislation which was discriminatory on grounds of sex and that the trial court erred in holding that the omission of the word "sex" from the definition of the word "discriminatory" in section 15(3) of the Constitution was neither intentional nor made with the object of excluding sex-based

discrimination. It was also contended that the omission of sex was intentional and was made in order to permit legislation in Botswana which was discriminatory on grounds of sex and that discrimination on grounds of sex was permissible in Botswana society as the society was patrilineal, and therefore, male oriented. Consequently, it was argued that the trial court erred in holding that sections 4 and 5 of the Citizenship Act were discriminatory in their effect or contravened section 15 of the Constitution. The State objected to the reliance by the trial court on international treaties and conventions as an aid to the interpretation of section 15, especially where these treaties and conventions have not been incorporated into domestic legislation. The majority of the court upheld the High Court decision.[138] Amissah JP approved Horwitz J's reliance on international treaties and conventions as seen from the above-quoted dictum by saying:

"The learned judge said that we should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations."

8.6.4 Presumption against retrospectivity of a statute

No statute shall be construed to have a retrospective effect unless such a construction appears very clearly in terms of the statute or arises by necessary implication.[140] In the English case of Re Athlumney Wright J stated the presumption in the following words:

"Perhaps no rule of construction is more firmly established than this " that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

There are exceptions to this presumption. Thus, where there is an express provision in the Act that it should apply retrospectively, the presumption will not apply. In Togbe Konda v Togbe Dompre V the provisions in sections 4(1) and (2) of the Stool Lands Boundaries Settlement Decree, 1973 was in issue. The former section vested exclusive jurisdiction in matters pertaining to boundaries of stool lands in the Stool Lands Boundaries Settlement Commission and the latter section provided that

all pending actions relating to stool lands boundaries before any court were to abate and the court was to decline jurisdiction in the matter. The matter before the court was adjourned for the court to render its judgment. The 1973 Decree was enacted before judgment could be delivered but the court nevertheless rendered its judgment in the case. On appeal, the Court of Appeal held that the trial judge had no jurisdiction to proceed with the case as the effect of the 1973 Decree was to retrospectively terminate the proceedings pending before the trial court on the Decree coming into effect. The language of section 4(2) of NRCD 172 was explicit. Again where the statute deals with procedural matters no presumption against retrospectivity apply. Thus, in Abdulai III v The Republic the appellants were tried and convicted in a circuit court. They appealed to the High Court where their appeal was dismissed. Under section 10(3) of Act 372 they could appeal as of right to the court of Appeal within 30 days of the High Court decision. The Courts (Amendment) Law, 1987 came into force on 26 October 1987 and the appellants filed their appeal in the Court of Appeal on 10 November 1987. Section 2 of the 1987 amendment Law inserted a new section 10(3) (b) into Act 372. The new section provided that:

"where a decision of the High Court confirms the decision appealed against from a lower court, an appeal from the High Court may lie to the Court of Appeal with the leave of the High Court... and where the High Court refuses to grant the leave to appeal the aggrieved party may apply to the Court of Appeal for such leave."

At the hearing of the appeal, the State raised a preliminary objection on the ground that the appellants had not complied with the provisions of the new section 10(3) (b) of Act 372 and hence the appeal had not been properly filed. The appellants contended that their right to appeal without leave had accrued by virtue of section 8(1) (c) of CA 4 and was not affected by the new procedure. The preliminary objection was upheld and the appeal dismissed on the ground of non-compliance with the new procedure. The court held that the 1987 amendment Act, being a procedural Act, must be given a retrospective effect to affect all pending actions unless there is an express provision to the contrary or by necessary implication it could be said that it did not have that effect. The court added that although the appellants' right to appeal to the Court of Appeal without leave had accrued, it had not been exercised before the amendment Act came into effect; consequently, the right could only be exercised in terms of the new enactment.

8.7 INTERPRETATION OF THE CONSTITUTION

Interpretation of the Constitution is radically different from the interpretation of an ordinary legislative provision. The Constitution being the basic document incorporating the enduring values the nation cherishes inevitably contains open-ended provisions which afford a wider scope for the judiciary when interpreting i Constitution. Consequently, a different approach from that which will be used to interpret an ordinary legislation must be adopted in order to appreciate the full import and meaning of the words used in the Constitution in relation to the vicissitudes of fact which from time to time emerge. The general principle underlying the interpretation of the Constitution can be seen from the following dictum of Sowah JSC in Tuffuor v Attorney-General.

"A written Constitution such as ours... embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life'. The Constitution has its letter of the law. Equally, the Constitution has its spirit...Its language ... must be considered as if it were a living organism capable of growth and development... A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time."

Article 130(1) of the 1992 Constitution gives the Supreme Court exclusive original jurisdiction, inter alia, to determine all matters relating to the interpretation of the Constitution. This jurisdiction is reinforced by article 2 which provides that:

(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.

No principles or guidelines were provided by the Constitution by which the Supreme Court was to exercise the above jurisdiction. This notwithstanding, by a series of pronouncements in cases that have come before the court over the years, certain interpretational principles have evolved. These can be summarized as follows:

1. The Constitution must be interpreted in a benevolent, broad, liberal and purposive manner so as to promote the policy underpinnings of it. However, in compelling cases, this general rule will not be applicable. Generally speaking, cases turning on fundamental human rights and freedoms lend themselves to a more liberal or generous interpretation, while cases involving the exercise of power would admit of more restrictive interpretation.

2. The Constitution must be construed as a political document capable of growth.

3. The Constitution, being a document sui generis, must be interpreted according to principles suitable to its character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.

4. The court must avoid importing into the Constitution what does not appear therein.

5. The court may have to take into account the spirit of the Constitution as a tool for constitutional interpretation.

6. The provisions of the Interpretation Act, 1960 (Now Interpretation Act, 2009) may be relevant in construing the provisions of the Constitution.

7. The court may resort to the directive principles of state policy embodied in chapter 6 of the 1992 Constitution as a tool for constitutional interpretation.

8. The court must ascertain the intention of the framers of the Constitution as can be seen or gleaned from the provisions of the Constitution and once ascertained, the court is duty bound to give effect to that intention.

9. In construing the Constitution, the court must take a holistic view of all its provisions.

10. In deciding the constitutionality or otherwise of any law the court should not concern itself with the propriety or expediency of that impugned law but what the law itself provides.

The application of the above principles to the interpretation of the Constitution has served to promote the efficacy of the Constitution. In the light of this, observation, it has been suggested that the greatest achievement that the Supreme Court would be proud of and thus justify its indispensable role as a constitutional court is to live up to expectation by construing the Constitution as a living document capable of growth, and at the same time, giving due recognition to the present needs and aspirations of the people. Such an approach would create the peaceful and congenial atmosphere for national development in all its facets.

8.8 INTERPRETATION OF DEEDS AND OTHER DOCUMENTS

8.8.1 INTERPRETATION OF DEEDS

A deed is a particular type of document. It must be in writing and on paper or its like, for example, vellum or parchment. Any document made under seal is a deed if made between private persons; it must be signed, sealed and delivered. A deed must either (a) affect the transference of an interest, right or property, or (b) create an obligation binding on some person(s), or (c) confirm some act whereby an interest, right, or property has already passed. There are four basic principles used by the courts to interpret a deed. These are:

1. The construction must be as near to the mind and intention of the author as the law would permit.
2. The intention must be gathered from the written expression of the author's intention.
3. Technical words of limitation must have their strict legal effect.
4. The document must be read as a whole in order to determine the true intention of the author.

8.8.2 Mind and intention of the maker

The cardinal rule is to ascertain the intention of the parties to the deed after considering the words in their ordinary natural sense. In Biney v Biney the Court of Appeal held that a donor had evinced a clear intention that his self-acquired property should not devolve according to the matrilineal rules of succession by choosing to use terminology peculiar to English law. In the words of Anin J A (as he then was):

"...the intention of the donor was clearly expressed in the preamble: 'Whereas the said Joseph Peter Oconnor Biney (of Cape Coast) is desirous to make a settlement of the said land in favour of...' (the named beneficiaries). Furthermore, the fact that the donor gave only a life interest to his two uterine brothers and a cousin who are his 'proper' successors (per Sarbah's Fanti Customary Laws (3rd ed) at p 102) shows clearly that he did not intend his self acquired property to be inherited in accordance with the matrilineal rule of succession.

In addition to the life interest only given by him to his 'proper' successors, the donor expressly made a gift over to his four named children as remaindermen, a class of beneficiaries who under the relevant matrilineal rules of succession are normally outside the pale of inheritance of their deceased father's estate...therefore, we find a deliberate intention on the donor's part to vest his own property in his children upon a contingency."

However, if the ordinary sense of the words gives rise to absurdity or inconsistency with the rest of the deed, the court may modify the words in order to give expression to the true intention of the parties. Thus, in re Amarteifio (Decd); Amarteifio v Amarteifio it was held that where the literal sense of the words would create an absurd situation they might be properly discarded and modified. In that case, a testator had directed that the balance of rents accruing from his house be distributed equally between the devisees under his will but not until his wife had been paid £20 of such rents annually. It was contended on behalf of the plaintiffs that the testator must have intended the wife to be paid twenty pounds only of the accruing rents at all times and that the defendants had misinterpreted the relevant clause of the will to mean that since rent at the date of the will was £100 per annum, the wife was entitled to 20 per cent of the rents accruing at all times from the property. In dismissing this contention the court held that:

"A will should be read together as a whole to realise the true intention of the testator. It would be ludicrous to accept that the testator who at clause 8 of his will directs that all documents pertaining to his house at Kokompe should be handed over to his wife, Rosina, and who at clause 12 (f) gives the said wife, Rosina, a bigger share of the said house, could have intended that only £20 annually should be paid to Rosina irrespective of any rent appreciation. I would conclude that the court would be doing an injustice if it did not give the words of clause 6, an import which would give effect and not defeat the intention of the testator."

Sometimes a word used in a document may have a wider meaning in the context used than its ordinary meaning. In that circumstance, the court will have to determine whether to adopt the ordinary or the wider meaning of the word. In Impraim v Baffoe Okunor J when interpreting the word "children" in the testator's will expressed the following view:

"As a general rule, the expression 'children' means immediate descendants and does not include grandchildren. ...It may however appear on the construction of a particular will that the testator used the word 'children' in a wider sense so as to include grandchildren and remoter issues and this may appear in the context of the will itself. ...In the will under consideration, the testator obviously a man of a respectable level of education and a minister of religion excluded his family, and devised the property to a devisee family and decreed that the house should never be sold. In such a context the word 'children' can only make sense and give expression of his intention if it is construed to include remoter issues of the specified beneficiaries."

In Addai v Donkor however, Adade JSC said the following:

"When a person chooses a particular language to express himself, he must be presumed to mean what the words he used normally mean in that language. Here the testator decided to use the English language. From the language of exhibit B (the will)...it almost certainly appears" that exhibit B was prepared by a lawyer, who must be deemed to know the difference between children and descendants...Children must be taken to mean what it means in the English language, viz, 'sons and daughters of any person."

It would seem from these two cases that no definitive stand has been taken by the courts where an intention is evinced to use a word in a context wider than its ordinary meaning.

It is submitted that the latter opinion coming from the Supreme Court is a pointer to the stand the court should take in the circumstance described.

8.8.3 Intention must be gathered from the deed itself

As seen from Amarteifio's case (supra), the intention of the parties must be gleaned from the document as a whole. This means that the court will ascertain what the parties meant by the words which they have used and not what they had intended to have been written. In Prempeh v Agyepong the Court of Appeal held that it was wrong for the trial court to have relied on the incomplete, unsigned and unapproved drafts of a will to determine the intention and wishes of the maker in the face of evidence that the evidence that the will the court was interpreting was based only on part of the instructions the maker gave for the preparation of the will. This could have led to one conclusion, that is the court either substituted its own intention and wishes for that of the maker or supplemented the missing parts of the wishes and intention with its own, a thing no court has power to do. As said by Francois JA (as he then was) in Allan Sugar (Products) Ltd v Ghana Export Co Ltd):

"It is no function of the court to rewrite an agreement for the parties by inserting terms that would have been beneficial but were overlooked especially when such interpolation would amount to an interference with a third party's bargain."

8.8.4 Technical words of limitation

When words which have acquired a definite technical meaning are used in a deed, the court will limit the meaning of such words to their technical meaning. As stated by Mensa Boison J (as he then was) in Monta v Pater son Simons (Ghana) Ltd:

"It is a rule of construction that where legal terms or words of a well known legal import are used by lawyers, especially by conveyancers, they will have their technical legal import."

This will be the case even where the words were inserted by mistake, thereby not fulfilling the intention of the parties. In British Bata Shoe Co Ltd v Roura & Forgas Ltd the Supreme Court held that under the strict rules of interpretation of the contents of an English conveyancing law in force in England on 24 July 1874, the word "heirs" following immediately after the name of a purchaser or grantee in the habendum of a deed was indispensable to the legal freehold estate to the purchaser or grantee. Since the deeds under consideration did not contain the word "heirs" the legal freehold or fee simple estate in the properties in dispute was not conveyed. Blay JSC expressed the view that since the parties were English companies and the agreement to sell the properties were made in England, it must be presumed that they intended the English law to apply to the interpretation of the agreement, that is the term freehold property must be understood and taken to mean what it implies in English law and therefore any root of title which did not contain the word "heir" could not convey freehold property.

8.8.5 Document to be read as a whole

As discussed above, in ascertaining the intention of the parties to a document, sometimes the whole document need to be read to come to a conclusion as to what that intention was. In Manu v Emeruwa the court was faced with the construction of a. document which appeared to be a pledge or a mortgage in which words such as "absolute assignment", "covenant" and "absolutely" had been used. In order to determine whether specific words pointed to the nature of the document, Abban J (as he then was) said:

"In cases of this kind, all the terms of the document must be looked at and whatever may be the phraseology adopted or used in some particular part of the document, if on the consideration of the whole document there are grounds appearing on the face of the document affording proof of the real intention of the parties, then that intention ought to prevail against the obvious and ordinary meaning of those words."

The court came to a conclusion that in spite of the use of the various words, the document in essence was a pledge.

8.9 INTERPRETATION OF OTHER DOCUMENTS - WILLS

The overriding principle in the interpretation of a will is that effect must, as far as possible, be given to the intention of the testator. The classical formulation of this principle can be found in the English case of Grey v Pearson where Lord Wensleydale said:

"In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that will lead to some absurdity, or some repugnancy or inconsistency in the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency but no further."

It has also been said in the English case of In re Allen that:

"It is generally the function and duty of a court to construe the testator's language with reasonable liberality, and to try if it can, to give sensible effect to the intention he has expressed."

However, a court cannot rewrite a will for the testator[185] but may correct mistakes that appear on the face of the will. Technical words will be construed in such a way as to give effect to the wishes or intention of the testator. In Abiba Ali v Alhaji Ali the court held that:

"In construing a will the function of the Court is to ascertain what is the meaning of the actual words and expressions used by the testator; prima facie his words should be given their ordinary meaning, but it may appear from a consideration of the will as a whole that he has used certain words in a peculiar sense, and if so, and if the words in question are not words to which the law has attached one definite meaning, then the words should be given the meaning which appears to have been put upon them by the testator in order that his intention may be carried out."

Where the language of the will is clear and applies without difficulty, extrinsic evidence is inadmissible to affect its interpretation but where it is peculiar or its application to the facts is ambiguous or inaccurate, extrinsic evidence may, subject to some qualifications, be given to explain it.

CHAPTER 9

INTERNAL CONFLICT OF LAWS

9.1 INTRODUCTION

As the discussion in chapter 1 indicated, Ghana inherited from the colonial era a system of legal pluralism, the African and the European-styled components operating in a form of tenuous coexistence. The colonial government introduced a dual system of law and of courts with choice of law based on ethnic origin. Despite the current dispensation having a unified court system, there is still the heed to make rules for the ascertainment, in appropriate circumstances, what law will be applicable in a particular cause or matter. The first such rules were enacted by the Courts Act, 1960 as an attempt to codify, so far as possible, the then current practice and interpretation of the courts in internal conflict matters based on the then applicable section 87 of die Courts Ordinance, 1935. The 1960 rules were replaced by paragraph 64 of the Courts Decree, 1966 which in turn were replaced by section 49 of the Courts Act, 1971. The 1971 rules were replaced by the current rules in section 54 of the Courts Act, 1993.

Section 54 of the Courts Act, 1993 provides that:

(1) Subject to this Act and any other enactment, a court when determining the law applicable to an issue arising out of any transaction or situation, shall be guided by the following rules in which references to the personal law of a person are references to the system of customary law to which he is subject or to the common law where he is not subject to any system of customary law:

Rule 1. An issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue or the

system of law which the parties may, from the nature or form of the transaction be taken to have intended to govern the issue.

Rule 2. In the absence of any intention to the contrary, the law applicable to any issue arising out of the devolution of a person's estate shall be the personal law of that person.

Rule 3. In the absence of any intention to the contrary, the law applicable to an issue as to title between persons who trace their claims from one person or group of persons or from different persons all having the same personal law, shall be the personal law of that person or those persons.

Rule 4. In applying Rules 2 and 3 to disputes relating to titles to land, due regard shall be had to any overriding provisions of the law of the place in which the land is situated

Rule 5. Subject to Rules 1 to 4, the law applicable to any issue arising between two or more persons shall, where they are subject to the same personal law, be that law; and where they are not subject to the same personal law the court shall apply the relevant rules of their different systems of personal law to achieve a result that conforms with natural justice, equity and good conscience.

Rule 6. In determining an issue to which the preceding Rules do not apply, the court shall apply such principles of the common law, or customary law, or both, as will do substantial justice between the parties having regard to equity and good conscience.

Rule 7. Subject to any direction that the Supreme Court may give in exercise of its powers under article 132 of the Constitution, in the determination of any issue arising from the common law or customary law, the court may adopt, develop and apply such remedies from any system of law (whether Ghanaian or non-Ghanaian) as appear to the court to be efficacious and to meet the requirements of justice, equity and good conscience.

