Legal systems and Traditions

A legal system can be said to be the set of institutions, processes, procedures, and rules through which the machinery of the law functions. It's not exclusive to countries. It can be applied to any group e.g. ECOWAS, Commonwealth, UN, etc. because each of these groupings develop an approach to law. The product the legal system works with is known as the rule of law.

Modern national legal systems are grouped into families or traditions. Traditions have the same ideas;

- About the nature of law
- About the role of law in society
- About how law is to be organised and operated
- How law is to be taught, made and applied

The traditions generate a culture which is spread when the tradition is exported to another country.

Major Legal Traditions of the World

- Civil Law Tradition- divided into public and private law
- Common Law Tradition- divided into civil + criminal + equity.
- Socialist Law Tradition-founded primarily on civil law
- Religion-based Law Tradition
- African Law Tradition

Social mobility may lead a national legal system to be pluralistic (hybrid)

Common law

This is in connection with the legal system of England & Wales and excludes Scotland. The common law legal system originated in England and spread to the other countries mainly through colonization. In some countries it was partly received, such as Muslim countries where it co-existed with Islamic laws. There were three main phases to the development of common law, the first phase being the development of the common law and the common law courts (1066-1485). The second phase was the development of equity (1485-1832) and finally the fusion of common law and equity (post 1832) which basically set the foundation for the modern English legal system.

The Norman conquest of England in 1066 is generally considered to mark the beginning of the history of English law. Before that England was not united and did not have a central administration. There was the existence of diverse customary laws of German origin which were supplemented by royal statutes. This period was called the Anglo-Saxon period. The local courts were presided over by bishops and earls. After the battle of Hastings, William the conqueror introduced a strong feudal system and brought an end to tribal rule. This system paved the way for common law. The Normans created a uniform and common law based on the unification of the diverse local customary laws the king's court was established and combined the executive legislative and judicial powers. It was the highest court and presided over the local courts. Its judges interpreted the common law. The king's court

eventually split into three; the Exchequer (dealt with financial matters), the common pleas (dealt with disputes about the rights in land) and the King's Bench (serious criminal matters). Difficult cases were tried in Westminster where the royal courts were centralised. When similar issues arose, the earlier solutions were applied. This gave rise to judicial precedence. Civil action in common law were built around the writ system. To begin an action, the plaintiff had to obtain a writ. The writ was 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 writ to cover what the plaintiff claimed then there was no remedy.

The common law developed rapidly in the 13th century but by the 14th century it declined. This is because it had some defects. Firstly, the writs became too rigid and could not be applied to every case. Secondly, an error in the applying of a writ can result in actions being lost. It was common to make mistakes because each writ had complex rules. Also writs were quite expensive and discouraged potential litigants. Thirdly, there was a problem with defences and corruption. Judges were accused of bribery and corruption while the defendants could delay proceedings. Fourthly, the remedies were inadequate in the sense that only damages could be awarded. Injunction could not be placed on individuals. Fifthly, the common law did not recognize trust. Due to these defects, cases were brought to the king-in-council. After a while, the Lord Chancellor who was referred to as the keeper of the King's conscience disregarded the common law formalities and stuck a fair dealing judging it with his conscience. This became known as equity and the court of Chancery developed case law based on it. This body of law supplemented common law and sometimes even corrected it.

A rivalry existed between common law because an injunction could be placed on someone to forbid the person from bringing the case to a common law court. Later on, common law and equity were fused. Even though they are fused together, their principles are not fused.

Civil law

Civil law legal system is based on Roman law. Roman law was developed during the Roman republic by praetorian edicts (magistrates' edicts inventing new causes of action). These were enriched by the written opinions of roman jurists and were later collected in Justinian's pandect. The pandect became part of Justinian's collection of imperial decrees. After a lapse during the dark ages, it was rediscovered in the medieval universities and developed further. It spread throughout Europe through colonization or voluntary reception.

Civil Law is said to be the oldest of the law traditions because the 1st known dating was 450 B.C. The most concrete historical source is the Corpus Juris Civilis (Justinian Codes). They organized the laws at the time into a codified text and set civil law apart on the basis of codification. In later years, the Napoleonic and Canon Laws evolved from those codified texts and aided in the development of commercial law.

Emperor Justinian became ruler of Rome in 600AD. He advocated for the law to become more scientific by putting it all in one place. The law could be organised into smaller groupings to make its search easier. This resulted in codification – every law which belongs to the same family in the same place. All existing legal texts were then burnt. Everything the law was concerned with were organised into 5 codes.

1. **Civil code**
2. **Commercial code**
3. **Civil procedure code**
4. **Criminal code**

5. **Criminal procedure code**

The classical rule of Roman law were collated in the corpus juris civilis. The first three codes dealt with the law of things, persons and obligations and is referred to as the civil law. This was taught as the fundamental law of the land until the end of WWII.

Canon Law

It was put together by the Catholic Church to administer the spiritual needs of Catholics in particular with respect to family law and criminal law. Because the Pope was close to the Emperor, the Canon Laws were applied in secular courts.

Roman Law

Justinian Laws were studied in universities and spread throughout Europe. The first universities were in Rome, Italy, hence the name, Roman Law.

Domestic Codes

Resulted from agitations against Roman law in different countries. This was led by the Germans

Commercial Law

These laws were developed from the commercial practices of Italian business centres. It formed a body of law which was called commercial law and it was spread throughout Europe. This accounts for the commercial code in the civil law countries.

To this day the Civil Law tradition is the most widely practiced legal tradition and within a civil law country, civil law is only a fraction of the totality of their laws; a fundamental outlook is that civil law (law of persons, etc) is the law of the land (not always so, but just a general characteristic). Apart from civil law, there are four additional codes by which the Civil Law tradition operates: criminal, civil procedure, criminal procedure, and commercial law.

The Civil Law system operates with two major courts; private and public (preceded by a conflicts court which determines which court has jurisdiction in a given case). Unlike Common Law, Jurists (legal scholars) are essential to the development of the civil law tradition; Case law is secondary to statutory law; Civil Law judges administer but do not create law; there is no judicial discretion or interpretation of laws practiced by the regular judges in a Civil Law country. The general idea in Civil Law is that there is only one solution to a specific legal problem; The court systems of Civil Law countries are usually inquisitorial (no jury); Trials are a series of hearings and letters of testimony from which evidence is gathered and judgement is delivered; and the Judge supervises the collection of evidence and usually examines witnesses in private.

Differences between common law and civil law

Civil law	Common law
Deductive -broad principles are applied to individual cases	Inductive- knowledge is based on experience
Approach is dogmatic (rigid)- based on logic	Empirical- based on experience and is still being developed
Influenced by Justinian codes	Influence is insignificant

Codes-systematically stated provisions of the different branches of law and complemented by legislation. Universally valid irrespective of time and place	judge made law suiting individual disputes
Decisions made by lower courts and superior courts are on the same level and not binding	Binding precedents should be followed by lower courts
Drafts main law and leaves the rest to the executive to fill in the details as secondary legislation	Legislature drafts detailed laws and leaves little as possible to be regulated by executive
Administrative court-settles disputes between citizens and government, ordinary courts-settle disputes between citizens	Uniform body of courts which settle all forms of disputes
Not triadic.	Triadic stand-two parties appear before judge and argue
Court proceeding outside court room. Might appear w/o a lawyer as judge plays active role, does not encourage argument, just looks at the fact and apply to the codes before him	Court proceedings inside court role as lawyers play an active role in arguing their point out to an impartial judge who would then pronounce judgement
Judge determines both facts and judgement	Jury determines fact so verdict can be given by judge

Note: differences are fast disappearing because due to the heavy workload, parliament in Britain is increasingly adopting continental style of Acts which contains merely guidelines, leaving the government to fill in the details by means of subsidiary legislation. Also, the decisions of the higher courts of France sometimes carry as much weight as the decisions of the superior courts of Britain.

GHANA LEGAL SYSTEM

Our legal tradition belongs predominantly to the commonwealth tradition but also has elements of two other traditions thus the African law tradition and the religion based tradition. Because of this our legal system is said to be pluralistic. Our legal system is common law based.

Our legal system is divided into criminal and civil. As far as our actions, conduct and behavior are concerned of which they are serious as to the safety of our society, such will be classified as criminal. Such conduct is addressed by the state. The citizen may be affected in a way but it is the state which is rather aggrieved. Here the attorney represents the government as can be found in **Article 88 of our constitution**, where it states that the attorney general shall be responsible for the initiation and conduct of all prosecutions of criminal offences in **clause 3**. The police also prosecute on behalf of the A.G. They collect information based on the evidence and forward it to the A.G.

As opposed to the criminal jurisdiction, the civil jurisdiction addresses disagreements between private individuals. What our legal system characterize as civil law are actions confined to the private individuals. Here the state does not get involved. It is possible that the private disagreement may degenerate to affect the whole society. E.g. If two people have a disagreement within the street and so attracts the attention of a lot of people in the society, they can be prosecuted for a breach of public peace. Hence it is possible for that to escalate into a crime.

Our legal system also differentiates by terminologies. In the criminal jurisdiction we say a person has been prosecuted and not sued as in the civil jurisdiction. If the person is prosecuted the result will be whether the person is guilty or not. If the person is guilty, the person will be convicted which would be followed by a sentence in the form of a fine or imprisonment. For imprisonment there is a scale between 0-death. This is because the legal system leaves to the judge the discretion to give his punishment. Generally speaking the law makers attach minimum sentences.

When a person is not guilty however he will be acquitted, then he must be discharged. **Art. 19 clause 7** says once a person has been either convicted or acquitted in a court for criminal offence can ever be charged again for the same offence unless the Superior Court demands so. I.e. double jeopardy.

NB: Cost is money that a party might have spent which is leveled against the other party to pay in the course of the trial and not a fine.

The one who initiates the civil procedure is the plaintiff and the other against is the defendant. If you bring an application you are an applicant and the other is the respondent.

In the civil court the outcome is whether the person is liable or not whilst in the criminal jurisdiction the outcome is whether the person is not guilty or not.

Also in the civil jurisdiction the case is proved on equal probability thus 50-50 as of being proven beyond reasonable doubt in criminal cases.

In our legal system apart from the above, there are two elements:

*the prohibited act (**ACTUS REUS**)

***The requisite state of mind (**MENS REA**).

If the person does the prohibited act without the requisite state of mind then the person is acquitted.

The title of a case can also tell us whether it is civil or criminal: Republic v. Alhaji, State v Alhaji, R v Alhaji. The above is that of the criminal court. The R stands for Rex or Regina meaning king and queen respectively.

But if it is Alhaji v. Mensah then it is civil.

The court system

When we say the original jurisdiction, it implies that the case is being called the first time. Where a case is initiated in the lower levels, then the upper levels can only use appellate jurisdiction for most cases.

There are three types of jurisdiction. They are

- **Original jurisdiction**-where a person goes to the trial court for the first time.
- **Appellate jurisdiction**- where a dissatisfied party brings his dissatisfaction to another court. The court of appeal has only appellate jurisdiction, the high court has both appellate and original jurisdiction and the circuit court has only original jurisdiction.
- **Supervisory jurisdiction**-this is the power the superior courts have in making sure the lower courts are performing according to law. The Supreme Court exercises this over all courts.

Our court system is divided into two: the superior courts which are established by the constitution and include the high court or regional tribunal court, the court of appeal and the Supreme Court in ascending other.

Quasi judiciary- this is not part of the court system but has powers to adjudicate over cases. Examples are CHRAJ, National Media Commission, and National Labor Commission.

Personnel – Judges are referred to as the bench, lawyers are the legal practitioners. The business of advocacy in the court room is the barrister and the business of sitting in the office drawing up cases is solicitors. But these are found in Britain. In Ghana they are all referred to as legal practitioners.

NB: Commission of enquiry is not part of our judicial system, it is a fact finding body established by the executive.

Petition is used only in civil cases. They are used only in **election** and **divorce cases**.

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Director of public prosecutions takes care of criminal cases, solicitor general takes care of civil cases and director of parliamentary drafts takes care of drafts by the legislature.

Classifications or divisions of the branches of the law

What is classification or division in the branches of the law?

This refers to the grouping together of the law because of specific similarities in their origin, principle and their application and effect in the field of law. It implies organizing legal information into subjects or fields of learning for the sole purpose of finding a proper solution to a legal problem

The subject of classification is important for several reasons:

1. It facilitates access to legal information. This means that it helps students and researchers to have access to information easily.
2. It helps to bring about certainty and predictability.
3. Classification brings about orderliness into the law.

4. It helps us to dichotomize lay notions of human interactions(mere paths) and legal notions of human interactions.[Fisher v. Bell], [Carlil v. Carbolic Smoke Ball],[Central London Property Trust v. High Trees House]
5. It helps members of the legal community (lawyers, Academics and judges) to gain deeper understanding and experience in the field of law.
6. It facilitates effective operation of the court system. Thus it facilitates the administration of justice.
7. It assists the courts to know the mode of trial to adopt. Thus helps the Judge to know the mode of trial in a case. Eg. Whether felony, indictment etc.

It should be noted that:

1. Some of the classifications overlap. Some are within others.
2. The classification of the law differs widely depending on the purpose a field of law is serving and how that field has evolved.
3. Some kinds have served useful purpose in the past but their relevance today is diminished significantly.

The various classifications

Law may be classified in various ways but it must be borne in mind that these classification overlap in some cases.

1. **Crimes and civil wrongs-** generally the law is divided into two categories; criminal branch and civil branch of the law. Glanville Williams in his book, learning the law says that this classification hinges on the legal consequences that may follow the act and not just the wrongful nature of the act. In criminal law it is a crime against the state but civil is against individuals.

Criminal and civil wrongs (torts) become clear when you look at the procedure adopted in both systems, outcome reached on both cases and finally terminologies. In criminal proceedings there is a prosecutor prosecuting an accused. The result in the criminal proceeding is that the accused is either convicted or acquitted. When convicted you are guilty. If acquitted you are not guilty. If a person is convicted that will be punishable by a fine or imprisonment or both.

In civil proceedings, the plaintiff sues or brings an action against the defendant. The outcome is a judgment which may order to the losing party to pay damages in the form of money, or you may be asked to do an act by transferring a property.

In re matter Poku- means Poku is deceased

Ex –Parte –without notice

Habeas corpus-produce the body

In bonis

Civil kind of classification

1. **Contract-** the law of contract deals with the legal effects of agreements in civil law. In short contract law is about agreements and promises.

2. **Tort-** the law of torts or civil wrongs consists of the law governing wrongs such as trespass to land, false imprisonment, libel and slander, nuisance and the negligent infliction of injury. The tort is a civil wrong which is independent of contract. This is the main contrast with contract.

By civil wrongs we mean a wrong whose remedy is intended to help the victim. Thus it is mainly concerned with compensation for injury and not to punish the wrong doer. Whereas contractual obligations are usually voluntarily assumed, tort law duties are typically imposed upon us whether we like it or not.

As the matter stands the law of torts currently appear to reflect a tension between two different theories of civil liability. According to the first, liability should occur when there is a deliberately inflicted injury or fault in the rather artificial sense which of a failure to exhibit care on the part of a reasonable person. The second one is that liability should not rely on fault at all. It should be strict and rely on the individual whose activities led to the act.