A few general observations may be made at this juncture. These rules are identical to those of 1971 with a few minor changes. The rules are not arranged in any strictly hierarchical order. Neither rule 1 nor rule 3 is restricted by reference to any foregoing rules; rule 4 starts with the words "in applying rules 2 and 3", and rule 5

is "subject to rules 1 to 4"; rule 6 is stated to be applicable "in determining an issue to which the preceding rules do not apply", but rule 7 appears to be applicable only where the common law or a system of customary law is the indicated law. Furthermore, the terms of rule 5 will seem to make those of rule 6 somewhat redundant. Rule 5 seems to be a residual rule covering any issue not covered in rules 1 to 4 and rule 6 seems to have the same function/Also, no indication is given as to how one determines what a person's personal law shall be, nor whether such a person can change it ad hoc or generally. Finally, the rules do not adequately deal with questions of status and tortious actions. The question has been posed as to how does one decide, for example, whether the child of a Fante father (matrilineal system) and an Ewe mother (patrilineal system) is (a) "legitimate"; and (b) a member of the customary lineages (families) of either its father or its mother? In terms of section 54(1) of Act 459, birth is not a "transaction" though it may be said to be a "situation" to which the rules may be applied. However, rules 1-4 would seem not to apply to questions of status although rule 5 may be applicable but will be limited to the personal law of the parties to the litigation and. not to the propositus Tortious liability generally do not arise out of a "transaction" as envisaged in rule 1, and as pointed out by a learned jurist, such liability does not anyway arise from actual or presumed agreement, and hence rule 1 will be irrelevant to tortuous actions. It would seem that rule 5 may be of help in such a situation but its application will mean that if the litigating parties have the same personal law, that law would have to govern the situation. Thus, it is conceivable that in a defamation case where the two litigants are Ghanaians customary law will be the applicable law. In enacting the 1993 rules care should have been taken to iron out and clarify some of the difficulties surrounding the interpretation and construction of the rules.

9.2 CHOICE OF LAW RULES

9.2.1 Rule l

It would seem that this rule, by stating that an issue "shall be determined according to the system of law, "allows the parties to choose any system of law presumably within or without Ghana. If this is the underlying rationale, it will import private

international law rules into its application. The rules obviously cover bilateral agreements, including marriage but it is a moot point whether unilateral transactions such as the making of a will are covered by this rule. It has been argued that for unilateral actions such as the making of a will to be covered under this rule, one would have to contend that by making a will under the Wills Act, 1971, for example, the testator .has evinced a clear intention that English law (provisions of the 1971 Act) should apply to the devolution of his estate. However, the rule as stated envisage a situation where all the parties are in agreement as to the law applicable to the issue in question, whereas the unilateral nature of a testamentary act does not admit of such an agreement. Persons likely to be affected by the testator's act (customary heirs) would have their interest affected to their detriment without their consent. It is submitted that rule 1 will not be an appropriate rule to apply to the situation just described but rather rule 6 dealing with the application of principles which will do substantial justice will be apposite.

In Ackaah v Asane, the application of rules 1 and 5 under the 1971 Rules was considered in determining the applicable law in a transaction for the sale of a lorry on credit entered into by two Ghanaians one of whom was an illiterate. The defendant argued that English law or the Limitation Act 1623 should be applicable to the transaction. The evidence revealed that the agreement was prepared in the Sefwi District by a licensed letter-writer and that the terms of the agreement were inconsistent with the standard provisions of a hire-purchase contract or the common law credit sale agreement. In the light of this evidence, the court held that it was reasonable to infer that the particular system of law which the parties intended to apply to the transaction was the customary law of the Sefwi people and that this customary law was identical to the custom prevailing generally among the Akan ethnic group. Consequently, their personal law was the customary law operating in the area where the transaction was entered into and not English law or the Limitation Act, 1623.

Because rule 1 allows any system of law to be chosen by the parties either expressly, impliedly by conduct or by the nature or form of the transaction, it is possible for a person not normally subject to customary law to choose that law as an applicable law or customary law may be applied to such a person if the nature or form of the transaction warrants it. This point was canvassed to no avail in Whittaker v Choiteram. The plaintiff, a Ghanaian woman, married Dr Whittaker, a British

national under the Marriage Ordinance 1884. Dr Whittaker died intestate in England leaving no issue of the marriage but leaving two admittedly illegitimate male children by the defendant, a Ghanaian woman. The plaintiff argued that-as a sole beneficiary, she was exclusively entitled to letters of administration of the deceased's estate to the exclusion of the illegitimate children. If the deceased had been a person subject to customary law, section 48(1) of the Marriage Ordinance, 1884 would have applied and two-thirds of his estate would have devolved in accordance with English law of succession as it existed in 1884 relating to the distribution of the personal estates of intestates. The remaining one-third would have devolved in accordance with customary law. In other words, two-thirds of the estate would go to the widow and children and the remaining one-third to the extended family of the deceased. The defendant on the other hand, argued that by entering into an extra-marital affair with her, the deceased had subjected himself to customary law and therefore the transaction that arose from the relationship must be governed by customary law. Consequently, she further argued, section 48(1) of the Marriage Ordinance 1884 was inapplicable to the case at hand. The court considered rule 2 of the 1966 choice of law rules which was similar to the present rule 1 and held that it did not apply to the case because rule 2 only applied to acts of the parties of a contractual nature other than devolution of property prescribed by law. In the opinion of the court, a father's obligation to maintain his children under customary law was personal and did not bind his estate. The plaintiff was therefore granted the letters of administration.

9.2.2 Rule 2

The opening words of rule 2 do not clarify whose intention is relevant under the rule. The overall intendment though may seem to be that it is the intention of the person whose estate is up for distribution and it is expressly designed to cover succession on death. In terms of the rule the personal law of a deceased Ghanaian will be customary law but this law will not automatically apply to the devolution of his estate. It would only apply if the deceased did not declare a contrary intention. Every Ghanaian is free, if he or she so wishes, to indicate in advance either, orally in front of witnesses, in writing or even by conduct that on his or her death a particular law, other than the customary law, shall regulate the devolution of his

estate. The declaration of such contrary intention will not amount to a testamentary act and need not satisfy the formalities of Act 360.

It has been held in Yirenkyi v Sakyi that in determining the personal law of an intestate Ghanaian for the purpose of devolution of his estate recourse should not be had to such negative or shadowy claims such as the deceased had lived al! his life among the particular community where his estate was situated or that he had adopted for his children names prevailing in that community to assist in the choice of his personal law because they could not conduce to "equity and good conscience" to achieve justice as required under rule 6 of Act 372. However, if the deceased intestate had succeeded to property within a particular system of his dual personal laws, then the devolution of his own estate must point to that system.

9.2.3 Rule 3

This rule in general governs title to property. It may however conflict with the rules of private international law which usually determines a person's immovable property by reference to the lex situs (the law of the place where the property is situated). It is unclear from rule 4 whether this possible conflict will be taken care of. What will constitute "overriding provisions" of the law of the place where the land is situated is too general to be helpful.

9.2.4 Rule 4

As explained above, rule 4 provides for due regard to be given to "any overriding provisions" of the law of the place in which the land is situated. Aspects of this rule give rise to speculation in that they are left unclear. For example, what will constitute the law of the place where the land is situated? Does this mean the customary law of the place; or to that law as affected by statute?

9.2.5 Rule 5

This is a residual rule covering cases where the preceding rules do not cover and will seem to overlap with the provisions of rule 6. The rule allocate the question of the proper system of law by reference to the accident of who happens to be litigating the particular issue

9.2.6 Rule 6

Rule 6 as stated above, overlaps with rule 5. Where none of the above rules apply the court is empowered to pick and choose elements of customary and common laws to do substantial justice between the parties.

9.2.7 Rule 7

This rule gives the Supreme Court a very wide discretion to borrow, develop and apply remedies from any system of law (whether Ghanaian or non-Ghanaian) as appear to the court to be efficacious taking into account the requirements of justice, equity and good conscience.

Despite the objective of these rules being to resolve possible conflicts in the operation of the various laws within the legal system, it would seem that the system has managed remarkably well without the assistance of the rules. Their application has been minimal in the dispensation of justice. Does this means the system can do without these rules? One will hesitate to give an affirmative answer, except to say that the rules need to be revised to take into account the shortcomings stated above.

CHAPTER 10

THE LEGAL PROFESSION

The legal profession refers to the whole of occupational roles purposely oriented towards the administration and maintenance of the legal system. It consists of lawyers, judges, as well as experts of legal education and scholarship, such as lecturers in our faculties of law at the universities. The legal profession in Ghana has had a long and distinguished history. The first native of Ghana to be called to the Bar (admitted as a barrister) in England was John Mensah Sarbah, who in 1887 was called to the Bar at Lincoln's Inn.[3] He thus became the first barrister (advocate) to be enrolled to practise in the then Gold Coast. There were, however, five solicitors enrolled and practising before Sarbah's call lo the bar.' The legal profession in England was and is still divided into, namely barristers and solicitors and consequently, this division was initially imported into the then Gold Coast. A barrister is the advocate in court and the solicitor is the counsellor and drafter of documents. It was an importation that was to have little impact on the profession in the country, because the practice from the beginning was not to draw the English distinction between what a barrister or solicitor could do. It was accepted that both were lawyers, and entitled to provide the full range of services expected of a lawyer, that is legal advice, drafting of documents, and the conduct of litigation as an advocate in a court Law. Such has been the development that in 1960, the Legal Profession Act, 1960 statutorily formalized the practice by defining a lawyer to include both barrister and solicitor. Thus, the profession as presently organized is based on a single profession without any distinction between barristers and solicitors although practitioners usually refer to themselves as "Barristers and Solicitors." It is estimated that there are some 2,500 lawyers currently in practice. The accuracy of this figure is not verifiable because not all lawyers take the trouble to register with the Ghana Bar Association, the professional association for lawyers, and although the records of the Judicial Secretary ought to give an accurate figure, those records only indicate the number of persons who have been enrolled since 1876 when the Supreme Court Ordinance was passed, without giving any indication as to how many have died so that one does not have an accurate figure of how many lawyers are actually in practice, but the estimate of 2.500 is thought to be largely correct making provisions for a ten per cent margin of error.

10.1 The role of the legal profession in Ghanaian society

By virtue of their training, lawyers play a multi-faceted role in society, the most notable being a cog in the machinery of justice. In this role, lawyers aid the administration of justice. As was put by an eminent English jurist:

"Ever since the State decreed that men must cease to settle their disputes with the arguments of fist and club, the administration of justice has been the prime concern of the State. In order to enable this primary function of government to be efficiently discharged, the experience of every civilised community has shown that it is indispensable to have a class of men skilled in advising and aiding the citizen in the vindication of rights before the courts.

For it has long been proved that the most effectual and only practicable method of arriving at the rights of a dispute is by critical debate in the presence of an impartial third party, where every statement and argument on either side is submitted to the keenest scrutiny and attack. Where every step on the way to judgment has been tested and contested, the chance of error in the ultimate decision is reduced to a minimum. The better the case is presented on each side and the keener and more skilful the debate before him, the more likely is it that the judge will reach a just and sound judgement. That is why it has been said that a strong Bar makes a strong bench. It is, then, as contributing an essential element to the process of the administration of justice that the profession of the advocate discharges a public function of the highest utility and importance."

This societal role has been played with distinction over the years. On the centenary celebration of the establishment of the Supreme Court in 1976, the then Chief Justice, Azu Crabbe, was reported to have made the following remarks about the legal profession:"

"If our legal history has been eventful in this past century, we can also say that we have been lucky in the people of our nation who have been alive, in every generation, to match the grandeur of the events of their time. We have, in these years past, never needed a hero in the law to speak up for our people " a Casely-Hayford to warn the Imperial Power to keep our lands inviolate; a Mensah Sarbah to plead the people's cause in the highest councils of Empire; a Coussey to guide in the writing of our first constitution towards independence; in our own lifetime, a Danquah to keep us reminded of the need for legal self-discipline in the tumultuous

years immediately after independence, and a Korsah to hold, first among our people, the scales of justice evenly between the Government, the Legislature and the people."

This remark amply demonstrates the various roles that lawyers have played and continue to play in society. Since the advent of the fourth republic, our law reports are replete with cases in which lawyers have taken the initiative to see to it that rights guaranteed by the Constitution are not trampled upon or that executive action comply with the dictates of the Constitution.

Despite its pre-eminence in the scheme of things, the legal profession has always had an ambiguous social position. On one hand, it generates tremendous respect and lawyers have usually been socially prominent and respected. On the other hand, lawyers have also engendered tremendous distrust and even hatred. The Irish satirist. Jonathan Swift, in his book, Gulliver's Travels, portrayed lawyers in the following words:

"...there was a Society of Men among us, bred up from their Youth in the Art of proving by Words multiplied for the Pleasure, that White is Black, and Black is White, according as they are paid.. .this Society has a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply; whereby they have gone near to confound the very Essence of Truth and Falsehood, of Right and Wrong; so that it may take Thirty Years to decide whether the Field, left me by my Ancestors for Six Generations, belongs to me, or to a Stranger three hundred Miles off."

In more recent limes. General Kutu Acheampong, the then Chairman of the Supreme Military Council (SMC), was reported to have made the following quip about lawyers:

"I put it to you", "I put it to you' ede eduane ba"(I put it to you", "I put it to you' does it produce food?").

This public distrust of lawyers stem partly from the public's misunderstanding of the role of lawyers in the judicial process and partly from the publicity given to cases in which lawyers have either stolen money from their clients or have acted unprofessionally towards them. Lawyers are often accused of defending those who

are guilty thereby letting them off. The irony of this accusation is that more often than not when those same members of the public find themselves in the clutches of the law, the first person they turn to is a lawyer. The truth of the matter is that lawyers are ethically bound to defend all and sundry. In this regard, it is worth recalling part of the speech made by Thomas Erskine, an English barrister, in defending the rebellious and irritating Tom Paine in 1792:

"From the moment that any advocate can be permitted to say that he will or will not stand between the crown and the subject arraigned in the court where he sits daily to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or the defence, he assumes the character of the judge: nay, he assumes it before the hour of judgment, and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principles of the English law makes all presumptions and which commands the very judge to be his counsel."

This statement is as true today as when it was made. It puts in the right perspective the role a lawyer is expected to play vis a vis his client. It emphasizes that it is not the function of the lawyer to determine the guilt or innocence of an individual. All the lawyer is paid to do is to put his client's case before the court as competently and eloquently as he is able. As was aptly put by Lord Reid in the English case of Rondel v Worsley:

"Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce."

In putting his client's case, a lawyer is expected to prepare thoroughly and to come before the court with the requisite materials to assist the court in resolving the dispute between the parties. As was eloquently put by Date-Bah JSC in GIHOC Refrigeration & Household Products Ltd (No l) v Hanna Assi (No 1):

"Counsel who appear before this court have a duty to this court to conduct effective research to cite all die binding decisions of this court which are required for the determination of the justiciable issue or issues which arise from the facts of their case. Not to do so would be equivalent to endeavouring to mislead this court, which would not be in accord with the high standards of professionalism expected of counsel appearing before this highest court of the land."

This duty to the client notwithstanding, the primary duty of a lawyer, as stated in Lord Reid's dictum above, is to the court and this is best performed by assisting the court to arrive at a fair decision "in the purest form possible." It is erroneous to suppose that a lawyer is the mouth piece of his client to say what he wants or to do what he directs. A lawyer owes allegiance to a higher cause, that of truth and justice. In exhibiting this allegiance to truth and justice, a lawyer must, inter alia, produce all relevant authorities pertaining to the case, even those that undermine his case; he must not knowingly conceal the truth and must disregard the most specific instruction of his client, if they conflict with his duty to the court.

It must be stressed that an overwhelming majority of lawyers perform their professional work diligently, competently and honestly. But like any other profession, there are bad eggs in the legal profession. The conduct and performance of these relatively few bad lawyers should not be used as a yard-stick to judge the whole profession but rather should be used as a means for introspection to see how best the General Legal Council can eradicate to the barest minimum the conduct of such recalcitrant lawyers.

Another misconception about the profession is the view that lawyers are avaricious of money and that they will take on any client provided the price is right. When the Ghana Bar Association refused to appear before the public tribunals established under the People's National Defence Council (PNDC) regime, it was accused of orchestrating the boycott because the people had finally secured for themselves a more efficient system which delivered better justice, thereby closing the lawyers'

avenues for making money. The truth is that lawyers, like any other profession, must be paid adequately for their services; any pretence to the contrary is vain. This is not to say that some lawyers have not taken advantage of their clients. This is few and far between and if a complaint is lodged with the General Legal Council, appropriate sanction will be visited on the erring lawyer. In this regard, the General Legal Council and the Ghana Bar Association should consider seriously the establishment of a Fidelity Guarantee Fund from which clients who have suffered financial loss or hardship as a result of the dishonesty of their lawyers may lodge a claim for compensation. Alternatively, the feasibility of some sort of compulsory legal professional insurance cover should be investigated with the view of its introduction for practising lawyers.

The strength of the country's legal system does not depend on the Judiciary alone. It must be a joint effort of the courts and lawyers who are officers of the courts. The contemporary challenge facing a basically conservative profession is how to adapt its role to the changing socio-economic and technology circumstances of Ghana. The profession must appraise its traditional role in society and bring about desirable changes in the way it operates if it is to continue to make valuable contribution to the improvement of society which has accorded it such a high profile, privilege and opportunity.

10.2 The General Legal Council

The organization of the legal profession is entrusted to the General Legal Council set up under section 1 of Act 32 with the particular duty to organize legal education and uphold standards of professional conduct. It may be regarded as the guardian of the prestige, status and dignity of the legal profession and the public interests in so far as they are affected by the conduct of members of the profession. Sections 13 and 14 of Act 32 empower the Council, by legislative instrument, to prescribe regulations for establishing a system of legal education. The constitution of the Council is set out in the First Schedule to Act 32, as subsequently amended. The Council consists of a chairman, a deputy chairman and (a) the two most senior judges of the Supreme Court after the chairman and the deputy chairman; (b) the Attorney-General; (c) the head of the Faculty of Law at the University of Ghana;

(d) three persons nominated by the Attorney-General; and (e) four members of the Bar elected by the Ghana Bar Association. The Council is responsible for the enrolment of lawyers to practice in Ghana. In pursuance of its mandate to uphold standards of professional conduct, the Council is empowered to set up a disciplinary committee consisting of not less than three and not more than seven members. The Council may, on the recommendation of the disciplinary committee, struck off the name of a lawyer who has been found guilty of a grave professional misconduct from the roll of lawyers. It may also suspend such a lawyer and prohibit him from practising for a specific period.

10.3 Ghana Bar Association

The Ghana Bar Association is the sole professional association for lawyers in Ghana. Although not a creature of statute, it is recognised by the Constitution. For instance, the 1992 Constitution requires representatives of the Ghana Bar Association to serve on the Judicial Council (article 153), the Police Service Council (article 201), the Prisons Service Council (article 206) and the Lands Commission (article 259), among others.