3. **The law of property-** A property can be movable or immovable. Immovable ones are landed properties such as buildings and lands. Movable could be tangible or intangible. Immovable property law deals with rules that govern the transfer of interest in landed property such as house, houses and things on them. The law of trust is a sub division of the law of property. A trust arises when a property is given to someone, a trustee on the understanding that the trustee is to hold and manage the property for the benefit of someone else, a beneficiary. If the trust is in a will, the one who writes the will is known as the testator and the beneficiary in the will is known as cestui que truste. There is private trust and public trust, this distinction is made by the purpose of creating the trust. Public or charitable trust is made at promoting public welfare.

Classification of criminal offences

Crimes are divided based on their mode of trial. Crimes are divided into 3 main categories:

1. **Indictable and summary offences-** this division highlights the two possible forms of trial under criminal jurisprudence. This classification is by means of dividing crimes into indictable and summary. Indictable trial is a mode of trial adopted by the courts for very serious offences such as murder. For an offence of murder, the procedure is that it is tried by a judge and a jury in Ghana. If the mode of trial is indictment, the prosecution charges you with an offence and put you before the lowest court (district or magistrate court) to commit you for trial which is known as committal proceedings. Here the prosecution presents before the magistrate two documents. The first is the Bill of Indictment which states in writing the charge against the accused person. For example, stealing contrary to section 124 of Act 29 (1960) is the charge for stealing. The second must contain the list of all the witness who will be called by prosecution and a summary of evidence to be given by each witness. What the judge does is to determine issues of law. That is the magistrate examines the evidences and proceedings. The judge commits the accused person to the high court after the summary of evidence.

   With the summary trial, it is a more expeditious mode of trial which is used for the less serious type of offences. This is applies for all offences not tried on indictment in Ghana. Here it is only before a judge or a magistrate. Summary offences require no jury.

2. **Inchoate offences and complete offences-**Inchoate offences are those offences committed based on steps taken by the accused person. These offences are incomplete. These offences are deemed to have been committed even though the person did not finish with the execution of the offence. For inchoate offences, it is difficult to find the action- **Section 18 of Criminal offences Act. Act 29**

   With the complete offences, the offence has been fully committed. There is both the elements of Actus Reus (there must be commission of the act) and mens rea (there must be an intention to commit the act)

3. **Bailable and non-bailable offences-** Non bailable offences include murder, armed robbery. A bail is a person who is standing surety to procure your release from arrest. For a bailable offence, a person will be allowed bail if he provides surety which could be self – recognizance. The surety's duty is to ensure that the person granted bail is produced before a custodial body, thus a court or police.

Other modes of classification

Other classifications cut across both civil and criminal.

1. **Substantive and adjectival law-** Substantive law lays down people's rights, duties, liabilities and powers. They are the substantive areas of the law which deals with the rights of individuals and corporations. Substantive fields in Ghana include, contract law, tort and even criminal law. These are substantive rules that govern us in the adjudication of cases. Act 29 is a substantive act in criminal matters.

   Procedural or adjectival law deals with the enforcement of individual rights and liberties. They are the rules which deal with how the cases should be framed and tried in the law courts. Procedurally, to enforce any of your civil rights, you use the High Court Civil Procedure Rules (CI 47). Another procedural rule is the Evidence Act-NRCD 323 which deals with how to lead evidence in court.

2. **Public and private law-** This classification is based on the degree of relationship or connection that exists between the parties concerned. On one hand, public law is concerned with the relationship between the state and individuals or group of individuals and also between the various state organs. Public law therefore regulate the activities of the state vis-à-vis its subjects. The main branches of public law are constitutional law, administrative law, adjectival law and criminal law. Constitutional law regulate the structure and functions of the principal organs of the state such as the executive, legislature, and judiciary. Administrative law is concerned with the regulation of governmental and administrative agencies. Adjectival law prescribes rules by which litigation is conducted and allegations proved in the court of law.

   On the other hand, private law concerns itself with regulating the relationship between individuals. The main branches of private law are family law, the law of property, the law of contract, the law of succession 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 estate. The law of property determines the nature and extent of rights which a person may enjoy over things such as land. Thus ownership, mortgage and pledges form part of this law. The law of tort represents the means whereby individuals may protect their private interest and obtain compensation from those who violate them.

3. **International and municipal law-** National (municipal) law is the law operating within boundaries of a particular state. This is what Blackstone describes as the rule of civil conduct prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong. A sub branch of national law is private international law (conflict of laws which sets out which national law governs a case with a foreign element)

   Public international law however comprises a system of rules and principles that govern the international relationship between sovereign states and other instructional subjects of international law such as the United Nations and the ECOWAS.

   In the relationship between public international law and municipal law, it must be noted that Ghana belongs to the dualist approach where international conventions and treaties do not assume automatic operation in Ghana. They must be first incorporated into national legislation by parliament before they can have the force and effect in Ghana. The monist approach involves the automatic incorporation of international legal instruments into laws.

Sources of Ghana law

Meaning of sources of law

The terms sources of law may have several meanings.

- It may mean that which gives the law its formal validity (formal source) for example the constitution.
- It may also mean the direct means which law is made or comes into existence (legal source) for example legislation and
- It may also mean the written materials from which we obtain knowledge of what the law is or was at any given time (literal source) for example Sarbah's Fanti Customary Laws and Rattrays Ashanti Law and Constitution.
- It may mean factors that have influenced the development of the law, and from which the content of the law may be traced (history or material source)
- According to C.K. Allen , 'Law in the making', 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.

According to **article 11 of the 1992 constitution** the laws of Ghana shall comprise-

- This Constitution
- Enactment made by or under the authority of parliament established by this constitution [legislation];
- Any Orders, Rules and Regulations made by any person or authority under a power conferred by this constitution [subsidiary or subordinate legislation];
- The existing law; [the written and unwritten law that existed immediately before the coming into force of the 1992 Constitution] and
- The common law [the English common law , English doctrines of Equity and the rules of customary law]

The constitution as a source of law

Article 1(2) provides that the constitution shall be the supreme law of Ghana and any other law found to be inconsistent shall to the extent of the insistency be void. This therefore establishes the supremacy of the constitution. This suggests therefore that the supremacy of parliament is limited and parliamentary enactments and those of previous legislation are subject to the supremacy of the Constitution. 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 law that 4 June and 31st 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 (2) of the Constitution, 1992,** any law found

to be inconsistent with any provision of the Constitution shall, to the extent of such inconsistency , be void.' This dictum reiterates the fundamental nature of the constitution. All laws derive their validity from this constitution and although there were existing laws before the coming into force of this constitution, in so far as they are not inconsistent with the provisions of the constitution, will continue in force as if enacted , issued or made under the authority of the constitution. This can be seen from **article 11(4), (5) and (6).**

Legislation

Legislation can create not only new laws but can also alter or repeal existing laws as well as affect the existence and content of other sources of law. **Article 93(2)** vests the legislative power in parliament which will be exercised in accordance with the provisions of the 1992 Constitution. Parliament therefore is not supreme in so far as the exercise of its legislative powers is subject to the provisions of the Constitution. This can be seen in **article 1(2).** The effect of **article 2(1)** was considered by the Supreme Court in the case of **MENSIMA V. ATTORNEY - GENERAL.**

The lack of jurisdiction of the legislative supremacy of Parliament, is also emphasized in the dictum of Aikins JSC in the 31st December case: "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 should 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 aspects. Its power 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, **Article 107.** Also in **Article 3(1),** Parliament has no power to legislate for the creation of a one – party state, nor can it make laws relating to chieftaincy without have referred the draft to the National house of Chiefs for advice in **article 106(3)** of the Constitution. 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".

Subsidiary/delegated/ subordinate legislation

According to Victor Essien, "Researching Ghanaian Law" this 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. This is also affirmed under Article 11 of the Constitution concerning any orders, rules and regulations made by any person or authority with power conferred by this constitution as part of the sources of Ghana law. In terms of article 11(7), 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 lacks power to amend any such subsidiary legislation except to annul it or allow it to come into effect.

Forms of subsidiary legislation

Statutory instruments

These are instruments made directly or indirectly, under a power conferred by an Act of Parliament or a Decree of law. For example **section 158 of the Local Government Act 1993** gives the Minster 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

Commented [sq2]: The plaintiffs who were members of a registered cooperative union broke off from the union and formed a limited liability company, they were prevented from distilling the said gin by the officers of the cooperative union; they were harassed and their products ceased by the officers on the grounds inter alia that , they did not belong to any registered distiller's co-operative union; and also having no licence as required by regulation 3(1) by the Manufacturer and Sale of Spirits Regulations ,1962. The plaintiffs brought an action in the Supreme Court under Article 2(1) of the 1992 Constitution for a declaration , inter alia, that regulation 3(1) of L.I 239 , which made it mandatory for an applicant "for the issue distiller's license" 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 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 license to belong to a registered distiller's cooperative. The court went further 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 provision, whenever the constitutionality of any law vis-a-vis a provision of the constitution is challenged the 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 afford no validity to the law. for article 2(1) contains a built-in mechanism which automatically comes into play whenever it is found that a law is inconsistent with the constitution"

this power will be called a statutory instrument. The Statutory Instrument Rules 1960, LI 39 govern the form of a statutory instrument. There are two kinds of statutory instruments-legislative instruments and executive instruments.

Legislative instrument (li)

These are those statutory instruments made under powers expressed to be exercisable by legislative instrument. For example **section 73 of the Economic and Organized Crime Act 2010 (Act 804)** under which the A-G and the Minister of Justice may by legislative instrument make regulations for , inter alia, tracking tainted property and for seizure of such goods. Generally such instruments will determine or alter a law rather than applying it to a particular case. An example of legislative instrument is the legal profession Rules 1969, LI 613.

Executive instruments

These are instruments which are neither legislative instruments nor instruments of judicial character. The executive arm of state is usually empowered to issue such instruments. Example is **section 4 of the Public Order Act 1994, Act 491** which empowers the Minister of Interior by executive instrument to impose curfew on any part of the country if the circumstances warrant it.

Constitutional instruments

These are instruments made under a power conferred by the constitution. For example, the Commission of Inquiry Instrument, 2009 which appointed a commission of inquiry under **article 278 of the Constitution** to inquiry into the operations of the Ghana @ 50 Secretariat and matters incidental to the Ghana @ 50 Celebrations. Constitutional instruments must be construed as one with the Constitution.

The existing law

Article 11(5) 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. In the case of **ELIS V. ATTORNEY GENERAL**, the plaintiff claimed that PNDCL 294 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 Constitution. Also 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 1970 Constitution.

The common law

Article 11(2) of the Constitution says that the common law of Ghana comprise of 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. The Courts Act 1960 explains the common law and customary law as "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 that have passed the test which have already been described and are contained in the body of case law on the subject. In the case of **RE ABOTSI; KWAO V NORTEY,** 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-à-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-à-vis the appellant, an infant, and were therefore accountable to him.

Customary law

There are only two types of customary law communities; patrilineal and matrilineal communities especially with respect to succession. Practically all our laws on land, marriage and succession are governed by customary law.

In 1876 when Ghana was colonised, the British passed the Supreme Court Ordinance of 1876 where in section 87 it stated that in the adjudication of cases, the colonial judges had to have regard to local custom and usage. During the mercantile period, Capt. McClean used judicial assessors to adjudicate cases outside the forts and castles. This was regularised in 1876 by the SC Ordinance.

Initially, customary law was a question of fact to be proved in open court so often that it became notorious – **ANGU V. ATTAH.** The principle was enunciated that to be recognised as customary law a particular rule of native law should have come before the court and been proved so often and frequently that the rule had become notorious.

By the use of the repugnancy clause/doctrine however, various rules of practiced custom and usage were struck out as being repugnant to natural justice, equity and good conscience e.g. pledging human beings, panyaring and human sacrifice.

Ghana's customary law remained unreformed for a long time. The earliest attempt at reform was in the nature of the Marriage Ordinance, 1884 (Cap 127) which reserved 2/3's of an intestate's estate to the surviving wife and issue(s), leaving only a third for distribution by the family on the basis of customary law – **COLEMAN V. SHANG**. In **RE ANNAN**, it was held that a native who had married under Cap 127 had divested himself of the right to make a customary law will. However in the case of **COLEMAN V SHANG,** the court so construed the legal definitions of 'wife' and 'child' to include children born outside the marriage under the ordinance but whose paternity had been duly acknowledged under the local law or lex loci domicili.

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The next set of reforms occurred between 1985 and 1986 when a raft of statutes were passed in the form of the following;

- Intestate Succession, 1985 (PNDCL 111)
- Customary Law Marriage and Divorce, 1985 (Registration) Law (PNDCL 112)
- Administration of Estates (Amendment) Law (PNDCL 113)
- Head of Family (Accountability) Law (PNDCL 114)
- Land Title Registration Law 1986 (PNDCL 152)

Although customary law was unreformed, the Chieftaincy Act, 1971 (Act 370) provided for Regional Houses of Chiefs as well as a National House of Chiefs to consider the assimilation or incorporation of specific rules of customary law practiced in the community into the official customary law. However, no traditional council has ever put forward a rule of customary law for such assimilation.

Importance of the sources of law

- Knowledge of the sources of law enables a distinction to be drawn between rules which are proposed or desired or morally worthy to be laws and rules which are actually laws.

- Also once the sources of law are known; it is possible to determine where one should look to discover the law on a subject. For instance if a rule is set forth in an act of Parliament then one can be sure that this is a source of law.

Alternative dispute resolution

Section 135 of Act 798 defines the concept as the collective description of methods of resolving disputes otherwise than through the normal trial process. This system of adjudication has been part of the traditional dispute resolution process well before the advent of colonialism.

Exclusions to alternative dispute resolution

- Matters of national interest
- Matters that relate to the environment, thus where you are fined by the town council it cannot be settled by the ADR
- Matters relating to the enforcement and interpretation of the Constitution.

Advantages of ADR

- It is less adversarial. That is it encourages openness, disclosure, direct communication and a win-win solution
- It is less costly
- It is less time-consuming
- It is less formal in that the parties themselves are able to control the process and express their
- It allows opinions and options.

Forms of ADR

- **Arbitration**

- **Mediation-** In mediation, a 3rd party is involved but that third party does not give an award but assist the disputing parties , and guide them to resolve the dispute

- **Negotiation**

- **Conciliation**- sometimes when the parties are before an arbitral tribunal, the rules may be too formal and so the parties may like an out of court settlement or an informal settlement

Arbitration

Section 135 of the Alternative Dispute Resolution Act, 2010, Act 798 defines arbitration as the voluntary submission of a dispute to one or more impartial persons for final and binding determination. **Section 59** of the Act makes a 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 is usually used in resolving commercial matters and disputes; example is that which was between Ghana and Argentina.

Ways arbitration may arise

- **By reference from a court.** According to **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.

- **By agreement after a dispute has arisen**. For instance where there is dispute as to the terms of a contract, the parties may agree to refer it to an arbitrator.

- **By contract.** Contractual parties may put an arbitration clause in their contract such that in the case of a breach they may refer it to an arbitrator to be appointed for instance by the Ghana Arbitration Centre (GAC). **Section 52 of Act 798** makes the award final and binding as between the parties. Under **section 58,** 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 be 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. This can be found in **section 59** of Act 798. The arbitrator may be an expert in the subject matter of the dispute. Organizations such as the Ghana Arbitration Centre, Ghana Association of Chartered Mediators and Arbitrators (GHACMA) and Commercial Conciliation Centre, American Chamber of Commerce (AMCHAM) may provide the requisite expertise.