The object of the Ghana Bar Association is to concern itself with all matters affecting the legal profession in Ghana and shall for that purpose take such action as it considers expedient and necessary. The Annual Conference of the Ghana Bar Association is the supreme authority of the association. All resolutions and important decisions of the association must be approved by the Annual Conference and so must all constitutional amendments. At the Annual Conference of the Ghana Bar Association, learned papers of academic and professional importance are from time to time presented by eminent members of the legal profession, both local and foreign. Apart from matters affecting the legal profession, the Annual Conference of the Bar discusses problems affecting the nation whether in the political, social, educational, economic or other fields and also international matters and takes decisions on these matters. So important has been the voice of the Ghana Bar Association that various governments of various political hues have attempted at one time or the other to control the association but none has succeeded. All such efforts have failed. The Ghana Bar Association has continued to maintain its

independence of all organs of government and has at all times not failed to oppose governmental measures or measures proposed by the Judiciary or the legislature that it considers inimical to democracy or to the larger interests of the people of this country.

10.4 Legal education

The history of formal legal education in Ghana dates back to the Report of the International Advisory Committee on Legal Education appointed jointly by the General Legal Council and the Council of the then University College of Ghana (now University of Ghana). One of the committee's main terms of reference was to relate the functions of the Ghana Law School to those of the Department of Law in the then University College of Ghana. The committee recommended, inter alia, that (1) except in special cases a degree in law should be the first essential qualification for admission to the Bar in Ghana; (2) in addition to a law degree, students would have to undertake a further period of training at the Ghana Law School and pass examinations in certain professional and practical subjects, such as taxation, company law. conveyancing and legal drafting, professional conduct and office methods; and (3) any applicant for admission to the Bar who had obtained a law degree from a university outside Ghana, would have to pass examinations set by the University of Ghana in subjects where the law was essentially different from the law on which the examination for the foreign degree was set.[31] This Report recommended a system of legal education involving an academic and practical component. The academic component is to be done in the university whilst the practical component is to be undertaken at the Ghana Law School. A brief description of how these components may be achieved is hereby set out.

10.4.1 Academic component of legal education

As stated above, a law degree is a prerequisite to the admission to the Ghana Bar. Currently, three institutions, ie the Faculty of Law, University of Ghana, the Faculty of Law, Kwame Nkrumah University of Science and Technology (KNUST) and

the School of Law, Ghana Institute of Management and Public Administration (GIMPA) offer the Bachelor of Laws (LLB) degree towards meeting this prerequisite. The following is a brief description of the set up in these institutions.

10.4.1.1 Faculty of Law - University of Ghana

The Faculty of Law at the University of Ghana was established in 1958 and admitted its first intake of students in October 1959. Currently, admission into the faculty is limited to applicants with an undergraduate degree. The structure of the LLB degree was largely based on the recommendation of the advisory committee whose report has been summarized above. The LLB programme currently lasts for two years with a total of forty-eight courses offered. The first year curriculum consists of twelve compulsory courses and four elective courses. The second year courses are made up of four compulsory courses and students have some twenty-eight elective courses to choose from. All these courses are three credits each. Students are required to attend lectures and participate in tutorials for a minimum of eighteen credits and a maximum of twenty-one credits each semester. In each year students are expected to take a minimum of thirty-six credits and a maximum of forty-two credits. To be awarded the LLB degree a student must fulfil all the course unit requirements by obtaining a minimum of seventy-two credits.

10.4.1.2 Faculty of Law Kwame" Nkrumah University of Science and Technology (KNUST)

The faculty of law at KNUST was established in 2000 with the objective of offering the LLB degree designed to equip students with a broad and comprehensive background in order to enable them on graduating, to engage in a wide variety of professional services to society, both national and international. There are two types of admission categories, namely (a) those with the Senior Secondary School Certificate, the General Certificate of Education (Advance level)

and mature students; and (b) holders of first and higher degrees in any discipline. The former undertake a four-year programme whiles the latter undertake a three-year programme. Students are required to take compulsory and optional courses during the programme.

10.4.1.3 GIMPA Law School

The GIMPA Law School, located at GIMPA main campus, offers a law programme that leads to the award of a Bachelor of Laws (LLB) degree. The main goal of the LLB programme is to expand legal knowledge and to produce qualified individuals who will work in the public sector generally and especially in the areas of the economy, administration and management. This expands into corporate governance within both the public and private sectors. The programme is structured to meet the criteria required by the General Legal Council for admission to the Ghana Bar.

The curriculum has also been designed to meet international standards and to prepare participants to compete in the global market. The entrance requirement is a first degree or its equivalent in any discipline, plus two years work experience. Short-listed candidates shall be required to take and pass an entrance examination and prove successful at an interview. To qualify for the LLB degree, a student shall be required to have taken and passed thirty (30) courses (120 credits) over a three-year period, comprising eighteen (18) core courses (72 credits) and twelve (12) elective (44 credits) for the duration of the programme. Five courses (20 credits) shall be taken per semester. A student shall take three (3) core courses (12 credits) and two (2) elective courses (8 credits) per semester.

10.4.2 Practical component of legal education

The practical component of legal education involves the study of subjects considered to be prerequisites to the acquisition of the necessary lawyering skills to

practise. This component of legal education is offered at the Ghana School of Law and a brief description of it is as follows.

10.4.2.1 Ghana School of Law

The Ghana School of Law was established in December 1958 and formally opened on 4 January 1962 by the then President, Dr Kwame Nkrumah. It is an independent institution under the auspices of the General Legal Council in fulfilment of its mandate under section 13 of Act 32 to make arrangements for legal education in Ghana. The school offers instructions leading to the professional qualification of legal practitioners. The council has delegated its statutory function in relation to the provision of legal education to a Board of Legal Education which is responsible for the selection of subjects in which students are to be examined, planning of the school's curriculum, regulating the admission of students and for holding preliminary, intermediate and qualifying final examinations. It was the first professional law school to be set up in West and Central Africa. The professional course is of two years duration and candidates who are successful become eligible for a practising certificate. Students are expected to study and pass the following subjects:

(a) Professional Part 1 (4 compulsory subjects and 2 electives) Compulsory" Civil Procedure, Criminal Procedure, Evidence and Company Law and Practice. Electives" Insurance Law and Practice, Industrial (Labour) Law, Banking and Finance, and Legislative Drafting.

(b) Professional Part II (6 compulsory subjects, no electives) Compulsory " Interpretation of Deeds and Statutes. Conveyancing and Drafting, Taxation. Family Law, Legal Accountancy, Advocacy, Ethics and Moot Court.

The School also offers a programme called the post-call law course, which is a three-month course designed for persons who have qualified as lawyers in common law countries outside Ghana. The programme consists of two main subjects, namely constitutional law of Ghana and Ghana customary law.

A glaring omission from the School's curriculum is clinical legal education whereby in essence students apply their knowledge in a setting which replicates

what actually happens in the practice of law. This gives students the opportunity to conduct cases as they would be conducted in the real world. One of the main advantages of clinical legal education is that it encompasses experiential learning, or "learning by doing" and enables the student to apply his knowledge to practical problems. It further gives the student an opportunity to explain why he is taking certain actions and he is able to discuss and reconsider his actions, a process which the practitioner rarely has the time and opportunity to do. The result is that what the student learns is far more likely to remain with him than the knowledge he crams for an examination. The curriculum of the Ghana School of Law should be reappraised with the view of introducing some aspects of this type of legal training into it.

10.5 Admission to practise law

Under section 3 of Act 32, a person shall be qualified for enrolment as a lawyer under the following circumstances:

"(1) If he holds a degree from a university approved by the General Legal Council.

If he satisfies the Council on two conditions, namely, (a) he is of good character, and (b) he holds a qualifying certificate granted by the Council under Part II of the Act.

The Council may, at its discretion, allow a person to be enrolled as a lawyer if that person is able to satisfy the Council that (a) he is of good character, and (b) that he is qualified to practice in any country having a sufficiently analogous system of law and that his qualifications are such as to render him suitable for enrolment.

If the applicant for admission is a citizen of Ghana, he satisfies the Council that (a) he is of good character, and

(b) he is qualified to practise law in any country having a sufficiently analogous system of law to that of Ghana. For this purpose such an applicant may be accepted as qualified to practise in a particular country if he has satisfied the educational tests required for admission to practise in that country, notwithstanding that he may not in fact have been so admitted to practise. However, such an applicant would have to satisfactorily complete at least a three months' course of lectures in customary law and other subjects the

Council may prescribe at the Ghana School of Law or other place of instruction as the Council may prescribe.

Admission to practise is formally done by a call to the Bar organized from time to time by the council at which ceremony duly qualified applicants are enrolled on to the roll of lawyers at the Supreme Court. A person other than the Attorney-General or an officer in his department shall not practise as a solicitor unless he has in respect of such practice a valid annual "Solicitor's Licence" issued by the council. A person who holds a qualifying certificate and who has been duly enrolled may be issued with a solicitors' licence but cannot establish his own office as a solicitor unless he satisfies the council that "he has read for a period of not less than six months in the chambers of another lawyer of not less than seven years' standing as a lawyer approved by the Council" Furthermore, a person who has not previously been entitled to practise as a solicitor in Ghana and who does not have a qualifying certificate but has attended and satisfactorily completed a post-final professional qualifying course approved by the council, shall not be issued with a solicitor's licence unless he satisfies the council that "he has, since qualifying as a lawyer, read for a period of not less than six months in the chambers of another lawyer of not less than seven years' standing as a lawyer approved by the Council." The issuance of the solicitor's licence may be predicated on the applicant satisfying the council that he has not been found guilty of professional misconduct either in Ghana or in any other country. These provisions effectively impose pupillage on those lawyers who wish to practise as solicitors. It will follow from this that those who wish to practise solely as barristers are exempted from these provisions. However, since in practice an overwhelming majority of lawyers act as both solicitors and barristers, the overall effect of these provisions is to impose a six-month pupillage on newly qualified lawyers.

10.6 Liabilities of lawyers

10.6.1 Civil liability

The duty of lawyers cuts across that of contract, tort and fiduciary duties. Consequently, an array of circumstances may present themselves in which a lawyer may incur civil liability. Lawyers, when engaged for reward are under a contractual duty to exercise skill and care on behalf of their client. This is by virtue of their retainer, that is the agreement by which he was engaged by the client. The contract gives rise to a complex of rights

and duties of which the duty to exercise reasonable care and skill is but one. The liability in contract may be concurrent with a tortuous liability in that a plaintiff can found his action in contract or tort, depending upon whichever was the more favourable to him in the particular circumstances.

In the absence of a contractual relationship, a lawyer who gratuitously offers his services to a client within a "special relationship" entitling the client to rely on his professional competence, may owe a tortuous duty of care to that client. The essence of this is that the lawyer must know that the client is relying on his skill and the client must in fact rely on it. In this regard, the view expressed by the Supreme Court in Fodwoo v Law Chambers & Co is apposite. The court said that in a fast developing country like Ghana where the numerical strength of the legal profession was on the increase, it was in the public interest that professional standards should be closely monitored and that lapses of lawyers must be seriously viewed and where, such lapses resulted in grave financial loss to lay clients, they must be adequately compensated. In undertaking their client's business, the court expressed the view that legal practitioners guarantee the existence and due employment of skill and diligence on their part. Where an injury was sustained by a client in the absence of either, the delinquent legal practitioner was responsible to his client for the injury. Thus, in that case, the court held that a lawyer can be sued in negligence for his conduct of a case and that the negligence of a partner is to be deemed as the negligence of the whole firm for which the latter can also be sued. It was also held in Otoo v Biney[57] that a solicitor could be sued in negligence for failure to advise his client to register her deed of conveyance to protect her interest.

Furthermore, in view of the confidential nature of the relationship with a client, a lawyer owes a fiduciary duty to a client. This fiduciary duty requires the lawyer neither to abuse nor take any secret advantage of the special situation that has been created by their relationship. If this duty is breached, the client will be entitled to sue him for relief. Thus, in Vambaris v Altuna it was held that the appointment of a junior partner of a law firm as company solicitor and subsequently as a company director on the recommendation of a senior partner who was also a director of the company, was in breach of the fiduciary duty the law firm owed to the company and should not be allowed to stand. The advice of the senior partner to the lay directors was regarded as not an independent advice given without influence.

10.6.1.1 Immunity from liability

For more than two centuries, English law accepted that barristers, including solicitors acting as advocates[59] were immune from suit, whether by their clients or anyone else[60] in respect of their conduct and management of a case in court[61] and also in respect of pretrial work "so intimately connected with conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that case is to be conducted when it comes to a hearing." The reasons given for this immunity was variously stated as (1) the absence of any contractual obligation towards a client; (2) the difficult nature of the work, so undertaken; and (3) public policy.

However, in Arthur J S Hall &Co v Simons the House of Lords by a majority of 4-3 held that these public policy considerations were no longer sufficiently persuasive, and that advocates were therefore in principle liable in negligence in the same way as other professionals. It should be left for argument in each case whether on the facts; the claim against the advocate should be struck out, for example, as being an abuse of process. The minority agreed with the majority that advocates' immunity should no longer apply to civil proceedings, but they, unlike the majority, thought that it should still have a part to play in criminal proceedings. As was seen from the Fodwoo and Otoo cases (supra), immunity from liability has not been a principle of law in Ghana and the decision in Arthur J S Hall & Co (supra) is in line with the established rule in Ghana.

10.6.1.2 Liability for professional misconduct

Lawyers are professionals obligated to uphold the highest ethical standards for the protection of clients, the legal system and the profession. The underlying object of legal ethics is to lay down rules of conduct expected of lawyers in the course of their professional work. In this regard, the Legal Profession (Professional Conduct and Etiquette) Rules, 1969 (LI 613), govern the professional conduct of lawyers. The rules provide in part that a practising lawyer shall not (a) be a managing director or executive chairman in any company or an active partner in any business; and (b) carry on any profession or business which conflicts or involves a serious risk of conflict with his duties as a practising lawyer. It is the duty of every lawyer at all

times to uphold the dignity and high standing of his profession and his own dignity and high standing as a member of it.

The rules also make certain acts on the part of a lawyer constitutive of professional misconduct. Thus, a lawyer who is convicted of a criminal offence involving dishonesty or moral turpitude makes such a lawyer prima facie unfit to continue on the roll of lawyers. Furthermore, any deliberate deception of the court on the part of a lawyer is classified as a professional, misconduct. Equally, it is a professional misconduct for a lawyer to knowingly permit a client to attempt to deceive the court.[70] Lawyers are as much a part of the court in which they practise as the judges who preside over them. It is therefore imperative that they should exhibit the highest standard of integrity. Lawyers are therefore expected to avoid all conduct which could damage their reputation as an honourable lawyer or an honourable citizen.

A breach of any of these rules will subject the culprit to a disciplinary action before the disciplinary committee of the General Legal Council. The committee has the power to recommend the striking off from the roll of lawyers, a lawyer found guilty of a professional misconduct. However, it has been noted that the disciplinary procedures have not been effectively utilized to keep erring lawyers in check. This lax attitude of the council amounts to an indictment of its supervisory role over the legal profession.

CHAPTER 11

OUTLINE OF CRIMINAL PROCEDURE

Criminal procedure describes the machinery for implementing the criminal law. This machinery is principally set out in the Criminal and Other Offences (Procedure) Act, 1960 (COOPA) (as subsequently amended). The machinery strikes a balance between the protection of the individual from unjust prosecution and unjustified punishment and the right of society to see to it that those who transgress

the laws of the country are punished. The fundamental principle of criminal procedure in Ghana is that it is "accusatorial" or "adversarial" in nature as opposed to "inquisitorial." This means that the accused is presumed innocent until proven guilty or has pleaded guilty. This generally involves the State accusing a person of having committed a crime, gathering evidence to substantiate the accusation and placing such evidence before a court, which decides the matter as if it were an umpire of a contest. The judge has no power to interrogate the accused person and docs not usually ask questions of the accused except to clear up some ambiguity left unanswered by counsel's questions. If the accused is not found guilty of the offence charged or of one of the few available alternative offences, he must be acquitted. The court cannot find him guilty of another offence on its own initiative or investigation. This set up is in sharp contrast with the "inquisitorial" system in which judges undertake an active investigation of crimes by examining the evidence and preparing reports.

The 1992 Constitution has provided elaborate rights to ensure the fair trial of an accused person. For example, an accused person is entitled to be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to the witnesses called by the prosecution.[8] Thus, one can speak of Ghana's criminal procedure as consisting of not only the statutory procedures set out in COOPA, but also the baseline protections given to the accused person by the Constitution.

11.1 Prosecuting authority

The Attorney-General is empowered to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person. He can also take over and continue any such proceedings that have been instituted by any other person or authority. He also has the power to discontinue such proceedings at any stage before judgment is delivered by the entry of a nolle prosequi ("not to wish to prosecute"). This is done by the Attorney-General informing the trial court either in writing or orally in the course of the proceedings that the State intends that the proceedings should not

continue. When this occurs, the accused, inter alia, shall be discharged immediately but not acquitted in respect of the charge for which the nolle prosequi was entered." The duty to prosecute offenders is however generally thrust on the police which have the duty to bring offenders to justice and enforce all written laws. The Attorney-General, however, maintains wide control over these prosecutions. Furthermore, section 56 of COOPA empowers the Attorney-General, by executive instrument, to appoint public prosecutors to prosecute criminal cases on his behalf. This power has been utilized to appoint various public officers to prosecute specific offences. The Director of Public Prosecutions usually prosecute cases tried on indictment and some difficult cases tried summarily. Private individuals can initiate criminal proceedings with the Attorney-General's consent but at his discretion, he may authorize such proceedings to be discontinued.

An issue which may raise concern regarding the Attorney-General's exercise of his prosecutorial discretion is the fact that he is also by virtue of article 88 of the 1992 Constitution the chief legal adviser to the government. This position may raise an issue of conflict of interest and possible executive interference where the Attorney-General is to exercise his prosecutorial discretion in deciding whether to prosecute government officials for acts of corruption, etc. One possible solution to this perception will be to make the Director of Public Prosecutions independent of the Attorney-General and to empower his office with the final say in the initiation, continuance and discontinuance of any criminal prosecution on the lines, for example, of the National Prosecuting Authority of South Africa or the Crown Prosecution Service in England.