Under **section 6(3)** of Act 798, the court will normally order a stay of the proceedings once the parties have voluntarily and validly submitted their dispute to arbitration.

Advantages of arbitration

- It is often faster than litigation in the normal court

- Where a dispute is highly technical, arbitration may be sued to settled since a specialist could be obtained which can't be found in the main court system

- The choice of the arbitrator is at the prerogative of the parties. They are at liberty to choose who the arbitrator should be and how the process should go

- Since the process is a private affair, the public is not entitled to be present and this may protect certain secrets of the parties.
- The proceedings are generally informal and the strict rules of procedure and evidence are not followed.
- Arbitration may be cheaper for more business and also more flexible.
- In arbitral proceedings , the language of arbitration may be chosen

Disadvantages

- Not all disputes are amenable to arbitration
- Though the process is based on the cooperation of both parties, a party may stultify the process, by for example not cooperating in the appointment of the arbitrator.
- There is no right to appeal
- Some argue that interim orders are not easily carried out since it is not backed by the police
- Some arbitration procedures may be subject to powerful laws

Types

- **Statutory arbitration-** this type of arbitration is regarded by the ADR Act only. Section 29 of Act 798 gives the processes.
- **Customary Arbitration.**

Customary arbitration

Part 3 of Act 798 deals with customary arbitration which starts from **sections 89-113.** *Kom* defines customary arbitration as the method of resolving claims and disputes among members of the various communities in Ghana. This procedure has been part with us since the introduction of the Bond of 1844, Supreme Court Ordinance. Under **section 89,** matters can be submitted under arbitration but you cannot submit a criminal matter. No arbitrator is also allowed to serve in customary criminal matters.

Essential ingredients for a valid customary arbitration

The case of **BUDU II V. CAESER & ORS** gives the five essential ingredients for a valid customary arbitration:

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- **Voluntary submission** of the dispute by the parties to arbitrators for the purpose of having the dispute decided informally but on its merits. This may take this form- whether the parties expressly agree or by their actions one party may submit the matter. **NYASEMHWE V. AFIBIYESAN, YAW V. AMOBI, AKUNOR V. OKAN, Section 90 of Act 798.**

Commented [sq5]:

- **A prior agreement by both parties to accept the award by the arbitrators. ASANO V. TAKU, Section 109**

Commented [sq6]:

- **Publication of the award.** Publication need not be in writing. Thus it could be pronounced or announced to the parties. **Section 110 of Act 798**

- **The award must not be arbitrary but must be arrived at by hearing of both sides in a judicial manner**. **BUDU V. CAESER, GBERVIE V. GBERVIE.** The rules of natural justice must be complied with. **ATTORNEY GENERAL V. SALLAH, Article 296.**

- **The practice and procedures being followed in the community must be followed as nearly as possible**. **Section 93 of Act 798.**

An award given is binding on the court. **Section 111** gives grounds where customary award may be set aside. **Section 112** makes provision for where there is breach of natural justice or miscarriage of justice.

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British Jurisdiction

British jurisdiction first began with the coming of the white man, first for discovery purposes and later on to trade in human beings. During this period they did not need more than temporary residence in the then Gold Coast.

Slave trade was abolished in the early 19th century and the introduction of 'legitimate trade' led to a paradigm shift. This concerned trade in minerals such as gold, diamond and bauxite. This required a more permanent residence in towns and villages. This meant that the whites had to protect themselves and their family from threat to lives as well as their property. The whites introduced the doctrine of Rule of Law as they understood it into the Gold Coast. They first took legal control of the territories and secondly modified or completely changed the pre-existing legal system to their advantage and comfort.

Examples of such modifications which were advantageous to them

- To protect themselves and their loved ones, murder and bodily harm were made felonies punishable by death and long prison terms.
- To protect their properties- you could defend your property from invasion even unto death.
- To ensure exploitation of the natural resources they imported their contract law and commercial law e.g. *pacta sunt servanda*, breach of contract, damages, specific performance.
- Adultery, a crime under custom, was not a crime under British rule so as to enable them to have sexual relations with the natives
- To top it all they established a system of courts to enforce these laws with the help of a police and prisons force they had previously established.

Character of the colonial project

The British assumed jurisdiction in the Gold Coast by taking control of these areas:

- **Chieftaincy**- In **Oseadeeyo Addo Dankwah 111's book, The Institution of Chieftaincy In Ghana-The Future**, he explained the effects of the British rule on chieftaincy in the then Gold Coast. In the pre-colonial times, there were various chiefs of the various communities, who were independent to each other and commanded respect from the indigenes. They were the custodians of the land. However, with the advent of the British into the territory in 1821, the duties of the chiefs were limited. As a result of lack of the proper means of communication and the strong ethnic loyalty enjoyed by the chiefs, they ruled indirectly through them. The indirect rule limited the role of the chiefs to only cultural and social matters whereas important matters such as finance, external and internal trade, foreign affairs and to some extent, law and order were in the hands of the colonialists. In **Appiah v. Inkyi (1907) ren 455** it was held that since a chief was not a justice of the peace no notice was required for an action to be instituted against him. Thus the colonial courts eroded the hitherto judicial authority of the native chiefs. They also passed certain ordinances which eroded completely chieftaincy power, influence and prestige. They include:
    - Supreme Court Ordinance of 1874: this ordinance left uncertainties as to the extent of the jurisdiction of the chiefs.
    - Native Jurisdiction Ordinance of 1910: this ordinance gave the chiefs power to make bye laws but must be in recognition of the S.C.O, thus, the Governor had power to restrict the jurisdiction of any particular chief.

- **Taxation- Raymond Atuguba, The Tax Culture of Ghana.** In the pre-colonial era, the chiefs set up the Native Treasury, which enabled them to tax the natives. This could be in the form of cash or kind. The sources include property levies, funeral contributions, community welfare levies, land rents, tolls, etc. Therefore, there existed a regime of taxation before the British came. With the advent of the British, they abolished the Native Treasury, thus, making the chiefs to lose their power to tax their subjects. They changed the system by using the chiefs to collect taxes for them. They passed the Poll Tax Ordinance of 1852 to collect taxes to raise revenues for the administration of the Gold Coast, independent of the British admin in Sierra Leone.

- **Prison systems**- In a research paper entitled **Human Rights beyond the Prison Walls: A Rights-Based Critique of Ghana's Prisons System by Mr. Dominic Ayine**, the state of pre-colonial and post-colonial prison systems was enunciated. In the pre-colonial times, imprisonment was in the form of banishment, the imposition of fines, flogging and execution. Imprisonment as a form of punishment was not institutionalized. However, the British, on coming into the Gold Coast, enacted the Prisons Ordinance of 1860, making incarceration as a mode of punishment. Convicted criminals were placed in prisons custody.

- **Akpeteshie-** There was the extensive production of a local wine made from palm wine, corn and cassava, popularly known as akpeteshie. The British however banned its production for the reasons that, it limited the respect of law and cut the market of liquor imported into the colony as it represented a loss in revenue. Moreover, the British had an interest in the Palm tree, which was the major ingredient of the wine, as they trade in them. They also abused the minds of the colonists that alcohol abuse, especially from akpeteshie was a serious health hazard.

- **Fishing-** eclectic

The process of the British taking complete control over the Gold Coast can be grouped into three:

- The process of taking legal control of the territories through self-serving legislation; orders in council for the Colony, Ashanti and Northern territories and the British Jurisdiction Acts;
- Modifying or changing the pre-existing legal system to their advantage, importing the Common Law, changing Customary Law through the use of the "Repugnancy Clause"; and
- Establishing the institutions that are necessary to enforce territorial acquisition and legal modification-Military, Police, Prisons, Courts, etc.

Despite all this, the assumption of British jurisdiction was always tenuous **as** there was never any complete military victory to justify the assumption of control over the various territories; there was no solid evidence that the chiefs willingly ceded jurisdiction to the British. This affected only the Coastal Chiefs, anyway. The Foreign Jurisdiction Act of 1843 was to settle this by stating that where there is a doubt, we assume that the crown acquired jurisdiction as if by conquest or cession.

Commented [sq11]: A close reading of the Bond of 1844 reveals this.

Commented [sq12]: Retroactive/ex post facto legislation, did not start with Nkrumah or the military regimes, they learn it from colonial governance.

Illustrations of tenuous jurisdiction and how the colonial government wriggled out

R V. KOJO THOMSON

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KING V. EARL OF CREWE

SOBHUZA V. MILLER

NYALI V. A-G

GOHOHO V. GUINEA PRESS LTD AND ANOR

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CONCLUSION

- There were pre-existing institutional forms in Ghana that mere mutilated, and in some cases, others constructed in their place, using as a key instrument, the Law.
- The law came later (and involved its own institutionalisation and the corresponding mutilation of the pre-existing legal infrastructure) and was used in the service of the colonial political, economic, and social agenda.
    - In the two processes of institution building; extra-legal and legal, the one (extra-legal) sometimes came first, but always required the legitimizing after word of the law.
- The colonial institutions live on today (with the mutilated pre-existing institutions) and will not collapse unless we collapse them.
    - And we need to use the crafty processes and instruments that aided their construction to deconstruct them.

The Gold Coast Before 1830

Commented [sq15]: THE RISE OF BRITISH JURISDICTION IN GHANA
WRITTEN BY JONQIL VAN

It would be nearly impossible to look at how the British influenced and changed the legal system of Ghana without going back in history, prior to what we know now as the "famous" treaties and bonds. For this is the place where change began, not at the signing of such pieces, like the Bond of 1844. Bonds and treaties that were signed in the mid 1800's were the result of what happened in the past.

First we must look at the definition and motive behind law. Every society finds it necessary to regulate the behavior of its members: to make them stop certain acts that, for reasons obvious to them, are crucial to the upholding of the society. At the same time they must control and make the people of the society perform acts that are considered useful for the public. Thus, upon landing on the Gold Coast, the beginning of constant struggle for power, jurisdiction, and rights began between European settlers and the aboriginal rulers. Narratives of travelers from the early 1600's to the 1700's show that natives at no time willingly submitted to any oppressive measures placed upon them by the Dutch, Danes, or the English. There were many instances when the natives fought back with power against the settlers. One example would be when the people of Elmina took into confines the Dutch governor and his officers in the castle for ten months. Twenty or so years later in 1681 the English agent at Cape Coast Castle lost eighteen slaves who had escaped into the town. The townspeople protected the runaways and after being threatened by guns from the castle, they formed an army of over seven hundred people, and charged the officers. These are only two of many examples that display the fight for freedom and rights of the natives.

In the late 1600's the Dutch attempted to execute jurisdiction over criminal and civil matters, and to assume the power of life and death in the coast towns. Prior to this new fight for jurisdiction things had been congenial, but the English began to increase their trade and sought to build forts and factories. The Dutch became threatened. It was in 1753 that the English and the Dutch finally became so aggravated with the constant fighting between the natives over small debts that they chose to take matters into their own hands. It was written in the Journal of the African Society that, "The solution of the question of the ultimate control of the Coast was therefore forced on the Europeans by the action of the natives. The existence of these disputes had the further effect of compelling the English to take up the task of adjudication in the general quarrels of the natives. It was obviously a necessary condition to efficient trading on the coast that these quarrels should be settled equitably, and it was from this point of view, and not from any feeling of duty to the native population, the question of establishing a real government over English settlement was first approached."

In the year of 1821 under the rule of the King of England, Sir Charles McCarthy was appointed Governor of the Gold Coast settlements. Upon his arrival he held a public meeting making a statement about the new government and laws of the settlements. He then established petty debt courts at Cape Coast Castle and other trading stations. He selected local merchants and officers who were open to help him, as magistrates. The officers readily tried civil and criminal cases brought to them. The natives took this as an opportunity to collect outstanding debts. From this point forward the jurisdiction and creation of laws through treaties and bonds began to increase immensely. It is crucial to take into consideration when reading this history that there are two sides being presented. As seen in the journal article, the European straightforwardly blamed the need for jurisdiction on the natives. They believed that their "barbarous and cruel" practices were beyond help, thus they needed order. The natives on the other hand easily could have made the statement that it was the action of the settlers that caused the disruption. For example the act to causing wars between the natives to increase the supply of slaves. Unfortunately the natives' history was not documented as thoroughly nor accurately. Reading this history, one must keep in mind the biases created in history.

The Administration of George MacLean

At the beginning of the nineteenth century the British, Danes and Dutch all were extremely active along the Gold Coast. The British and Danes supported the coastal towns, while the Dutch supported the Asante. From 1821 onwards the British openly supported the southern states and took direct responsibility of the administration in the forts. They handed over administration to British traders who were given a £4,000 annual subsidy. The forts were run by a council in Cape Coast elected by British merchants who had inhibited the area for more than one year. The council was led by a president elected by its members. They

were instructed to use their authority and jurisdiction only over those living in the forts. They were specifically told to not interfere with the local politics.

By 18453 jurisdiction over the forts had spread out along the coastal states, with the exception of Elmina, and for approximately forty miles inland. This amazing spread was a result of the work of Maclean, the appointed president of the colonial council. He was introduced into the administration in October 1829 as neutral arbitrator with the goal to better relations between the British and the natives. Maclean realized that sufficient trade and the increase in missionary activities would not exist unless peace and order was established in Ghana. He projected forward with belief that administering a judicial system into the Gold Coast was the most appropriate step to take.

Maclean first great act was to conclude a treaty between the king of Ashanti and the British Government with their allies on the 27th of April, 1831. In the clause, the treaty stated that the king of Ashanti would deposit six hundred ounces of Gold in Cape Coast Castle, and deliver two princes of the royal blood as security into the hands of the Governor for six years in order to keep peace. It is in the second clause that he will see a movement towards British jurisdiction, it states: In order to prevent all future quarrels which might lead to an infraction of the treaty, the following rules are agreed upon: (a) the path are to perfectly open and free to all persons engaged in lawful comers, and persons molesting traders in any way to be liable to punishment; (b) panyarring to be rigorously punished, and no chief or master to be held responsibly for the crimes of his servant unless committed with his sanctions or by orders; (c) the King of Ashanti renounces all title or right to any homage or tribute from the kings of Denkera, Assin, and others formerly his subjects. The main objectives of this treaty was to secure, protect, and extend trade for the British. It did so by removing all obstacles that reduced trade by lifting regulations that pertained to trading routes. The treaty opened doors inland for the British, giving them not only the security of trade but also the ability to make a move towards colonialism. It is also the first written modification or amendment of the customary laws of the country made after conference with and by the local rulers.

For that, it is extremely significant and is the starting point for numerous more treaties that came in the near future. After achieving the Ashanti peace agreement that was centered on “rules and regulations for the better protection of lawful commerce” Maclean then designated a British governor at Cape Coast as arbiter of all conferences between the signatories under the form of peace-keeper. Throughout the 1830’s Maclean sought to gain and maintain peace among the southern states chiefs, and to stop human sacrifices, attacks or raids on peaceful traders, panyarring, and abolish slave trading.

Upon his arrival Maclean left all criminal cases to the local people, yet in 1836 having not felt confident in the present justice system carried out by the aboriginal leaders, Maclean made the decision to either attend cases himself or send a representative from the council to make sure justice was really being served. Gradually he asserted his right to hear all important cases and serious crimes. He also placed magistrates in Dixcove, Anomabo, and Accra, while using the soldiers of these forts as police to ensure that order was maintained.