11.2 Commencement of criminal proceedings

Criminal proceedings may be commenced in one of two ways, namely (1) by laying a complaint before the court followed by an application for the issue of process to compel the appearance of the accused person before the court. The process may be either a summons or a warrant of arrest; and (2) by a charge sheet/ indictment signed by a police officer or a public prosecutor where the accused person has already been arrested without warrant. The charge sheet/indictment must specify

the name and occupation of the person charged, the charge against him, the time when and where the offence is alleged to have been committed.

The most distinguishing characteristic between a summons and a warrant is that in the former case the accused person comes to court under his own steam on a given date and time whereas in the latter case the accused person named in the warrant is arrested and brought before the court under compulsion. Once issued, a warrant remains in force until it is executed or cancelled by the court which issued it.

A warrant, summons, or other process issued by a judge or magistrate is not considered to be invalid, by reason of the judge or magistrate who signed it, dying or ceasing to hold office or have jurisdiction.

11.3 Bail

Bail involves a process whereby the liberty of an accused person in custody is secured pending further investigations into the crime he is accused of or his trial for the offence with which he is charged. The granting of bail may be conditional upon a guarantee given by another person or other persons who agree to assume responsibility for the accused person's appearance in court at a later date by standing surety, or even upon the person's own recognizance or promise to make himself available whenever needed to answer the charge. There are different considerations for granting bail depending upon the stage at which the proceedings are or upon the type of offence with which the accused is charged.

Bail may be granted by the police upon the arrest and detention of the accused person. This will be in pursuance of article 14(3) (b) of the 1992 Constitution which mandates that a person who is arrested upon reasonable suspicion of his having committed or being about to commit an offence, and who is not released, shall be brought before a court within forty-eight hours after the arrest. A court may grant an accused person bail before his trial, during his trial and upon conviction pending an appeal.

The grant of bail is at the discretion of the court. The fundamental consideration is to determine whether the accused person will appear to stand trial at the appointed time and venue. In this regard, the seriousness of the offence committed and the

likelihood of a heavy punishment being imposed are incentives for the accused to abscond and hence an accused charged with such an offence is unlikely to be granted bail. However, section 96(7) of COOPA restricts-the court's discretion in granting bail in cases involving murder, subversion, treason, robbery, hijacking, piracy, rape, defilement or escape from lawful custody. The said subsection also prohibits the granting of bail to a person being held in custody for extradition to a foreign country.

The main grounds for refusal of bail are set out in section 96(5) of COOPA. These include the following:

a. that the accused may not appear to stand trial;

b. that he may interfere with any witness or evidence, or in any way hamper police investigations;

c. that he may commit a further offence when on bail; or

d. he is charged with an offence punishable which was committed while on bail.

Section 96(6) of COOPA provides factors which may be taken into account in determining the likelihood of the accused person absconding if granted bail. The court is enjoined to consider:

a. the nature of the accusation;

b. the nature of the evidence in support of the accusation;

c. the severity of the punishment which conviction entails;

d. failure to comply with conditions of recognisance on a previous occasion;

e. whether or not the defendant has a fixed place of abode in Ghana and is gainfully employed; and

f. whether the sureties are independent, of good character and sufficient means.

These are the only relevant considerations to be taken into account in determining whether or not to grant the accused person bail. Other considerations such as the

character or demeanour of the accused person or the desires of the complainant are irrelevant considerations unless they will affect the likelihood of the accused person absconding.

The amount and conditions of bail shall be determined having regard to the circumstances of each case, and shall not be excessive or harsh. Finally, a court is not permitted to withhold or withdraw bail merely to punish the accused person.

11.4 The trial

The law makes provision for the following categories of offences, namely (1) capital offences, such as murder, treason and piracy for which the maximum penalty is death; (2) first degree felonies, such as manslaughter, rape and mutiny punishable by life imprisonment or a lesser term; (3) second degree felonies, for example, intentional and unlawful harm to persons, perjury and robbery punishable by a term of imprisonment not exceeding ten years; (4) misdemeanours, for example, assault, theft, unlawful assembly and official corruption; and (5) public nuisances, such as drunken and disorderly conduct, punishable by a term of imprisonment not exceeding three years. Increased penalties apply to individuals with a prior criminal record.

An offence may be tried either summarily or on indictment depending on whether the offence is a misdemeanour or a felony.

Under section 2(1) of COOPA, an offence must be tried summarily if the enactment creating it makes it punishable on summary conviction and provides no other mode of trial. Similarly, section 2(2) of the Act provides that an offence must be tried on indictment if it is punishable by death or it is an offence declared by any enactment to be a first degree felony. Apart from these two categories of offences, a number of offences are not specifically stated to be triable either summarily or by indictment. Where this is the case, such an offence may be triable either way. A pointer to which procedure will be adopted is seen by the way the proceedings are commenced; if the prosecution initiates the proceedings by way of a charge sheet, this will indicate their intention to try the offence summarily; on the other hand, if a bill of indictment is preferred, this will indicate a trial by indictment. The criterion of choosing one mode over the other has not been definitively determined. Section 1 of the Criminal Offences Act, 1960 (COA) and section 414 of COOPA

both give a vague definition of what constitutes an indictable offence. Both provide that an indictable offence is any offence punishable on indictment but no specific offences are stated to be punishable on indictment. This will indicate a position that the categories of indictable offences are open-ended. However, in practice, indictable offences are limited to offences punishable by death and first degree felonies.

11.4.1 Rights of the accused

Article 19 of the 1992 Constitution provides for certain safeguards for a person charged with a criminal offence. Some of these will be briefly discussed below.

11.4.1.1 Right to be informed immediately and in detail of the nature of the offence charged

This right is provided for by article 19(2)(d) of the 1992 Constitution to the effect that a person charged with a criminal offence shall be informed immediately in a language that he understands, and in detail, of the nature of the offence charged. In All Yusuf Issa (No 1) v Attorney-General (No 7 J[38] the appellant argued in the Court of Appeal that even if section 179 A (3) (a) of the Criminal Offences Act, 1960 as amended by the Criminal Code (Amendment) Act, 1993[39] were constitutional, the second charge founded on that section did not contain sufficient details to meet the requirements of article 19(2)(d). The court unanimously rejected this argument. It held that the particulars of the second charge, founded on section 179A(3)(a) of the Criminal Offences Act, as amended by the 1993 Act, did not contravene article 19(2)(d) of the 1992 Constitution. In the court's view, the provision in article 19(2)(d) of the 1992 Constitution must necessarily be construed as implying that the information was to enable the accused to adequately prepare for his defence to the charge. This, the court held, was the only attributable rationale behind the provision of the said article. It was further held that the information required by article 19(2)(d) of the 1992 constitution could either be in writing or be oral.

11.4.1.2 Presumption of innocence

Article 19(2)(c) of the 1992 Constitution provides that a person charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty. This provision is at the heart of the adversarial system of criminal justice practised in Ghana. Commenting on a similar provision in section 10(2)(a) of the

Botswana Constitution in Sello v The State? Hayfron-Benjamin CJ slid:

"If the constitutional presumption of innocence means anything at all, it means that an accused person comes to court under a halo of innocence. It is for the prosecution to displace this presumption and establish, by cogent and relevant evidence, his guilt beyond reasonable doubt. The accused person is entitled as of right to have his case considered adequately, fairly and on its merits. To treat notice from the accused to the police that he would disclose his version of the incident only in court as evidence of perfidy is intolerable. It leads support to the complaint by the accused that he did not get a fair trial."

This dictum was a reaction to the trial magistrate's categorisation of the appellant as an untruthful witness because he chose to reserve his defence till the trial.

It should be noted that the provision in article 19(2) (c) of the 1992 Constitution may be derogated from in terms of article 19(16) (a) of the 1992 Constitution by imposing on the accused the burden of proving particular facts. Thus, section 15(3) of the Evidence Decree, 1975 provides that unless and until it is shifted, the party claiming that any person, including himself, is or was insane or of unsound mind has the burden of persuasion on that issue. Furthermore, section 206(1) of the Criminal and Other Offences Act, 1960 provides that any person who, without lawful authority the proof of which shall lie on him, has with him in any public place any offensive weapon shall be guilty of a misdemeanour. The placing of this type of burden of proof on the accused is not a proper exception to the general rule that the prosecution bears the burden of proof in criminal cases. This is so because the prosecution invariably has to prove certain basic facts before the accused person is called upon to prove the facts thrust upon him.

11.4.1.3 Right to a fair trial

The right to a fair trial is one of the basic foundations of the rule of law and it is recognised internationally as a human rights norm. Its purpose is to protect individuals from unlawful and arbitrary curtailment or deprivation of their basic rights and freedoms, particularly those relating to life and liberty of their person. The right to a fair trial is applicable to both the determination of an individual's rights and duties in a suit at law and with respect to the determination of any criminal charge against him. It is guaranteed under article 14 of the International Covenant on Civil and Political Rights. At the continental level, article 7 of the African Charter on Human and Peoples' Rights also guarantees a person's right to a fair hearing.

Article 19(1) of the 1992 Constitution embodies this universally recognised right by providing that a person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court. This right protects three types of interests, namely the right to liberty, to personal security and to a fair trial. Interpreting a similar provision under the Botswana Constitution in Busi v The State Amissah JP opined that what the constitutional provision requires is not that charges should be heard within a specific time but that the hearing should be within a reasonable time. Such time will vary depending on the circumstances of each case. In determining what a reasonable time is, the period taken to bring and to prosecute the charge will be one, but only one of several factors to be taken into account. The nature of the particular criminal act, the complexity of the charge, the availability of witnesses, the effort made to prosecute the charge expeditiously, and the availability of judges or magistrates, will all be factors which would have to be taken into consideration. The appellant, an inmate in a mental hospital, was charged with the murder of ten people and the unlawful wounding of six others all inmates of the hospital and arson. The offence took place in December 1992, the trial begun in September 1995 and in June 1996 the prosecution sought and was granted leave to withdraw the charges against the appellant. The court ordered that the appellant "be discharged and liberated." The appellant sought an order from the Court of Appeal quashing the decision of the court and entering a verdict of not guilty and an acquittal on the grounds, inter alia, that the provisions of section 10(1) of the Botswana Constitution which provides for a fair trial of an accused person within a reasonable time had been violated. It was contended that by the withdrawal of the indictment it was opened to the prosecution to re-indict the

appellant for the same offence at some unknown future date and this uncertainty would infringe the constitutional provision of trial within a reasonable time. The Judge President having expressed the views stated above concluded thus:

"In this case, the delay apparently was due to the fact that some of the witnesses and the appellant himself were so badly injured by the fire that they were admitted into hospital for long periods. Some of the witnesses have since the event regressed in mental condition and the whereabouts of some became unknown so that their production before the court at an earlier period became useless or impossible. It seems to me that in these circumstances, section 10(1) of the Constitution cannot be said to have been infringed by the time that the application was made by the prosecution to withdraw the case."

The views expressed in this case may be equally applicable in construing the provisions of article 19(1) of the 1992 Constitution. The overall effect of article 19 of the 1992 Constitution was considered by the Supreme Court in Ali Yusuf Issa (No 2) v The Republic (No 2). The appellant, a Minister of Youth and Sports, was entrusted with the sum of US$46,000 to be used for payment of winning bonuses and imprest for players and officials of the national team, the Black Stars, who were going to play a world-cup qualifying match in Sudan. The appellant claimed that before travelling by air to Sudan for the match, he had packed the amount of US$46,000 into his suitcase, but discovered on arrival in Sudan that the money in the suitcase was missing. He was charged with stealing and fraudulently causing financial loss of US$46,000 to the State, contrary to sections 124(1) and 179A(3) (a) of the Criminal Code, 1960, as amended by the Criminal Code (Amendment) Act, 1993, respectively. He was convicted and sentenced to, inter alia, four years imprisonment on each charge plus a fine of 010 million (GH₵1,000) on each charge.

He appealed to the Court of Appeal against both the conviction and sentence and the court upheld the conviction but varied the sentence. On a further appeal to the Supreme Court, the appellant argued, inter alia, that the trial court had conducted the trial in such a manner as to deny him the constitutional right to a fair trial as required by article 19 of the 1992 Constitution. In particular, he argued that (1) the refusal of the trial court to stay proceedings pending the determination of the appeal by the Supreme Court against the decision of the Court of Appeal,

upholding the trial court's submission of no case to answer; (2) the question of the constitutionality or otherwise of the second charge of the offence of causing financial loss to the State; (3) the refusal of the trial court to grant the application for necessary adjournment to facilitate the preparation of the appellant's defence at the trial; and (4) the higher fees being charged at the Fast Track High Court all contributed to his denial of a fair trial. The Supreme Court unanimously dismissed the appeal. The court held that the trial court had the discretion to grant or refuse the application for an order of stay of proceedings; that in the instant case, the trial court had sound reasons for refusing the application and that it had acted judicially in refusing the application for stay of proceedings. Consequently, there was no denial of the right to a fair trial under article 19 of the 1992 Constitution. With regard to the issue of the refusal of the trial court to adjourn the matter for the preparation of defence, the court held that adjournments were within the sole discretion of the trial court; and that the mere refusal of the trial court to grant the application for adjournment, could not, per se, constitute a denial of the right to a fair trial, particularly given the peculiar circumstances of the trial court's capacity to produce transcripts of the previous days' proceedings within a matter of hours. The court further held that the higher fees being charged at the Fast Track High Court could not justify a conclusion that such fees constituted a denial of the right to a fair trial under article 19 of the 1992 Constitution.

It must be emphasised that it is incumbent on the accused to assert his right to a speedy trial. The mere fact that there has been an unreasonable delay is not ipso facto, a reason for the court, to order a permanent stay of the prosecution. Furthermore, since the phrase "reasonable time" has no precise definition, whether a delay is reasonable or unreasonable will depend on the circumstances of each case. Finally, section 33 of the Juvenile Justice Act of 2003 provides for the trial of juveniles within six months from the date of arrest, failing which the accused is to be discharged unconditionally.

Despite the existence of these provisions, delays have become a routine reality in the judicial process, denying fair trial in many cases. It is not uncommon to find an accused person remanded in custody for many years. There is some glimmer of hope that this deplorable state of affairs is being rectified by a concerted effort to decongest the prisons.

11.4.1.4 Right to a jury trial

Article 19(2) of the 1992 Constitution provides that:

"19. (1) A person charged with a criminal offence shall -

(a) in the case of an offence other than high treason or treason, the punishment for which is death or imprisonment for life, be tried by a judge and jury and-

(i) where the punishment is death, the verdict of the jury shall be unanimous; and (ii) in the case of life imprisonment, the verdict of the jury shall be by such majority as Parliament may by law prescribe..."

This right is a constitutional recognition of statutory provisions dating back to colonial times. Section 204 of COOPA provides that all trials on indictment shall be by a jury or with the aid of assessors in accordance with Part V of the Act. By section 2(2) of the Act, an offence shall be tried on indictment if: (a) it is punishable by death or it is an offence declared by an enactment to be a first degree felony; or (b) the enactment creating the offence provides that the mode of trial is on indictment.

The envisaged jury consists of seven members and they decide the guilt or innocence of the accused person under the direction of the presiding judge. Those eligible to serve as jurors must be between the ages of 25-60 years and must be able to understand the English language and must be resident in Ghana. There are a number of statutory exemptions from jury service for such persons as judges, legal and medical practitioners. A unanimous verdict is required of the jury for offences carrying a death sentence, but a majority verdict of 5-2 is sufficient for a finding of guilt in all other cases.

11.4.1.5 No conviction for criminal offence unless defined and penalty prescribed

Article 19(11) of the 1992 Constitution makes provision to the effect that no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law. This right was the subject of argument in

British Airways v Attorney-General. The appellant, an external company, operating in Ghana, was charged with its manager for refusing to pay rent in convertible currency, contrary to sections 4 and 9(1) and (3) of the External Companies and Diplomatic Missions (Acquisition or Rental of Immovable Property) Law, 1986. While the criminal proceedings were pending, the law was repealed by the Statute Law Revision Act, 1996. However, there was no provision in the repealing Act saving the offences created under the law under which the appellant was charged before its repeal. The accused objected to their continued trial under the repealed law but their objection was overruled by the trial court. Consequently, the accused, as plaintiffs, brought an action in the Supreme Court under articles 2(1) (a) and 130 of the 1992 Constitution for a declaration to the effect that their continued prosecution under the repealed law was unlawful and also for an order for a permanent stay of the prosecution. The Attorney-General contended that the continued prosecution of the plaintiffs could be justified under section 8(1) (e) of the Interpretation Act, 1960(CA 4). The effect of that section was that a person could still be prosecuted under a repealed enactment because the section has preserved any pending proceedings or punishment under the repealed enactment. The Supreme Court declared that the continuance of the criminal trial of the plaintiffs under the repealed law was unlawful. The court held that the provision in section 8(1) (e) of CA 4 was inapplicable because under article 19(11) of the 1992 Constitution, no person could be convicted or punished unless a written law had defined the offence or provided sanctions for same. The court construed the provision in section 8(1) (e) of CA 4 as being inconsistent with article 19(11) of the 1992 Constitution in respect of criminal offences contained in a repealed law, such as the one under consideration. The court expressed the view that the position would have been different if the plaintiffs had been convicted before the law was-repealed or if the repealing Act had saved offences committed before the repeal of the law. Acquah JSC (as he then was) said:

"Note that the verb used in article 19(11), is 'is' and not ‘was'. If it had been 'was' the formulation could have referred to the past and not the present. The use of 'is' clearly shows that the formulation looks beyond the time of the commission of the offence to ensure the legality of what happens thereafter. If at any stage before the conviction, the law creating the offence and the punishment is totally repealed without any saving, the investigation and proceedings cannot be continued."

11.5 Arraignment

The arraignment of an accused before a court consists of three stages, namely:

(a) calling the accused by name to the bar of the court;

(b) reading, interpreting (if necessary) and explaining the nature of the charge to him; and

(c) taking a plea, that is asking the accused how he pleads— guilty or not guilty — and recording his answer.

1l.5.1 Plea

On: arraignment the accused has several pleas open to him.

These are:

a. Plea of guilty. The plea must be by the accused himself and not by his counsel on his behalf. This plea is regarded as a judicial confession and it absolves the prosecution from proving the case against the accused. However, for the plea to be accepted, it must be clear, unambiguous and unequivocal.

b. Plea of not guilty. This is a general denial of the charge the effect of which is that the accused joins issues with the prosecution.

c. Plea to the effect that he has already been convicted or acquitted of the offence With which he is charged (autrefois convict/acquit). For this plea to be successful there must have been a trial by a competent court on a charge which comprised the subsequent charge and there must have either been a conviction or an acquittal at the trial not a mere discharge from the charge. On either of these pleas, the question to be considered is whether the subsequent charge is the same or substantially the same, as [the offence previously charged. In considering the question, it is immaterial that in the

present case, the facts examined or the witnesses called are the same as those in the previous case.

d. Plea to the effect that he has received a pardon from the President for the offence-charged.

e. Plea to the effect that the court has no jurisdiction to, try the offence.