By the early 1840’s peace had been established and British power and jurisdiction had been introduced and administered in Ghana. Although, Maclean’s judicial power was great the British still had no legal authority. British recognizing this found need to take up direct responsibility of the administration of the forts. As a result, under the recommendation of the Parliamentary Select Committee of 1842, Captain Hill was sent as governor of the forts. George Maclean was appointed judicial assessor. Upon Hill’s arrival he got eight Fanti rulers to sign what has become known as the Bond of 1844. This bond introduced English justice into the Gold Coast territories and abolished such customs as human sacrifice, but stopped short of any direct intrusion in the government of these communities. The Bond of 1844 stated that:

1) The signatory chiefs recognized the power and jurisdiction that had been exercised in their states and declared that “the first objects of law are the protection of individuals and property.”

2) Human sacrifice and "other barbarous customs, such as panyarring, are abominable and contrary to law."

3) The customs of the country were to be "molded in accordance with the general principles of British law."

Eventually through time Hill got eleven more chiefs to sign this bond. This sovereignty of the chiefs was still recognized due to the fact that the new jurisdiction granted to the British was limited only to criminal cases, and was to be exercised alongside the chiefs. Because Maclean was appointed judicial assessor the practice of British law remained similar to that of the past until his death in 1847.

It is crucial to state that because of MacLean's earlier position this was not important as it may seem. The Bond of 1844 simply affirmed the existing judicial situation on paper and recognized MacLean's former administration for what it had created. It is relevant to repeat that at no time did the local chiefs hand over direct responsibility of all judicial matters. The judicial assessors were to act as assistants to the chiefs in cases. Trials were to take place in front of the queen's officers and the chiefs of the area. The sentences were carried out by the aboriginal leaders.

There are two extremely important factors that decreased the authority of the chiefs and increased the British power, which is seen quickly after the death of Maclean. First, Cruikshank, an Englishman who lived on the Gold Coast for eighteen years and acted as governor for some time, sums it is up quite clearly when he states: 'Indeed, we had no legal jurisdiction in the 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 Britain: but by this act they only meant the military services of vassals to a superior. Native laws and customs were never understood to be abrogated or affected by it." This is a common error that was made by many of the British. This is an error pertaining to allegiance, an error caused by probably an unclear notion which many have between sovereignty and independence, and in no way lessened by an imperfect knowledge of the position of a protected person according to local customary laws. It is clear that upon the signing of the bond the signatory chiefs felt they were gaining British protection. Unfortunately the British saw the singing of the bonds to be a clear giving of jurisprudence in the administration of local justice. The African rulers did not see the word allegiance in the same context as the British, thus they had assumed quite unreasonably that in signing protection treaties African rulers willingly parted with their sovereignty.

Secondly, lack of money and availability of the local people between 1844 and 1850 increased the use of British law. When local disputes broke out the people needed administration. The chiefs and headmen were generally too expensive to go to. They often required extensive gifts, fees, and fines. The magistrate's courts, before 1850, only required a small sum for summons, thus fewer material resources came to the magistrates court. Although the magistrates' court had legal jurisdiction on only criminal cases, it was more often used for minor disputes by the local community. In Cape Coast and Anomabo in the fourth quarter of 1944 there were sixty-one out of eighty-eight minor dispute cases, such as small debts. Only six serious cases, pertaining to murder and robbery were acted on. The remaining were domestic complaints, including minor assaults, disputes over slaves and pawns, and complaints by slaves over their treatment. In the second quarter of 1845, 128 cases were tried. Ninety-one of those cases regarded small debts, there were two cases of murder, six thefts, plus minor disputes. In 1851 one single magistrate would hear approximately one hundred-twenty cases a month, most of which dealt with small claims. The magistrate's court became quite clearly a popular place to go to deal with disputes. The majority of these cases were not in any way required to be acted upon in the magistrate's court, rather they were independently brought there due to financial reasons. In connection to Maclean's office, his original intention of assuming authority in an area in which indigenous leadership seemed to be temporarily lacking, he created a flexible system for widespread involvement in the internal affairs of the states of the Gold Coast, and especially in the lives of the residents of the coast towns. Maclean's system was expanded, institutionalized and made more inflexible by his successors. The availability of the alternative system of justice served to further weaken the authority of the chiefs and to embroil the British more deeply in the daily lives and affairs of the country.

Although this may have not been Maclean's initial objective, through colonialism and the various treaties that he created it did occur.

Part Three
Britain Obtains Direct Responsibility

After the death of George Maclean all judicial practices began to turn against the local rulers. Treaties created during Maclean's time in office became mere acknowledgments of what was. The beliefs and practices that were used began to hold little to no importance. By the 1865 the bond of 1844 was no longer relevant. Rather than the chiefs deferring to the British courts in selected situations, the British claimed the authority over not only what was or was not to be heard in the chiefs courts, but also over the very existence of the courts.

The British enacted the first law providing for a Supreme Court of Civil and Criminal Jurisdiction on 26th of April, 1853. The chief justice was the judicial assessor at that time. The law included "the right of a suitor to appeal from the decision of his chief to a council of wise men and captains." The Ordinances granted jurisdiction to the Legislative council to hear appeals. The new court of appeal consisted of the governor, the judicial assessor, and at least one neutral council member. Instantly, after this law was put into order six amending Ordinances were passed. The last being enacted on the 21st of November, 1866. This particular law made better provisions for the administration of justice within the settlements on the Gold Coast and its dependencies.

The mishandling by the British of the Asante invasion of 1863 is yet another point in which loss of control for the aboriginal leaders occurred. The invasion led to the creation of the British Parliamentary Select Committee of 1865. Its mission was to go into the affairs of the British West Africa settlements and make sure there was no further extension of British power and jurisdiction, nor any more treaties offering protection. It was also to "encourage in the natives the exercise of those qualities which may render it possible for us more and more to transfer to them the administration of all the governments, with a view to our ultimate withdrawal from all except probably Sierra Leone." These orders were not completely different. Instead of withdrawing the British chose to fight further in. In 1866 they exiled Aggrey, the king of Cape Coast, when he openly objected to appeals against the decision of his court being sent to the British court. Furthermore they restored their negotiations with the Dutch. This led to an exchange of forts in 1867 and four years later a buying of all Dutch forts on the coast of Ghana.

Three years later the British claimed the whole of southern Ghana as a crown colony. Speculations have been drawn as to whether or not the natives fought the new ruling of the British. Aside from Aggrey's strong attempt, the people made a serious effort by creating the Fanti Confederation in 1869. This confederation was created in hopes of establishing, for the natives, an improved form of government. Although, the leaders of the group were treated as conspirators and traitors. Some were prosecuted while others were unlawfully imprisoned. The Fanti Confederation was thus destroyed. This confederation was only one movement formed to help the local people and fight against the jurisdiction of the British and their settlements.

The British Crown acquired absolute power and rights. The circumstances in which this power was gained should be clearly understood and repeated: at no point did the aboriginal rulers give sole power and / or rights to the British. In 1869 focus was drawn to certain complaints about the administration of justice. It was said that there was too much law and little equity in the assessor's court: that lawyers were permitted to intervene to an "extent ruinous to unsuspecting natives and to the destruction of all confidence in the British courts of law." Lord Granville, the Secretary of State for the Colonies admitted this to be true and brought forth the apparent need for a judicial assessor. It was also decided that in order to have a functioning government the assurance and co-operation of the neighboring chiefs and headmen was crucial, along with the ability that native questions should be decided by the chiefs. Of course revisions and the assistance of an assessor were necessary, along with the final decision of the Governor.