If the accused when called upon to plead refuses to plead, the court may, if it thinks fit, order a plea of not guilty to be entered on his behalf. The plea so entered has the same force as if the accused has so pleaded. The refusal to plead may be attributable to the accused being of unsound mind, in which case the court will proceed to try whether this is the case. If the accused is found to be of unsound mind, he will be dealt with in the manner provided for persons so afflicted.

11.6 Conduct of the trial

On the assumption that the accused has pleaded not guilty and is represented by a lawyer and the trial is on indictment before a jury, the conduct of the trial may generally take the following order:

a. Prosecution lawyer opens his case by addressing the court for the purpose of explaining the charge and outlining the evidence to be led in support of it.

b. He calls his witnesses and examines them in-chief. The cardinal rule here is that the witness should not be asked leading questions, that is questions that suggest the desired answer. However, leading questions may be asked on introductory matters, for example, the witness's name, address or occupation and on undisputed facts.

c. The accused's lawyer cross-examines the prosecution's witnesses. This is designed to elicit facts favourable to the cross-examiner. Matters not cross-examined on are usually taken to have been accepted as the truth.

d. Prosecution attorney, if he wishes, re-examines the witnesses. The purpose is to get the witness to explain matters which have been left in doubt after the cross-examination or to restore the witness's credibility which may have been damaged during the cross-examination.

e. The prosecution closes its case after calling all its witnesses. At this point, if the court considers that there is no evidence that the accused committed the offence charged or any alternative offence supported by the evidence, it may acquit and discharged the accused.

f. If (e) above is inapplicable, the accused is given three options, namely to remain silent and not to say anything in his defence, to give unsworn evidence from the dock upon which he cannot be questioned or to give evidence in his defence for which, subject to some limitations on questions he may not be asked, he will be treated like any other witness. If he chooses the latter, his lawyer may give an opening speech outlining the evidence to be given in support of his defence.

g. Defence lawyer may then call the accused, if he deems it appropriate, and examine him in chief.

h. Prosecution cross-examines the accused after which the defence re-examines the accused, if necessary.

i. Other defence witnesses, if any, are called and examined in-chief and they are in turn cross-examined by the prosecution. The defence may re-examine such witnesses if desirable.

j. Defence closes its case.

k. Prosecution addresses the court.

l. Defence replies to prosecution's address.

m. Court then sums up the case and gives direction to the jury.

n. After the summing up the jury will retire to consider their verdict or if it is a non-jury trial, the judge will give his judgment or reserve it to a subsequent date. The court imposes appropriate punishment after hearing evidence in mitigation of the offence.

11.7 Punishment

A person convicted of an offence may be punished by the imposition of the penalty prescribed by the law with regard to the offence for which he has been convicted. As a general rule, the court has wide discretion as to the type of punishment to impose but there are instances where this discretion is fettered by statutorily imposed mandatory or minimum sentences. There are different types of punishment provided for in COOPA and these will be briefly discussed.

11.7.1 Death sentence

The death sentence is mandatory for treason, murder and aggravated piracy. Under the Suppression of Robbery Decree, 1972, the death penalty may be imposed for robbery and is mandatory if the robbery results in loss of life. However, the death sentence may not be passed on a juvenile or a pregnant woman. Defendants have a right to appeal to the Court of Appeal and the Supreme Court, except in treason cases which are tried by a specially-appointed High Court and in which appeal is allowed only to the Supreme Court. The President may, acting in consultation with the Council of State, commute a death sentence. Execution may be by hanging, lethal injection, electrocution, gas chamber or any other method determined by the court.

There is a world-wide campaign to abolish the death penalty. Despite statements by government officials that the death penalty should be abolished, no concrete steps have been taken towards its abolition. The last reported execution was in 1993. Ghana has not ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights that aims at the abolition of the death penalty.

11.7.2 Imprisonment

Various terms of imprisonment may be imposed depending on the terms of the statute creating the offence for which the accused person has been convicted. Some enactments require that a minimum sentence be imposed whilst others require a maximum sentence. In terms of section 296 of COOPA, a person convicted of a crime declared by any enactment to be a first degree felony, for

example, rape, forgery or uttering currency notes, where the punishment for the crime is not specified, is liable to imprisonment for life or to any lesser term. Similarly, a person convicted of a crime designated as a second degree felony, where the punishment is not specified, is liable to imprisonment for ten years or any lesser term. Where the crime of which a person has been convicted is designated as a misdemeanour, and the punishment for it is unspecified, he shall be liable to imprisonment for three years or any lesser sentence. Within these limits, the judge, depending on the seriousness of the offence, has discretion as to the prison term to impose. However, the law does not allow a juvenile offender to be sentenced to imprisonment.

11.7.3 Absolute and conditional discharge

Under section 353 of COOPA, a court may, if it is of the opinion that it is inexpedient to inflict punishment on an offender and that a probation order is inappropriate in the circumstances, make an order for the absolute or conditional discharge of the offender. Where an order for conditional discharge is made, the period within which the conditions must be observed would also be specified. The court, before making such an order, is required to "explain to the offender in ordinary language that if he commits another offence during this period, he will be liable to be sentenced for the original crime." This provision thus operates to save a particular convict from prison provided the conditions for discharge are observed. In making such a decision, the trial judge is enjoined to the take into account (1) the circumstances of the case; (2) the nature of the offence; and (3) the character of the offender.

11.7.4 Probation

Probation is the suspension of a sentence of imprisonment. This may be done where the trial court has convicted the accused person but is of the view that he is amenable to probation and would be returned to the community for a specified period under certain conditions imposed by the court. Section 354(1) of COOPA provides that where a person is charged with either a summary or indictable offence, and the court thinks that the charge is proved but is of the opinion that having regard to the youth, character, antecedents, home surroundings, health, or mental condition of

the offender, or to the nature of the offence or any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may make a probation order, putting the offender on probation. The order must contain such provisions as the court may deemed necessary for the supervision of the offender by a probation officer and such additional conditions such as residence and other matters as the court, having regard to the circumstances of the case, considers necessary for securing the good conduct of the offender or for preventing a repetition of the same offence or the commission of other offences. The disadvantage for ordering probation for an adult offender is that the order may be made only if the person is willing to comply with the conditions of the probation. This dependence on the will of the convicted person severely limits the court's power to impose probation of its own accord.

In terms of section 356 of COOPA, placing an offender on probation is without prejudice to the power of the court, under any law for the time being in force, to order the offender to pay costs or damages for injury or compensation for loss as the court may think reasonable.

Despite the statutory provision for probation, it does not seem that the infrastructure is in place for effective utilization of this alternative means of punishment. Consequently, it is not used frequently as an alternative to imprisonment. However, probation has been used mainly for young offenders as one of the methods designated by section 29 of Act 653 for dealing with juvenile offenders. In this regard, section 31 of that Act requires the court to be furnished with a social inquiry report, the contents of which may deal with the nature of the offence, the character, antecedents and home surroundings of the juvenile offender. Based upon this report, the court may then make a probation order with such conditions as it may deem fit. Such an order shall be valid for between six months and eighteen months. If a juvenile offender breaches the conditions of the probation order or commits an offence during the period of the probation order, the juvenile is liable to be sentenced for the original offence.

11.7.5 Fine

Where the enactment creating an offence has stipulated a fine as the only penalty, the court is bound to impose such a fine although as a means of ensuring that the offender pays the fine it can fix a term of imprisonment in default of payment of the fine. The court also has discretion to impose a fine either in addition to or in lieu of any other punishment for which the offender may be liable, where the conviction is for a felony or a misdemeanour or any offence punishable by imprisonment, and the sentence is not one fixed by law. Fines have traditionally been used as a means of punishing by "hitting the pocket" of the convicted person, and is seen as an effective measure for discouraging deviant conduct. However, this system of punishment has been said to be inherently flawed in that it bites unequally depending upon the economic status of the convict in question and very poor people who are unable to pay the fines wind up in prison anyway. Consequently, its value as an alternative to custodial sentence is limited by the convict's economic status. A fine thus penalizes a poor convict more than a rich one, leaving behind the unfortunate impression that rich people are punished little when they are fined.[1]" Moreover, inflation over time erodes the value of the fines imposed thereby drastically reducing their deterrent effect. To combat this, the Fines (Penalty Units) Act, 2000 substituted units for monetary value and permitted the Attorney-General, by legislative instrument, to vary these units from time to time to bring them in line with the contemporary economic realities. This Act has been repealed by section 52 of Act 792, sections 26 and 27 of which enacted similar provisions to those contained in the 2000 Act. Under the second schedule to Act 792, one penalty unit is equal to GH₵12.00.

11.7.6 Reparation

Under section 35(1) of the Courts Act, 1993 a person charged with an offence which has caused economic loss, harm or damage to the State or any State agency may offer to make reparation. For such an offer to be accepted it must be preceded by a plea of guilty. Such reparation would be taken into consideration when the court considers the appropriate sentence to pass on the offender. It may, in lieu of passing sentence on the offender, make an order for him to pay compensation or make restitution and reparation. Such an order may be subject to such conditions as the court may deem fit. This provision smacks of selective justice in that it appears to

offer highly placed white-collar criminals a way out of going to prison. As aptly pointed out by a learned writer, "If reparation is such a good mechanism for retrieving money from individuals, how come it is available only to those who have defrauded the State or State agencies or caused it economic loss? This mechanism should be more widely available for all victims of fraud, so that fraudsters get to return some of the loot and enable victims to make good some of their loss.

11.7.7 Punishment of Habitual Criminals

Punishment for habitual offenders is provided for under the Punishment of Habitual Criminals Act, 1963. Under section 1 of the Act, where a person aged 25 years is:

1. convicted of any offence other than an offence for which he is liable to suffer death;
2. has been convicted previously of at least two offences, each of which is either a felony or a misdemeanour; and
3. it appears to the High Court, after enquiring into the circumstances of the case, that by reason of his criminal habits or tendencies or of his association with persons of bad character, it is expedient for the protection of the public that he should be detained in custody for a substantial period, the court shall, subject to the provision on the convicted person's health, pass in lieu of any other sentence, a sentence of preventive custody with productive hard labour for such term, not being less than ten years, as the court may determine.

The section provides a minimum sentence without specifying what the maximum is. All the above conditions must be satisfied before the court can exercise its power under the Act.

CHAPTER 12

OUTLINE OF CIVIL PROCEDURE

A lawyer who embarks on civil litigation faces a number of problems of a procedural nature. For example, he has to decide in what court he should proceed? What form should the proceedings take? What documents must be prepared and filed with the court? How must they be served on the opposing party? How must the proceedings be conducted in court? How must the judgment of the court, if obtained, be executed? Should the judgment go against his client, to what court should he appeal, or in what court should he seek a review of the proceedings? Is the proper remedy an appeal or a review and what is the procedure in either case? These questions are answered by the law of civil procedure which deals with things such as the jurisdiction of the courts to decide issues brought before them; the different ways in which proceedings can be instituted and conducted; the manner in which documents should be served; the manner in which proceedings should be conducted in court; the manner in which court judgments can be executed, and appeals and reviews of court judgments.

The procedure for civil litigation in Ghana is governed by the High Court (Civil Procedure) Rules, 2004. These rules are made by a Rules of Court Committee in the exercise of the powers conferred by articles 33 (4) and 157 (2) of the 1992 Constitution. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the courts dispense justice uniformly and fairly, and that the

true issues between the parties are clarified and tried in a just manner. The rules are divided into Orders, of which there are 82. Each Order is in turn divided into rules and many rules have sub-rules or paragraphs. The rules apply to all civil proceedings in the High Court and the circuit court, except that they shall be applied mutatis mutandis (with the necessary modification) in the circuit court. Failure to comply with the rules is regarded as an irregularity and shall not nullify the proceedings even though the High Court still reserves the ultimate discretion to decide on the magnitude of the breach and whether or not it is collateral or substantially affects the proceedings.

12.1 Forms of proceedings

The process of taking legal action in a civil matter may commence with the issue of a writ of summons, a petition, or originating notice of motion. Order 2, r 2 of CI 47 provides that subject to any existing enactment to the contrary, all civil proceedings shall be commenced by the filing of a writ of summons. The writ of summons is therefore the basic document for initiating civil proceedings; consequently, it will be briefly discussed.

12.1.1 Writ of summons

The writ of summons ("writ" for short), is the usual means of initiating civil proceedings. The writ will announce to the person to whom it is directed that a legal proceeding has been started against that person, and that a file has been opened in the court records. The writ announces a date by which the defendant(s) must either appear in court, or respond in writing to the court or the opposing party or parties. A plaintiff who files a writ is required to also file a statement of claim. The writ must contain an endorsement stating the nature of the claim or relief or remedy sought in the action.

The writ is valid in the first instance for twelve months from the date of issue unless its validity is extended. It follows from this that it must be served within a year. Some good reason for the delay in service will have to be shown before the court will exercise its discretion in renewing the writ.

12.1.1.2 Service of the writ of summons

It is a fundamental principle that where a party's rights are affected by legal proceedings, notice of such proceedings must be brought to his attention to enable such a party to take the necessary steps to protect his rights. In other words, the party must be afforded an opportunity to be heard in accordance with the maxim, audi alteram partem (hear the other side). Consequently, a writ when issued must be served on the opposing party.

As a general rule, a writ must be served personally on the defendant(s). This is usually done by a bailiff or process server of the court. Exceptions to this rule include cases where the defendant is an infant or a lunatic or is detained, cases where the defendant is a company/corporation, partnership firm or government department, maritime actions, actions for the recovery of land where no person appears to be in possession, and where the action is against a stool or skin (traditional titles of chiefs) or a head of family. Where personal service of a writ cannot be effected after three or more attempts, the court may make an order for substituted service by serving the defendant through a registered letter, posting the writ on a notice board at the court premises or at some other public place or at the usual or last known business or residential address, or by advertisement in the Gazette or in a national newspaper.

When a solicitor of a defendant undertakes in writing to accept service on behalf of his client and enters appearance, no service shall be required to be effected on the defendant. Service on the solicitor is deemed to be proper service on the defendant.

The writ of summons must be indorsed with proof of service within three days of service. Service is not permitted on Sunday, Good Friday, the day before Christmas day, Christmas day, Boxing day and any other public holiday.

12.1.1.3 Service of writ of summons outside jurisdiction

Sometimes it may be necessary to serve the summons outside the jurisdiction, that is outside Ghana. In that event, an ex parte application supported by an affidavit

may be made to the court and if granted, the service can be effected with leave of the court. Leave may be granted, for example, if an act, deed, will, contract, obligation or liability affecting immovable property situated within the jurisdiction is sought to be construed, rectified, set aside or enforced in the action. Service is usually done through the Judicial Secretary, the Ministry of Foreign Affairs and diasporial relations and the Ghana Embassy or a representative in the country where service is to be effected. Proof of service is obtained through the same channels.

12.1.1.4 Entry of appearance

A defendant who has been duly served with a writ of summons and statement of claim is required to enter an appearance within 8 days of service by filing a Notice of Appearance. This is a process by which the defendant shows his intention to defend the action and submits himself to the jurisdiction of the court. If the defendant fails to enter an appearance, the plaintiff may apply for a judgment in default of appearance. If the claim is for a liquidated demand, the plaintiff may, after the time limited for appearance has elapsed, apply to enter final judgment against the defendant for the sum demanded plus costs. Where the plaintiff's claim is for unliquidated demand, the plaintiff may apply to enter an interlocutory judgment against the defendant. Where for whatever reason the defendant is opposed to the jurisdiction of the court or the competency of the action, he may enter a conditional appearance and raise his objection.

12.1.1.5 Service of defence

A defendant who enters an appearance to defend has 14 days within which to file his defence and/or counterclaim. If the plaintiff decides to reply to the defence of the defendant, he must file a reply and/or defence to[1] the counterclaim. After this, no further pleadings shall be filed except with the leave of the court. Failure to file a defence will enable the plaintiff to apply for judgment in default of defence.

12.1.2 Petition

Some types of action must be initiated by a petition to the court. This will be a formal written request presented to the court. The most important types of proceedings which must be commenced by a petition are those for divorce, nullity of marriage, presumption of death and dissolution of marriage, maintenance orders, and child custody orders.

12.1.3 Notice of motion

Notice of motion is usually used for applications. Such an application may be made ex parte where the rules of court permit or where, having regard to the circumstances, the court considers it proper to permit the application to be made. Every application shall be supported by affidavit deposed to by the applicant or someone duly authorized by him stating the facts on which the applicant relies.

12.2 Parties to civil proceedings

As a general rule every entity recognised by law as a person can sue and be sued. However, there are certain classes of persons who are under a disability in that they cannot sue or be sued on their own. For example, a minor, that is a person under the age of 18 years cannot sue or be sued in his own name. There are other specialized persons, such as corporations, and other entities, such as partnerships and the government for whom special rules apply. Sometimes problems may arise as to who are the proper parties to an action, and as to the separate or joint trial of actions between the same or different parties. A defendant may also wish to bring into the action a person who has not been sued by the plaintiff, this is done by a joinder of the party.

12.2.1 Joinder of parties

Generally, two or more persons may be joined together in the same action as plaintiffs or as defendants without the leave of the court, where:

a. if separate actions were brought by or against each of them, some common questions of law or fact would arise in all the actions; and

b. all rights to relief claimed in the action whether they are joint, several or in the alternative are in respect of or arise out of the same transaction or series of transactions.

Also where the plaintiff in any action, other than a probate action, claims any relief to which any other person is entitled jointly with the plaintiff, all persons so entitled shall, subject to the provisions of any enactment and unless the court gives leave to the contrary, be parties to the action. Any of them who does not consent to being jointed as a plaintiff shall, subject to any order made by the court on an application for leave, be made a defendant.

12.2.2 Misjoinder and non-joinder of parties

The rules provide that no proceedings shall be defeated by reason of misjoinder or non-joinder of any party. Misjoinder occurs when a party whose legal or equitable rights will not in any way be affected by the reliefs sought in the proceedings is joined as a party. Non-joinder occurs when a party whose legal or equitable rights will be affected by the reliefs sought in the proceedings is not joined as a party. The court may in any proceedings determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the proceedings.[34] This means that the fact that a person who should not have been made a party to the action was made a party or the omission at first to join a person, who should have been a party, will not cause the action to fail.

At any stage of the proceedings the court may on such terms as it thinks just on its own motion or on application:

a. order any person who has been improperly or unnecessarily made a party or who for any reason is no longer or a necessary party to cease to be a party; and

b. order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon to be added as a party.

A person shall not be added as a plaintiff without his/her consent given in writing or in such other manner as may be authorized by the court. A person ordered to be

made a party shall not become a party until the writ is amended in relation to him/her and if that person is a defendant, the writ has been served on him/her.

12.2.3 Representative actions

Where numerous persons have the same interest in any proceedings (other than proceedings relating to trustees, executors or administrators, where they can be sued in such capacity without joining the beneficiaries), the proceedings may be brought, and unless the court otherwise orders, continue by or against any one or more of them as representing all or as representing some of them.

At any stage of the proceedings the court may on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons to represent all the defendants or some of them.

The occupant of a stool or skin or, where the stool or skin is vacant, the regent or caretaker of that stool or skin may sue and be sued on behalf of or as representing the stool or skin.

The head of a family in accordance with customary law may sue or be sued on behalf of or as representing the family. If for any good reason the head of a family is unable to act or if the head of the family refuses or fails to take action to protect the interest of the family any member of the family may sue on behalf of the family.

12.2.4 Minors

A minor, a person under the age of 18 years, may bring or make a claim by his next friend and may defend an action by his guardian ad litem. Generally speaking, a next friend or guardian ad litem will be the minor's guardian or a relative or friend of the family and not a mere volunteer. The next friend or guardian ad litem must act by a lawyer. Except where the next friend or guardian ad litem has been appointed by the court,[44] the name of any person shall not be used, and a person shall not be entitled to act as a next friend or guardian ad litem in any action unless the lawyer of the minor has filed the following in the court registry:

a. a written consent of the person proposing to be next friend or guardian ad litem to act in that capacity; and

b. a certificate made by the lawyer for the minor certifying that the lawyer knows or believes the person to whom the certificate relates is a minor, and that the person named in the certificate as next friend or guardian ad litem is a proper person to act as such and has no interest in the action adverse to that of the minor.

When the minor attains the age of 18 years before judgment is given in the case, he/she shall file a notice to that effect and serve a copy on the other party to the action. Such a minor may, with the leave of the court, repudiate proceedings brought on his or her behalf by the next friend or guardian ad litem.

12.2.5 Partnerships and unincorporated association

Partnerships and unincorporated associations (voluntary associations) may sue or be sued in their names. The High Court Rules make provision for such association to sue and be sued in its name. A plaintiff can therefore sue a partnership in its own name. The rules allow the writ to be served on any of the partners at the principal place of business of the partnership.

12.2.6 Incorporated association

An incorporated association is recognised as a "person" in law, consequently; it can sue and be sued in its corporate name. A typical example is a company, for example, Barclays Bank Ltd. Corporations exist independent of the natural persons who are shareholders. A corporation can only initiate civil proceedings by a lawyer unless authorized to do otherwise by express provision of any enactment.

12.2.7 Government

The word "government" is used in its widest sense to include all the governmental machinery such as the Civil Service and other government departments as well as

public officers. Civil actions by or against the government or a public officer shall be instituted by or against the Attorney-General. A prerequisite for bringing such an action is that the plaintiff should give the Attorney-General one month's notice of his intention to bring the action. Such notice should state the cause of action, the name, description and the place of residence of the plaintiff, and the relief he claims.

12.3 Pleadings

Pleadings are the written statements of the parties in actions begun by writ of summons which are served by each party in turn on the other, setting forth in a summary form, the material facts on which each relies in support of his claim or defence, as the case may be. They are the means by which the parties are enabled to state and frame the issues which are in dispute between them, without embarking at that stage on the evidence which each party may adduce at the trial. The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the court will be called upon to adjudicate between them. It serves two purposes, namely (a) they inform each party what the case of the opposite party is, which he will have to meet before and at the trial; and (b) at the same time, informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.

The system of pleadings is based on three fundamental principles.

1. That each party must plead the material facts on which he relies for his claim or defence.

2. That the material facts stated in the preceding pleading will be deemed to be admitted if not expressly traversed or denied by implied joiner of issues.

3. That any fresh matter must be specifically pleaded which makes the claim or defence in the preceding pleading not maintainable or which might take the opposite party by surprise or which raises issues of fact not arising out of the preceding pleading.

The machinery works by requiring the parties to serve their respective pleadings on each other within the times specified in each pleading or any extended time provided.

First, the plaintiff must serve his statement of claim on the defendant, and whether it is indorsed on the writ or not, it must contain in summary form only the material facts on which he relies for his claim together with the relief or remedy which he claims. Secondly, the defendant in answer to the statement of claim must serve his defence on the plaintiff in which he may take all or any of the following courses:

a. He may make express admissions.

b. He may expressly traverse, that is deny or refuse to admit, any of the material facts stated by the plaintiff.

c. He may confess or admit the facts alleged and avoid their effect by asserting fresh facts which afford an answer to them.

d. He may plead collateral matters to destroy or defeat any claim made against him.

e. He may raise a question of law as to any claim made by the plaintiff.

f. He may raise a cross-claim against the plaintiff by way of a set-off or counterclaim.

Any fact in the statement of claim which is not admitted in the defence, because it is either expressly admitted or impliedly admitted by omission of the defendant to traverse it expressly ceases to be controversy between the parties and only those facts stated in the statement of claim which are expressly traversed in the defence will remain in issue between them.

Thirdly, the plaintiff in answer to the defence may, though he need not, serve a reply[59] but if a counterclaim has been served on him, he must serve a defence to the counterclaim if he intends to defend it. If no reply is served, all the material facts alleged in the defence will be deemed to be denied by virtue of the implied joinder of issue. If the plaintiff does serve a reply he may expressly join issue upon the defence but he must plead any special defences which he alleges makes the defence not maintainable or which might take the defendant by surprise or which raises issues of fact not arising out of the defence.

Once all these steps have been taken, pleadings will be deemed to have been closed.[60] This is taken to be the case seven days after service of any reply, or if there is no reply, seven days after service of defence to counterclaim, or if there is no reply or defence to counterclaim, seven days after service of defence. The close of pleadings creates an implied joinder of issues on the pleading last served and also fixes the date by reference to which an application for direction may be made.

12.4 Application for directions

The plaintiff must make an application for directions within one month from the time when pleadings are deemed to be closed. If he does not do so within the prescribed time, any defendant who has entered an appearance may take out the summons or apply to dismiss the action for want of prosecution.

The purpose of the application for directions is two fold:

a. It enables the court to deal at one and the same time with all interlocutory matters in dispute thus saving the costs of numerous applications.

b. It provides a "stock-taking" process at which the court can consider whether the case is ready for trial and check that consideration has been given to the provision of all evidence.

In practice, the plaintiff in his application sets out in numbered paragraphs the issues in dispute and when these are served on the defendant and the defendant does not agree with them, he must file additional issues which will be taken together with those of the plaintiff at the hearing of the application.

Upon the hearing of the application, the court may make an order in respect of any of the following:

a. discovery and inspection of documents;

b. interrogatories;

c. admission of fact or document;

d. inspection of property;

e. method of proof of facts in dispute;

f. appointment of court experts;

g. limitation of right of appeal to the Court of appeal;

h. an order for further and better particulars;

i. consolidation of action; and

j. place and mode of trial.

12.5 Enforcement of judgment and orders

When a court gives its judgment in money, the person in whose favour it is given is referred to as the "judgment creditor" and the person against whom it is given is referred to as "the judgment debtor." The first step to the enforcement of judgment or order is for the judgment creditor to enter judgment or file a notice after trial. As between the original parties to the judgment or order, execution may be issued at any time before the expiration of six years from the date of the judgment or order, but in the following cases leave of the court must be sought and obtained before execution can be effected:

1. where six years have elapsed since the judgment or date of the order;

2. where any change has taken place by death or otherwise in the parties entitled or liable to execution under the judgment or order;

3. where the judgment or order is against the assets of a deceased person coming into the hands of his or her executors or administrators after the date of the judgment or order, and it is sought to issue execution against the assets;

4. where under the judgment or order any person is entitled to relief subject to the fulfilment of any condition which is alleged has not been fulfilled; or

5. where any goods to be seized under a writ of execution are in the hands of a receiver appointed by the court or a sequestrator.

A judgment or order for the payment of money, not being a judgment or order for the payment of money into court, may be enforced by one or more of the following means:

a. writ of fieri facias;

b. garnishee proceedings;

c. a charging order;

d. the appointment of a receiver; and .

e. an order for committal or a writ of sequestration.

12.5.1 Writ of fieri facias

Application for this writ may be made ex parte and must be supported by an affidavit which must contain such facts as identity of the judgment order and such information as will enable the court to be satisfied that the applicant is entitled to proceed to execute on the judgment order. On hearing the application the court may grant it as prayed for or may order that any issue or question, a decision on which is necessary to determine the rights of the parties; be tried in any manner in which any question of fact or law arising from an action may be tried. It may also impose such terms as to costs or otherwise as it considers just.

When a writ of execution is issued, it is valid in the first instance for twelve months from the date of its issue but may be extended from time to time for a period of another twelve months. The writ may be put into effect:

1. in respect of movable property in possession of the judgment debtor by seizure of the property and being put in possession of the registrar until sale;

2. in respect of any money or negotiable instrument, by actual seizure and the money or instrument being deposited in court by the registrar and held subject to further order of court;

3. in respect to any movable property to which the judgment debtor is entitled subject to a lien or right of some other person to immediate possession of the property, by delivery to the person in possession a written order prohibiting the person in possession from giving over the property to the judgment debtor;

4. in respect of shares in any body corporate, by a written order prohibiting the person in whose name the shares are held from making any transfer of the shares or receiving payment of any dividends of the shares, and prohibiting the manager, secretary or other proper officer of the body corporate from making such payment until such further order; and

5. in respect of immovable property or any interest in immovable property, whether law or in equity, by a written order prohibiting the judgment debtor from alienating the property or any interest in the property by sale, gift or in any other way, and prohibiting all persons from receiving it by purchase, gift or otherwise, and the Registrar may also, by direction of the court, take and retain actual possession of the property.

12.5.2 Garnishee proceedings

If it is known to the judgment creditor that a third party ("the garnishee") has money due to the judgment debtor, he can apply by an ex parte motion, supported by an affidavit, to the court for an order nisi. The order nisi may order the garnishee to appear before the court on an appointed day to show cause why he should not pay to the judgment creditor the money due from him to the judgment debtor or so much of it as will satisfy the judgment debt together with costs. Service of the order nisi on the garnishee binds him with regard to the money or so much of it as may be specified in the order.

On the appointed day, if the garnishee does not dispute the debt due or claimed to be due, or fails to appear, the court may make the order nisi absolute against the garnishee. However, if the garnishee disputes his liability the court may summarily determine the question in issue or order that any question be tried and determined. If the garnishee asserts that some other person other than the judgment debtor is or

claims to be entitled to the debt sought to be attached or has claims to have a charge or lien on it, the court may order that other person to attend and state the nature and particulars of his claim.

Any payment made by the garnishee in compliance with an order absolute is a valid discharge of the liability of the garnishee to the judgment debtor to the extent of the amount paid or levied, notwithstanding that the garnishee proceedings are subsequently set aside or the judgment or order from which it arose are reversed.

12.5.3 Charging order

The court may for the purpose of enforcing a judgment or order for the payment of money order the imposing of a charge on any immovable property of the judgment debtor to secure the payment of any money due or to become due under the judgment or order as may be specified in the order.[76] The order is initially given as an order nisi to enable the judgment debtor to show cause why the order should not be made absolute. If the court on further consideration of the matter determines that there is a sufficient reason to justify the making of the order absolute, it may so determine. The application for the order may be made ex parte supported by an affidavit. .

12.5.4 Appointment of a receiver

An order for the payment of money into court may be enforced by the appointment of a receiver. A receiver may also be appointed to enforce a charge imposed on immovable property of the judgment debtor.

12.5.5 Writ of sequestration

A writ of sequestration may be issued against the estate and effects of the delinquent judgment debtor. The writ is a commission directed to two or more persons called "commissioners" appointed by the court empowering them to enter upon any

immovable property of the person against whom the writ has been issued and to collect, take and obtain not only the rents and profits of the property, but also all the person's goods and movable property, and detain them under sequestration in their hands until the person is cleared of the contempt of court.

12.6 Costs

The question of legal costs of litigants may be dealt with by the court at any stage of the proceedings but it usually arises at the conclusion of the case. Although each litigant is primarily responsible for his/her own lawyer's costs, it is usual for the successful party in an action to be awarded an order for costs against the unsuccessful party. As a general rule, a right to costs as against the unsuccessful party only arises after the court has made an order for costs. However, there are some cases in which a party may obtain his/her costs without a court order. These are:

a. When the plaintiff's claim is for a liquidated demand only, and the defendant within the time limited for appearance pays the amount claimed to the plaintiff or the lawyer or agent of the plaintiff, the plaintiff shall be entitled, without an order of the court, to costs of the action.

b. Where the plaintiff by notice in writing and without leave either wholly discontinues an action against any defendant or withdraws any particular claim made by the plaintiff against the defendant, the defendant shall be entitled, without an order of the court, to costs of the action or costs occasioned by the matter withdrawn.

c. Where a defendant by notice in writing and without leave discontinues a counterclaim against any party or withdraws any particular claim made by the defendant against any party, that party shall be entitled, without an order of the court, to costs of the counterclaim or costs occasioned by the claim withdrawn, incurred up to the time of receipt of the notice of discontinuance or withdrawal.

d. Where the plaintiff accepts money paid into court in satisfaction of a cause of action, or any of the causes of action, in respect of which the plaintiff claims, or where the plaintiff accepts a sum or sums paid in respect of a loan or the specified causes of action and gives notice that the plaintiff abandons the

others, the plaintiff shall be entitled, without an order of the court, to costs incurred up to the time of receipt of the notice of payment into court.

e. Where a plaintiff in an action for defamation against several defendants sued jointly accepts money paid into court by one of the defendants, the plaintiff shall be entitled, without an order of the court, to costs incurred up to the time of receipt of the notice of payment into court.

f. A defendant who has counterclaimed shall be entitled, without an order of the court, to the costs of the counterclaim if:

(i) the defendant pays money into court and in the notice of payment, the defendant States that the defendant has taken into account and satisfied the cause of action in respect of which the defendant counterclaims, and

(ii) The plaintiff accepts the money paid in,

But the costs of the counterclaim shall be limited to those incurred up to the time when the defendant receives notice of acceptance by the plaintiff of money paid into court.

Finally, notwithstanding what has been stated in (d), (e) and (f) above, where money is paid into court in an action is accepted after the trial or hearing has begun, the party accepting that money shall not, without an order of the court, be entitled to costs under any of the circumstances stated in (d), (e) and (f).

12.6.1 General principles for awarding costs

The purpose of awarding costs was succinctly expressed in the

English case of Harold v Smith as follows:

"Costs as between party and party are given by law as indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out the extent to which costs ought to be allowed is ascertained."

In terms of CI 47, an award of costs is ordinarily designed to compensate for the expenses reasonably incurred and court fees paid by the party in whose favour the award is made; and to provide reasonable remuneration for the lawyer of that party in respect of the work done by the lawyer.

The fundamental principle for awarding costs is that costs are at the discretion of the court and the court has full power to determine by whom and to what extent the costs are to be paid. This discretion must be exercised judicially and the court ought not to exercise it against the successful party except for some reason connected with the case. Since the question of costs is for the trial court to determine, an appellate court will be reluctant to interfere with the trial court's award unless it is satisfied that the latter applied a wrong principle.

The second principle is that generally costs follow the event. This means that generally the successful party will normally obtain an order for costs from the loser.

A third principle is that no party shall be entitled to recover any costs of or incidental to any action from any other party to the proceedings except under an order of the court.

12.6.2 Assessment of costs

Assessment of costs is made by the court but prior to this, the parties or their lawyers may briefly address the court on the question of costs. In assessing the costs to be awarded, the court is enjoined to take the following matters into account:

a. the amount of expenses, including travel expenses, reasonably incurred by that party or that party's lawyer or both in relation to the proceedings;

b. the amount of court fees paid by that party or that party's lawyer in relation to the proceedings;

c. the length and complexity of the proceedings;

d. the conduct of the parties and their lawyers during the proceedings; and

e. any previous order as to costs made in the proceedings.

The court is also enjoined to take the following special matters into account, namely any offer of contribution made in third party proceedings which is brought to the court's attention in pursuance of a reserved right to do so; and any payment of money into court and the amount of the payment.

12.6.3 Interlocutory orders for costs

At the end of interlocutory applications, that is applications brought by a party for a particular relief before the final resolution of the dispute, the court will make an order as to who should pay the costs of that application.

The following are some of the orders that may be made by a court. 12.6.3.1 Costs in the cause

An order for "costs in the cause" means that the party in whose favour costs is awarded at the conclusion of the case will also be entitled to costs of the interlocutory application. This is usually the most common form of interlocutory order for costs.

12.6.3.2 Costs reserved

An order for "costs to be reserved" normally has the same effect as an order for "costs in the cause", but leaves it open to the trial court to make some other order if, in the light of the facts presented the trial, it appears to the court just to do so. At the conclusion he trial, it is up to the party against whom costs are awarded to persuade the trial court to make some other order.

12.6.3.3 Plaintiff's costs in the cause

An order for the "plaintiff's costs in the cause" means the plaintiff is entitled to recover the costs of the interlocutory proceedings if he wins the main action.[94] If the plaintiff loses the main action both parties will bear their own costs of the interlocutory proceedings.

12.6.3.4 Defendant's costs in the cause

An order for the "defendant's costs in the cause" has the same effect mutatis mutandis as an order for the "plaintiff's costs in the cause."

12.6.3.5 Costs in any event

An order for "costs in any event" means that whatever the outcome of the main action, the party in whose favour the order is made is entitled to costs of the interlocutory proceedings.

12.6.3.6 Costs thrown away

An order for "costs thrown away" is made where all or part of the proceedings have been ineffective or have been set aside. The party in whose favour the order is made is entitled to costs of the wasted work.

12.6.3.7 No order as to costs

An order for "no order as to costs" means that each party will pay his or her own costs of the interlocutory proceedings, but will not pay costs of the other party whatever the outcome of the main action.

12.7 Personal liability of lawyer for costs

In any proceedings where costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default on the part of a

party's lawyer, servant or agent, the court may order disallowance of the costs as between the lawyer and the client and order the lawyer:

a. to pay to the client costs, which the client has been ordered to pay to the other party in the proceedings, or

b. to personally indemnify the other party against costs payable by that party.

Such an order will not be made until the lawyer has been given a reasonable opportunity to appear before the court to show cause why the order should not be made.

CHAPTER 13

ALTERNATIVES TO CIVIL DISPUTE SETTLEMENT

The discussion in chapter 12 gives a fair idea of how civil litigation can be complex and cumbersome with its attendant slowness and the inevitable expense that comes with it. Consequently, there has been in recent years a general negative perception of the judicial process in Ghana. This has led to a search for alternative means of settling civil disputes between individuals as well as companies. The objective is to provide more expeditious and cost-effective procedures for dispute settlement as viable alternatives to the normal process of litigation in the courts. This chapter deals with some of the available alternatives for resolving civil disputes outside the court system.

13.1 Alternative Dispute Resolution (ADR)

The Alternative Dispute Resolution (ADR) may be defined as any method of resolving a legal problem without resorting to the legal process. This system of adjudication has been part of the traditional dispute resolution process well before the advent of colonialism but in recent years these have waned due to the rapid deterioration of the extended family system which was the bedrock of the system. ADR has gained currency because of the steady increase in the judicial workload which has led to backlog of cases extending to several months and in some cases

years. However, judicial adjudication is still the most popular method of dispute resolution in Ghana because it is said that many Ghanaian litigants receive a sense of "satisfaction" from beginning a formal court procedure with a writ because it is regarded as the most powerful method of informing the respondent that a dispute has been filed, and that they prefer the authority of a court judgment to any out of court settlement. The truth of the matter is that the average Ghanaian is ignorant about these extra-judicial procedures and prior to the enactment of the Alternative Dispute Resolution Act, 2010 (Act 798), a concerted effort was made to sensitise litigants about the availability of these procedures. With the enactment of Act 798 this sensitization will be greatly enhanced.

The ADR process may be said to have the following advantages:

1. It is less adversarial; it encourages openness, disclosure, direct communication and a win-win solutions.
2. It is less costly.
3. It is less formal in that the parties themselves, are able to control the process and express their opinions and options. Because the parties are in control of the process, they are able to make it as flexible as their situation will allow.
4. It is less time-consuming compared to formal litigation.

The ADR process may be said to have the following disadvantages:

1. There is no opportunity to assess the objectiveness of the process.
2. No precedent is established which may be a guide to similar disputes in the future.
3. The potential exist for a stronger party to prevail on a weaker party with the result that the agreement reached may not be fair.
4. There is no right of appeal.

The following discussion will set out some of the available alternatives to the formal legal process.

13.2 Arbitration

Arbitration may be classified as a form of alternative dispute resolution (ADR) mechanism but, as it is more formal and the end result is a legally binding decision, it may be argued that it is strictly not an ADR properly so called. The Alternative Dispute Resolution Act, 2010 provides the legal framework within which arbitration is practised in Ghana. Section 135 of Act 798 defines arbitration as the voluntary submission of a dispute to one or more impartial persons for final and binding determination. The Act also makes provision for the enforcement of a foreign arbitral award in Ghana in accordance with the UN Conventions on the recognition and enforcement of foreign arbitral awards.

Arbitration may arise in one of three ways:

1. By reference from a court. Under section 7 of Act 798, the court has the power to refer the action or part of it to arbitration with the written consent of the parties where it is of the view that the action or part of it can be resolved by arbitration. Section 6 of Act 798 also allows a party to apply to the court for the matter to be referred to arbitration.

2. By agreement after a dispute has arisen. For example, where there is a dispute as to the terms of a contract, the parties may agree to refer it to an arbitrator.

3. By contract. Contractual parties may put an arbitration clause in their contract by virtue of which in the event of a dispute they will refer it to an arbitrator to be appointed by for example, the Ghana Association of Chartered Mediators and Arbitrators (GHACMA) or the Ghana Arbitration Centre (GAC).

Arbitration is a kind of "private trial" and requires the disputants to submit the dispute to one or more impartial persons, with the object of a final and binding decision. Thus, section 52 of Act 798 makes the award final and binding as between the parties and any person claiming through or under them although a party may challenge the award and if successful may be set aside by the High Court. Such an award may, by leave of the court, be enforced in the same manner as a judgment or order of the court and, where leave is granted, judgment may be entered in terms of the award. The arbitrator may be a specialist lawyer or, more

likely, an expert in the subject matter of the dispute. As indicated above, organizations such as GAC, GHACMA and Commercial Conciliation Centre, American Chamber of Commerce (AMCHAM) may provide the requisite expertise.

Once the parties have voluntarily and validly submitted their dispute to arbitration, the court will not generally allow a party to ignore this submission and make a claim in court. Under section 6(3) of Act 798, the court will normally order a stay of the proceedings.

Arbitration is also practised under the Ghana Investment Promotion Act, 1994. Under section 29 of Act 478, when a dispute between an investor or a licensee and the government arises and all efforts at resolving it fails, the aggrieved party is given the option to submit the dispute to arbitration under the procedures of the UN Commission on International Trade Law (UNCITRAL), or within the framework of any bilateral or multilateral investment protection agreement to which Ghana and the investor's country are parties, or in accordance with any other national or international dispute settlement procedure.

13.2.1 Advantages and disadvantages of arbitration

The following advantages may be claimed for the arbitral process:

1. The choice of the arbitrator is the prerogative of the parties. They are at liberty to choose whom they want to arbitrate their dispute and how the arbitrator should go about the proceeding.
2. The process is a private affair, consequently, the public is not entitled to be present at the proceedings thereby, for example, protecting business/trade
3. The proceeding is generally informal and the strict rules of procedure and evidence are not followed.

The disadvantages of the process may be said to include:

a. The fact that not all disputes are amenable to arbitration.

b. The fact that because the process is largely based on the cooperation of the parties involved, a party can stultify the process by, for example, not cooperating in the appointment of the arbitrator.

13.3 National Labour Commission

The National Labour Commission (NLC) was established by the Labour Act, 2003 to, inter alia, facilitate the settlement of industrial disputes and to investigate labour related complaints, in particular, unfair labour practices and to take such steps as it considers necessary to prevent labour disputes in Ghana. It is also required to maintain a database of qualified persons to serve as labour mediators and arbitrators.

In exercise of the powers conferred on the commission under section 152 of Act 651, it has made regulations to facilitate its mandate. The general principle underlying the regulations is that parties to an industrial dispute shall negotiate in good faith in the first instance to resolve the dispute in accordance with the dispute settlement procedures established in their respective collective agreements or contracts of employment This involves the parties considering the interests of each other and assisting, in a problem solving way, the other party to jointly resolve the issues in dispute. If after seven days the negotiation have not yielded any results, either party shall refer the matter to the commission for the appointment of a mediator. The regulation also provides for compulsory arbitration in the event of a dispute remaining unresolved within seven working days after the commencement of a strike or a lock out. In order to facilitate a congenial atmosphere (cooling-off period) for the settlement of disputes, the regulations provide that a party to an industrial dispute shall not resort to a strike or a lock out during the period when negotiation, mediation or arbitration proceedings are in progress.

13.4 Mediation

Mediation is an informal, voluntary process in which an impartial person (the mediator), trained in facilitation and negotiation techniques, helps disputants reach a mutually acceptable resolution of their dispute. The role and function of the

mediator is not to determine the issues but to assist the parties in identifying issues and information needs, reducing obstacles to communication, exploring alternatives and focusing on the needs and interests of those most affected by the dispute. The objective being to help the parties visualize alternative solutions and the mediator attempts to guide the parties to areas of common ground. If the end result of the process is an agreement, such agreement will be binding on the parties.

Mediation is distinguishable from other forms of ADR, for example, arbitration and litigation, in that the mediator does not impose a solution but rather works with the parties to create their own solution. Mediated solutions often include relief not available in arbitration or litigation. Furthermore, the parties control the outcome, whilst in arbitration, the arbitrator controls the outcome. The mediator has no power to decide, settlement can only be reached with the consent of the parties. In arbitration, the arbitrator is given the power to decide and his decision is generally final.

Mediation as an ADR, is quite new in Ghana although its use is gaining acceptance. AMCHAM's Commercial Conciliation Centre, for example, has as its primary objective, the mediation and settlement of commercial disputes. A community mediation programme has also been introduced by the Legal Aid Scheme under which community mediation centres have been set up in selected regional and district capitals to encourage members of the community to resolve their disputes with the help of trained mediators. With the enactment of provisions for mediation under Act 798, it is hoped this mode of dispute settlement will continue to gain currency.

13.5 Court-connected Alternative Dispute Resolution

Under the High Court Civil Procedure Rules, 2004 (CI 47), arbitration is provided for under Order 64. Under this Order, parties may apply for their dispute to be referred to an arbitrator. The Courts Act, 1993 (Act 459) also encourages the use; of ADR to resolve disputes pending before the courts. As part of an attempt to speed up the judicial process, the Judicial Service has introduced a national ADR Programme as a mainstream: process of resolving cases pending in court-connected mediation. In this programme, trained mediators are attached to selected

courts to assist parties to resolve their disputes. The magistrate or judge, after educating the parties on the benefits of ADR and suggesting the alternative process of mediation, seeks their consent to refer the dispute to mediation. The parties are then assisted to select a mediator and attend the mediation session on an agreed date. Between January and September 2008, it is said that about 45 per cent of cases referred to mediation have been settled successfully. Most of these cases were settled under two hours, thus indicating the expeditious nature of the process. It is further said that some 583 cases were successfully resolved in Accra alone through mediation in the first nine months of 2008. Significantly, some 162 mediators involved in the programme at the district courts level are said to have contributed immensely towards peace-building in their communities.

ADR is increasingly being seen worldwide as a convenient and relatively cheap means of dispute resolution. If many of the above alternatives to civil litigation are effectively and constantly utilized, they will go a long way to relieve the courts' congestion, reduce cost and delays of litigation. Furthermore, they will enhance community involvement in the dispute-resolution process, thereby enhancing the overall access to justice to many people who will otherwise have been denied such access.

CHAPTER 14

BASIC LEGAL SKILLS

As was seen in chapter 9, the training of lawyers in Ghana is divided into two stages, academic and professional. The rationale behind this arrangement would seem to be that trainee lawyers will have their academic training at the universities and their professional training at the Ghana School of Law. Consequently, it would be expected that the lawyering skills needed to start legal practice will be taught at the Ghana School of Law. However, a close look at the curriculum of the school

reveals that apart from mooting, not much else is taught by way of other legal skills. It, therefore, follows that much of the skills that a new lawyer will need will have to be learnt on the job. That said, it is a trite fact that every aspiring lawyer needs to learn certain basic skills to equip him/her for a successful practice. These skills are multifarious and it is not the aim of this chapter to deal comprehensively with all of them. Instead, a random selection of skills which can be learnt in training for the profession will be discussed.

14.1 MOOTING

A moot is a legal debate in a courtroom setting. It is based on a hypothetical case normally set in an appellate court. The mooters are usually four in number and are required to act as senior and junior counsel, arguing for and against grounds of appeal set out in the moot problem, before a judge who will eventually adjudicate upon their mooting abilities, as well as give a judgment upon the legal issues raised in the case. Moots promote and facilitate confidence in public speaking. They also impart the skill of persuasion and enhance the ability to appreciate both sides of an argument. Mooting, therefore, is an important skill in preparing for advocacy in court and should be encouraged at an early stage in the law students' training.

14.1.1 Organizing a moot

Moots can be organized informally by students' law society or can be done within a formal setting of a clinical course. In the latter case, the staff of the faculty may be asked to contribute problems in their areas of specialities for distribution to students. This ensures that a variety of legal problems are available to enable students to exercise their minds over different subjects. The problems must be based on very narrow issues, well balanced, relatively short and have grounds of appeal clearly stated. The problem may be preferably based on subjects being studied by students involved.

14.1.2 Time for preparation

Participants must be given a relative short period, two weeks may be appropriate, to prepare for the moot.[3] Those arguing for the appellant(s) should be given seven days to submit their heads of argument and the respondent(s) the same time to submit their heads of argument. It is important that participants keep to whatever deadlines are imposed for the submission of the heads of arguments. This not only facilitates the planning of the moot but also inculcate into participants the professional habit of meeting deadlines within the rules of court.

14.1.3 Heads of argument

As can be seen from the above section, heads of argument form a crucial part of the preparation for a moot. Each participating team is required to prepare heads of argument for the side it is appearing for (appellant/applicant or respondent, as the case may be). The heads should contain the following:

a. A cover page (properly identifying the court, parties, date of hearing, etc).

b. Brief statement of the facts.

c. Statement of the issues.

d. Summary of the arguments.

e. The arguments.

f. Conclusions.

g. Index of authorities.

A few general comments on the drafting of the heads for a criminal appeal will be in order.

1. The heads of argument are an expansion of the grounds of appeal so it is a good starting point to set out in a summary the grounds of appeal to be pursued, first in relation to conviction, then in relation to sentence.

2. Then in a series of short paragraphs, set out your submissions in outline. Not in full detail.

3. Cite authority (case law or textbook) for each proposition of law. The citation should be correct. It is very annoying and frustrating for a judge to spend hours searching for cases referred to by counsel, only to be told at the hearing, "Sorry, my Lord, that should be [1998] GLR 123." When you cite a case, always make sure: (a) that you are not relying on a minority judgment of the Court of Appeal/ Supreme Court and (b) that the case has not since been overruled. Don't set out in full the passages you are relying on, but rather refer the court to the citation, that is "[1998] GLR 123 at p 126."

4. Do not cite numerous authorities for obvious general propositions like "It is desirable to keep first offenders out of jail." On the other hand, do not put some outrageous proposition and say airily "this is trite law and needs no authority."

5. Make available at the moot, if this is feasible, the authorities you rely on; so that if you are questioned on them you can effectively give an answer.

6. In your heads do not say "I think" or "I believe" or "in my opinion." The court is not interested in your thoughts; neither is it interested in your beliefs nor your opinions. Say "I submit" or "It is submitted." Although you must be both humble and respectful, it is not necessary to say "I humbly submit" or "I respectfully submit." Even worse is "It is my humble and respectful submission before this honourable court." That will be taking humility and respect over the top.

7. You must do a detailed research on the area of the law on which the question is based and you should consider both the authorities in your favour as well as those against you. Bear in mind that you are foremost an officer of the court and duty bound to help it to come to a fair and just decision in the case.

14.1.4 Moot court rules

Procedure for the moot should, mutatis mutandis, be the same as that of the Court of Appeal./ Supreme Court Each team should be given 30 minutes to argue its case of which 20 minutes should be allocated to the senior counsel and 10 minutes to the junior counsel. 10 minutes should be given to the opponents for rebuttal. The judge should have the discretion to extend each speaker's time taking the circumstances into account. The order of speaking may be as follows:

a. First speaker for applicant/appellant.

b. Second speaker for applicant/appellant.

c. Rebuttal by senior counsel for respondent.

d. First speaker for respondent.

e. Second speaker for respondent.

f. Rebuttal by senior counsel for applicant/appellant.

g. Judge's decision and comments on participants' performance.

14.1.5 Some mooting etiquette

The following are some basic points about etiquette which participants of a moot should endeavour to follow:

a. Stand up when addressing, or being addressed by, the judge. Sit down if interrupted by another mooter. You are at the mercy of the court. Treat your position with the dignity which it deserves. Do not slouch, lean against the furniture or have your hands in your pockets. Always maintain eye contact with the judge.

b. Never interrupt the judge. Such impetuosity may bring a wry smile to the judge's face but may also incur his wrath.

c. At the appellate court, all judges should be addressed as "my lord" or "my lady." If you are inclined to say "you" or "your" say "your lordship" or "your ladyship." For example, "I am indebted to your lordship for pointing out the flaw in my submission."

d. Be prepared to ask the judge's permission to continue at certain stages, for example, to move from one submission to another, or to resume your presentation after an interruption. For example, "If your lordship pleases, I will move on to the next submission" or "With the permission of your lordship, I will move on to the next point in my presentation."

e. As stressed above, avoid saying "I think" or "I believe." This devalues your role as an advocate. Simply say for example, "It is my submission that the appellant has failed to prove that the trial court erred in law in finding for the respondent."

f. Avoid over gesticulation with your hands. This may create a theatrical scene which may devalue your presentation;' Similarly, try avoiding irritating mannerisms such as stroking chin or scratching your ear. You may be unmindful of them but everyone else will notice.

g. Avoid reading from prepared notes. Master the outline of your case and speak with minimal reference to your heads of argument. Some students think preparing the heads of argument is an end in itself and they go on to read it at the moot. This is bad advocacy. At the moot you are to motivate and persuade the judge of the soundness of your case.

h. Be courteous to your opponent.

Apart from the above, you may learn from watching others moot but it is not advisable to model yourself completely on others. Learn to avoid the mistakes others make but imbibe their good virtues. The important thing is to be yourself. If you are naturally a slow, deliberate speaker do not try to speak at a fast pace in order to get more in within your allotted time. If you are a naturally fast speaker, do slow down but not to a pace which will distort your presentation. Remember the judge may be taking notes and a measured delivery will help him to take down the salient points you make.

14.2 EFFECTIVE LEGAL WRITING AND DRAFTING

14.2.1 Legal writing

Good writing is a practical skill that cannot be acquired overnight but comes through experience in writing and receiving constructive criticisms. It is therefore crucial that the student is introduced to the art and techniques of good legal writing very early in his legal education. Legal writing is a form of technical writing used by lawyers and others in the legal fraternity to express legal analysis and legal rights and duties. Its distinguishing features include reliance on and citation of authority, importance of precedent, specialized vocabulary or jargon, and a tendency toward excessively complicated grammar and over formality. In this section, the characteristics of effective writing and drafting will be highlighted. Good legal writing may be said to have four basic features, namely accuracy, order, brevity and clarity.

14.2.2 Accuracy

The aim of a lawyer's writings is to advise a client to do something or not to do something, to persuade a court that a particular outcome of a dispute is the correct one, or to explain to a fellow-lawyer how a legal problem can be resolved. Thus, accuracy should be the paramount consideration of the writing. No amount of writing skill can overcome a faulty conclusion or take the place of a painstaking research.

14.2.3 Order

From the outset, one needs to have an outline for what one intends to write. An outline, it has been said, does for a piece of writing what the human skeleton does for the body. It gives it shape. An outline will help the writer achieve three important objectives:

a. That the work covers the entire ground the author wishes to cover, that is meet the client's goals and carry out the client's instructions.

b. That it develops logically from first step to last.

c. That it takes a balance and coherent shape.

14.2.4 Brevity

The writing should be no longer, but no shorter, than is necessary to accomplish its purpose. Longer is rarely better. Make it reader-friendly, excessively wordy writing does not make it easier for the reader to understand. Appreciate the person to whom you are addressing and tailor your writing to suit his/her level of understanding. Thus, different approaches will be required depending on whether you are writing to a client or a professional colleague.

14.2.5 Clarity

The first step to clear writing is to understand and then solve the problem at hand. The second step is to show how the problem was solved by dividing into component parts. The third step is the actual writing. This should take the form of short words rather than long ones. Short paragraphs with introductory headings are easier to follow than pages of solidly set type. Do spend some time in pruning and sharpening your writing. A true test of clear writing is simply this:

a. Do you the writer understand it?

b. Will the reader understand it?

14.3 Legal drafting

Legal drafting is the category of legal writing concerned with creating binding legal text. It includes enacted law, such as statutes, rules, and regulations; private and public contracts and agreements; notices and legal information; and documents related to personal legal matters, such as wills and trusts and giving of legal opinion. Legal drafting does not require the citation of legal authority and is generally written without personal flair or voice. A greater part of a lawyer's work is devoted to drafting pleadings. The golden rule in drafting pleadings is to deal with the facts, the law and allegations to be made. This will cover each and every

essential element involved in the dispute at hand. This will involve the lawyer undertaking the following tasks:

Familiarizing himself with the facts of the case by conducting proper consultation and scrutinizing any relevant documents relating to the facts.

Analyzing the facts-and consulting with client

1. Researching the applicable law, taking into account the specific problem(s) raised by the facts.

Analyzing and applying the research to the facts.

2. Advise on the appropriate steps to be taken.

Drafting the pleadings.

It must be emphasized that the ability to draft pleadings effectively can only be acquired over a number of years. In this regard experience is the best teacher and constant practice is a sure way of achieving the required ability. The following should be some of the factors a beginner should take into account when drafting a legal document:

a. Before putting pen to paper, make sure that your client's instructions are clear and that you know precisely what the client wants.

b. Never draft a legal document without being familiar with the law that governs the subject matter of the document.

c. Remember that there is no such thing as "legal English". The language of law is ordinary English. Therefore, use plain words and keep your sentences as short as possible.

d. Develop a mental picture of the structure of the draft before you put pen to paper. Remember that there must be some order in your draft. Begin at the beginning and end at the end.

e. Clarity must always take precedence over style.

f. You must not vary words but must use the same word when the same meaning is intended. You must not use the same words with different meanings.

g. Use definitions if these will save repetitions but discretion is required. A definition should be used to assist comprehension, but not to carry too much of the active purpose of the document.

h. Always use the active voice, the indicative or imperative mood and avoid the subjunctive.

i. Avoid words such as "heretofore", "hereinafter" and "aforesaid."

j. Draft in singular.

k. Beware of rushed jobs. Drafting is time consuming and must be thought through.

l. If the particular document you are drafting is based on specific provisions of a statute, then you should closely adhere to the wording of the statutory provisions.

m. Be as brief as possible and avoid lengthy, repetitive drafting.

n. Use precedents with great care and thought.

o. Do not presume that a precedent is correct and up to date.

p. Ensure that the precedent you rely on suits your client's requirements.

q. Even if a precedent is suitable for your purpose, do not automatically use it. See if you can improve it, for example, by redrafting ambiguous or prolix provisions or removing archaic words.

r. Never rely on any provision in a precedent unless you understand what it means and why it is there.

s. Never alter a part of a precedent without making sure that there are no adverse effects on the remainder of the document. Failure to do so may lead to inconsistencies and ambiguities in the document.

14.4 LEGAL INTERVIEW

Legal interviewing involves interaction and communication with a client, witnesses or other persons to gather information. The first face to face meeting between a lawyer and the client will be the interview. Professional ethical rules prohibiting advertising for clients ensure that to be successful, a lawyer needs to attract his custom mainly through personal recommendation. Consequently, the first interview with a client is very important in enhancing the lawyer's reputation or impacting negatively on it. The purpose of interviewing is to obtain information (a) about the client's problem; (b) to find out what the client's purposes are; and (c) to advise the client satisfactorily.

14.4.1 Preparation for interview

Most interviews will be arranged in advance, either by letter or by telephone or other means of communication such as email. The lawyer will often, therefore, be forewarned, albeit to a limited extent, as to the nature of the subject matter of the interview. It may be that the client is facing criminal prosecution; or seeking to form a company; or wishing to make a will; or seeking a divorce. Since a lawyer cannot be expected to carry all the law in his head, he should first acquaint himself roughly with the law involved in the client's case. More importantly, as part of his preparation, the lawyer must know what questions to ask to ascertain the facts, to enable him to consult the law and give accurate advice. The omission of an important question may necessitate an additional interview and wastes time and money for the client. Here, the use of check list is very important. The contents of the check list may be influenced by whether the interview will be a "litigation interview" or a "planning interview". If it is a "litigation interview" the following check list will be helpful:

Obtain a chronological overview of the facts using:

i. Open-ended questions.

ii. Narrow questions for clarification or elaboration.

iii. Active listening responses.

iv. Repetition to keep client on track.

v. Communication facilitators.

vi. Organize the facts obtained, taking notes in a manner which does not inhibit communication.

vii. Avoid sidetracking the client or causing chronological gaps.

If the interview is to be a "planning interview", the following checks will be useful:

a. Develop a clear organizational plan for the interview (eg. check list, order of concern to client, general to specific, etc) and explain the plan to the client where appropriate.

b. The organizational plan should address the client's goals and convenience over the lawyer's convenience (eg flexible use of check list).

c. Use appropriate question techniques to exhaust one topic area before moving to the next.

Let us take, as an example, a check list in respect of an interview where the client is seeking a divorce. Under the Matrimonial Causes Act, 1971, the only ground for divorce is the breakdown of the marriage beyond reconciliation. In considering the question of whether the marriage has broken down beyond reconciliation, the petitioner must satisfy the court of one or more of the following facts:

a. that the respondent has committed adultery and that by reason of such adultery the petitioner finds it intolerable to live with the respondent; or

b. that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; or

c. that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or

d. that the parties to the marriage have not lived as man and wife for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the grant of a decree of divorce; provided that such consent shall not be unreasonably

withheld, and where the court is satisfied that it has been so withheld, the court may grant a petition for divorce under this paragraph notwithstanding the refusal; or

e. that the parties to the marriage have not lived as man and wife for a continuous period of at least five years immediately preceding the presentation of the petition; or

f. that the parties to the marriage have, after diligent efforts, been unable to reconcile their differences.

Check list:

1. Surname and given names of client (whether a citizen or non-citizen).
2. Surname and given names of client at the time of marriage, if different.
3. Address, telephone numbers at home and work.
4. Birthplace of client.
5. Age and sex of client.
6. Employer, if employed.
7. Surname and given names of respondent (whether citizen or non-citizen).
8. Address for service of documents, home and work.
9. Telephone numbers at home and work.
10. Birthplace.
11. Age and sex. .
12. Date of marriage and place of marriage.
13. Details of where the parties have cohabited since the marriage—showing dates of cohabitation, location and address.
14. Domicile of the parties (or whether resident in Ghana and for how long).
15. If parties are living apart, date of separation.

16. Full names of children of the marriage, age, birth dates and whether parties are the natural father and mother of each child: (Are any of these children adults?)
17. State who has the custody of the children.
18. State whether each child is receiving instruction at an educational establishment or undergoing training for a trade, profession or other occupation.
19. State whether there have been any prior proceedings in Ghana or elsewhere with reference to the marriage and if so, the details of such proceedings and the nature of the order made.
20. State whether the parties have made an agreement or intends to make an arrangement with respect to the respondent and/or children.
21. List of matrimonial assets.
22. What is the facts relied upon by petitioner for the breakdown of the marriage.
23. Full particulars of allegations which would bring the matter within the legal requirement for granting divorce.
24. The nature of relief sought — Decree nisi, custody, maintenance, division of joint assets etc.
25. Costs — who is to pay costs?

It must be noted that no check list is perfect. It is only a useful guide and the interviewer must be prepared to adapt it to suit the circumstances of the interview.

Furthermore, ensure that your office seating does not put your client at a disadvantage. He must feel relaxed in the office and ensure that there is minimal interruption during the interview. Remember that the client is employing you to represent him. Try to eliminate prejudice and do not be judgemental. Your role is to assist the client the best way you can considering your professional ethical duties to the court and the profession.

14.4.2 The interview

You must start by making the client relax. The surroundings may not be familiar with him unless he has been frequently in contact with lawyers. Make the client feel at ease perhaps by chatting briefly about mundane matters or generally about lawyer-client relations (eg. confidentiality). In conducting the interview, allow the client to explain the general nature of the problem and as much as possible avoid interruptions. Build a rapport by appropriate use of:

a. Passive listening responses (eg. silence, non-committal acknowledgement, open-ended questions).

b. Active listening responses which reflect understanding of the content and feelings expressed verbally and non-verbally.

c. Communication facilitators (eg recognition, expectancy).

Identify the following:

1. the underlying transaction or situation which caused the client to seek legal assistance;

2. the client's perception of the problem;

3. the client's main concerns, both legal and non-legal;

4. the relief or solutions the client desires; and

5. the client's goal(s).

As clients are not usually objective in their representation of the facts during the interview, you must appreciate that the story he is telling is likely to be exaggerated and is certainly likely to be one-sided. All too often, in telling their stories, clients omit relevant points or stray into irrelevant facts. In such a situation, the lawyer must politely interrupt to ascertain the facts in greater detail or prevent the client from further ramblings. Take notes and to assist you in checking whether what you are putting down is accurate, you will often need to ask the client to repeat part of his narrative. Expressions such as "Can we just go over that again?"; "Have I got this right?"; "I will just repeat that part to you" will help you to recapitulate certain vital parts of the interview and help you to gain' time to think about the next stage. You should be prepared to explain to the client why you, as a lawyer, have to ask certain questions. Most clients wish to be treated as equals and not

to be talked down to. Your explanation of the legal reason for the question will be welcomed by the client.

14.4.2.1 Proof of evidence

When the lawyer is satisfied that he has heard the whole of his client's story and he has come to a conclusion that litigation is likely to result, he should then take a proof of evidence as to what his client would say when the case goes to trial. The proof will usually begin with "I Kofi Ananse will say.. ." The proof should be read over to the client and he should be invited to sign it if it is correct. If witnesses are to be called, they should also be asked to give proofs of evidence. Thus, the lawyer will be fully prepared when going into court and know exactly what his witness should say if they come up to proof.

14.4.3 Advising the client

Give an explanation of the legal issues and procedures which is:

a. understandable;

b. well-organized; and

c. logically sequenced.

Thereafter:

1. Develop and evaluate alternative courses of action, legal and non-legal, to achieve the client's goals.

2. Assist the client to analyse and predict likely consequences (eg legal, economic, social and psychological) of each alternative.

3. Assist the client to select which course(s) of action, if any, he wishes to pursue.

4. Develop, in conjunction with the client, a step by step plan for the achievement of the client's goals, specifying the time frame and responsibility for each step.
5. Discuss your fees with the client and reach an agreement with the client regarding the scope of your retainer and fees.
6. Confirm the client's instructions about the implementation _ of the plan.
7. Schedule your next meeting with the client.
8. Adjourn the interview appropriately.

14.4.4 Post-interview steps

After the interview, it is desirable to put finishing touches to some of the things you have done during the interview. Depending on the procedures in the office in which you work, you may undertake some of these things:

1. Complete your interview notes.
2. Carry out or initiate any relevant office procedure (eg diarising the file and next interview).
3. Prepare a memo to file which organizes and records the substance and details of the interview including:

a. the salient facts, noting any relevant factual or behavioral inconsistencies;
b. the client's concerns, desired solutions and goals;
c. the legal issues, procedural and substantive;
d. the alternative course(s) of action, where identified;
e. the preferred course(s) of action, where identified;

f. sequenced steps of the plan for achievement of the client's goals, the estimated time for completion of each step, and the allocation of responsibility for each;

g. the client's instructions;

h. the fee arrangement agreed upon; and

i. the next scheduled meeting with the client.

4. Organise the documents and file.

5. Draft a letter to client, confirming:

a. the client's instructions and the agreement for services;

b. the fee arrangement;

c. the plan for achievement of the client's goals; including the time frame and allocation of responsibility for each step; and

d. the next scheduled meeting with the client.

6. Draft any documents, correspondence or memoranda which are required, sending a copy of each to the client.

14.5 NEGOTIATION

Negotiation is a bargaining process between parties in an effort to reach an agreement either to pre-empt a dispute or to resolve a dispute that exists between them. As seen from chapter 12, alternative dispute resolution is increasingly being used to resolve disputes. Negotiation forms a very important element in such procedure. Apart from that lawyers, at one time or the other, may negotiate on behalf of their clients and as such negotiating skill is vital in the legal armoury of a lawyer although it is not used as often as it should. The style, strategies, tactics and techniques may vary from situation to situation but the following may help as a general guide:

1. observe the rules of professional conduct;

2. organized the information obtained during the initial fact gathering phase and over the course of the negotiation;
3. identify the interests and goals of the client and other party(ies) to the negotiation;
4. identify and evaluate the relevant facts and legal issues;
5. develop and evaluate appropriate courses of action;
6. assist the client to select which course(s) of action to pursue, including their priority and sequence;
7. design and implement a step-by-step negotiation plan to achieve the client's goals;
8. create conditions for communication during the negotiation;
9. listen and observe effectively;
10. use language appropriate to the other negotiator;
11. speak and question effectively;
12. respond and react effectively to the other negotiator;
13. analyze and interpret the behaviour of the other negotiator;
14. adapt and adjust the negotiation strategies and tactics in response to the dynamics of the negotiation; and
15. carry out the relevant practice operations.

14.5.1 Principal stages of negotiation

14.5.1.1 Preparation — analysis

1. Complete initial fact gathering phase, subject to obtaining or seeking further facts during the negotiation.

2. Identify and prioritize the needs and goals of the client and the other party to the negotiation.

3. Identify and evaluate the relevant facts and legal issues.

4. Develop and evaluate appropriate options for achieving the client's goals, including negotiation.

5. Assist the client to choose which option(s) to pursue and their priority and sequence (eg negotiate towards a settlement of a civil action, while instituting the appropriate pre-trial procedures so that litigation may proceed in the event the negotiations break down).

13.5.1.2 Preparation — planning

1. Identify and evaluate your client's objectives.

2. Ascertain or anticipate the other party's negotiation objectives, assumptions, strategies and tactics.

3. Analyze and choose the appropriate negotiation strategy (ies) to achieve your client's negotiation objectives.

4. Analyse and choose the most appropriate negotiation tactics in furtherance of the selected negotiation strategy (ies).

5. Develop, in conjunction with your client, preferred alternative(s) to a negotiated agreement and consider the alternatives available to the other party.

6. Design and implement a plan for the negotiation, sequencing the appropriate steps, including any steps to maintain viable alternatives to a negotiated agreement (eg pre-trial, arbitral or mediation procedures).

7. Select the most appropriate time and location for the negotiation session(s).

8. Draft an agenda which effectively structure the negotiation, positioning problems and points of contention where they can best be solved.

14.5.2 The negotiation

It has been said that most people either apply a "soft" or "hard" approach to negotiation. The soft negotiator wants to avoid personal conflict and so makes concessions readily in order to reach agreement. He wants an amicable resolution; yet he often ends up exploited and feeling bitter. The hard negotiator wants to win; yet often ends up producing an equally hard response which exhausts him and his resources and harm his relationship with the other side. A third way, dubbed "principled negotiation" has been suggested. This involves deciding issues on their merit rather than through a haggling process focused on what each side says it would and won't do. This suggests that you look for mutual gain whenever possible, and that where your interests conflict, you should insist that the result should be based on some fair standard independent of the will of either side. The posture one takes will depend on the circumstances of one's case, viewed from the standpoint of the other party's strength and weakness. In deciding how to approach the negotiation, one will need to consider the following:

14.5.2.1 Preliminaries

1. Initiate contact with the other negotiator, assessing his basic interest, approach, strategies and style.

2. Reassess your negotiation strategies and tactics in the light of(l).

3. Obtain agreement on the time and location for the [v] negotiation session(s).

14.5.2.2 Discussion

1. Create an environment conducive to negotiation.

2. Negotiate agreement on agenda for the negotiation and clarify the matters or issues to be negotiated in the session.

3. Ascertain the scope of the other negotiator's authority.

4. Frame your opening position or approach to the negotiation.

5. Gauge the other negotiator's opening position or approach to the negotiation and the interests underlying the position/approach taken. Encourage the other negotiator to explain the needs and goals of his client.

6. State your understanding of the other party's interests and constraints asking for clarification where necessary.

7. Explain and persuade the other negotiator of the importance and legitimacy of your client's interests, using concrete and specific details or examples where appropriate.

8. Characterise the problem as a mutual one, the resolution of which must take into account the interests of both parties. Identify shared needs and goals.

9. Describe problems in terms of their impact on your client.

10. Develop options for mutual gain which reconcile the interests of the parties.

11. Develop objective criteria, standards or procedure for resolving the conflicting interests.

14.5.3 Agreement

1. Assess the options for mutual gain developed in the negotiation, evaluating the consequences of each in relation to the needs and goals of both parties.

2. Assess each option against your alternative (s) to a negotiation agreement.

3. If possible, reach agreement on an appropriate option, subject to your respective clients' approval.

4. Explain to your client the terms of the tentative agreement and its consequences in relation to the client's needs and goals.

5. Receive instructions concerning the agreement and communicate them to the other negotiator.

6. If no agreement is possible and the negotiation has reached an impasse, conclude the negotiation and pursue your alternative (s) to a negotiated agreement.

7. If agreement is reached, proceed to document the agreement.

14.5.4 Document the agreement

1. Formalise the agreement and draft terms of the agreement and any necessary releases.

2. Write the client a reporting letter confirming his instructions and the terms of the agreement.

3. Carry out relevant practice operations. 205- interpretation of statutes, 230 judicial precedent,