Upon arrival of the new judicial assessor and chief magistrate it was found that the commandants held commission of justices of peace, but all too often, as seen in Part Two, they dealt with civil actions such as small debts, and not criminal cases. This was opposing the laws created earlier, yet it had been going on since the mid 1840's for various reasons. The chief magistrate instantly questioned the exercise of jurisdiction and the use of law. On the 9th of May, 1872, he stated, 'With the progress of the country, it becomes the more expedient to obviate the risk of miscarriage of embarrassment in the administration of justice in any of its branches.' 3 During this time a war between Elmina and Fanti land had broken out. The Ashanti monarchy had attacked numerous settlement outside it land barriers, badly wounding many of the villages. Many European armies choose to intervene, and eventually got the Ashanti back onto their own ground. It was on July 24th 1874 the detached settlement from this war became a colony.

The Supreme Court was transferred all rights and jurisdiction connected with administration of justice, which the queen had acquired by treaty and other state document that held lawful authority. In the proclamation of 1874, which it became known as, the extent of the queens jurisdiction were defined to included 'the determination of appeals from the native tribunals to magistrates, the supervision and regulation of native prisons, and the by authority of the government of disputes arising between different chiefs and rulers." 4 The aboriginal rulers at no time had in mind to give up all jurisdiction, power, and right to the British authority. They never agreed to become British subject, nor cut themselves free from their past and traditions. Originally no right or power was to be used by the queens officers unless under the consent of the aboriginal leaders. The British crown and the authority manipulated the jurisdiction and power of the aboriginal leaders, stripping from them what was rightfully theirs. It is seen many friendship and protection treaties between England and Gold Coast that this holds true.

Two examples of native rulers and their people being deprived of their judicial powers and other sovereignty right over time can be seen in the Sefwi treaty of1887 and the Adansi treaty of1895. The Sewfi treaty dealt with the dismemberment of the Ashanti kingdom. The principal parts stated that:

ii. The Governor of the Gold Coast colony hereby takes the country of Sefwi under the protection of Great Britain.

ii. The Government of Her Majesty the Queen of Great Britain and Ireland, Empress of India, will not prevent Kweku Inguan, King of Sefwi, or his lawful successor either in the levying of revenues appertaining to them according to the laws and customs of the country, nor in the exercise of the administration thereof; and Her Majesty's Government will respect the habit and customs of the country, but will prevent human sacrifices; and slave dealing, when brought to the notice of the government, will be punished according to the laws of the Gold Coast Colony.'

The Adansi treaty of 1895, similar to many treaties of the time period declares in article seven that the: 'King or his chiefs and principal head man and their lawful successor will not be prevented from levying customary revenue appertaining to them according to the land and customs of their country, nor in the administration thereof; and Her Majesty's Government will respect the habit and customs of the country, but will not permit human sacrifice; and slave dealing, whenever discovered, will be punished according to Gold Coast laws." These treaties were not used as a form of protection for the settlements. Rather the treaties were a form of threat towards those rulers who had not signed treaties with the British. As soon as the protection and friendship treaty was signed the ruler and his people would be considered conquered. In 1901 the Ashanti was in the order of Council declared to be British possession by right of conquest, as well as Gold Coast territory. In and around 1910 some Supreme Court decisions declared that there was no aboriginal judicial tribunal, unless under the Native Jurisdiction Ordinance. (The Native Jurisdiction Ordinance was destroyed by the Supreme Court Ordinance in 1876.) It was proclaimed that on the principles of English law, the English sovereign is the only foundation of justice and honor. This concept blatantly objected the foundation of the treaties and their obligations. It was from this point on, the will and beliefs of the crown ran the country, not the wish of the people, nor the aboriginal ruler's constitutional history.

Conclusion

"The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution."*1 This is the very first clause in the Ghana," the sovereignty that was re-established on March 5, 1957. Kwame Nkrumah and other members of the Convention People's Party had fought for nearly ten years to regain independence from the British. The British having seen the support of the people of Ghana, eventually, after struggling and fighting the independent parties, agreed to pass the motion calling for independence. At which point Nkrumah's rule began in 1957 and lasted all the way through to 1966. In 1960 the adoption of the new republican constitution was created. Although independence was established many traditional practices had been lost over the hundreds of years of colonialism. The legal system had become one resembling that of the British courts and lawyers, which is seen both in criminal and civil proceedings, along with today's constitution. The judiciary section of the Ghana National Constitution consists of twenty-one pages and thirty-six clauses. When moving forward to the Chieftaincy section one would see that it includes four pages and holds seven clauses, proving that the power of the chief is legally near to insignificant. There has indeed been the establishment of a National House of Chiefs and a Regional House of Chiefs to "preserve" tradition and customs, yet they are all under the ruling of the Supreme Court and Parliament. "The National House of Chiefs shall have appellate jurisdiction in any cause or matter affecting chieftaincy which has been determined by the Regional House of Chiefs in a region, from which appellate jurisdiction there shall be an appeal to the Supreme Court, with the leave of the National House of Chiefs, or the Supreme Court." Thus reminding the reader that that the chiefs sovereignty is a concept of the past.

In 1865 the King of Cape Coast, John Aggrey, criticized Maclean saying that he "in a very peculiar, imperceptible and unheard-of manner, wrested from the hands of our kings, chiefs and headmen their power to govern their own subjects." In opposition to the rise in British jurisdiction he further wrote to Governor Conran in 1866 "the time has now come for me, to record a solemn protest again the perpetual annoyance and insults that you persistently and perseveringly continue to practice on me in my capacity as legally constituted King of Cape Coast…. the government in England has expressed it desire that we, kings and chiefs of the Gold Coast, are to prepare ourselves for self-government and no protection.' As seen above this self-government did not come about for another one hundred years. 'The perpetual annoyance and insults,' also continued for one hundred years. Today Ghana is ruled by one president and the foundation of social rules is based on the constitution that holds little support for the traditions and customs of the past.

History of Ghana Court System

The current court system is directly descended and is a beneficiary of the British Court System which was introduced to the Gold Coast.

Timeline

1800s: foreign powers came to the shores of Ghana seeking riches (gold, minerals, slaves, etc). Each left due to the unfavorable and unstable environment and when the slave trade was abolished, only the British were left, carrying out trades on the coast of Sierra Leon. Their court system at that time was restricted to the merchants who were involved in the trades until one Cpt. McLean began to administer justice for the natives in British courts. The natives preferred the British court system and the justice it provided. The Chiefs, who were losing acclaim/influence appealed to the Crown to get McLean to stop his actions. The

Commented [a16]: 1824: Battle of Nsamankow between Brits and Ashanti's; death in battle of Gov., Sir Charles McCarthy
1826: Battle of Dodowa, again w/ Brits and Ashanti's; Ashanti's lost (peace treaty followed in 1831)

Crown investigated and agreed that what McLean was doing was, in fact, an infringement on the jurisdiction of the Chiefs. However, they also realized that McLean's actions could give them control of the people and the lands.

1843: British Settlement Act empowered the Crown to legislate for British settlements in West Africa and to delegate its authority to resident officers

1844: 6th March, Fanti chiefs and other tribal leaders agreed to bring major legal disputes before the Crown as well as the chiefs of the districts (Bond of 1844)

An Order in Council extended British Jurisdiction to areas where it had been acquired by agreement or usage; authorized the trial of locals; required that in default of local customs, the law of England be applied; appointed McLean as Judicial Assessor and stipendiary Magistrate

1853: Supreme Court Ordinance established Supreme Court with civil and criminal jurisdiction within forts and settlements

1874: Brits officially took the Gold Coast as a colony again (including Lagos)

1876: Ordinance #4 re-established the Supreme Court with Chief Justice and jurisdiction over the whole of Gold Coast. This is the time when ordinances, the rules of common law, and the doctrine of equity were introduced to the Gold Coast. Ordinance also allowed Customary Law to be applied when the dispute involved natives who did not request British law; on the condition that the customary law being applied was in line with the rules of equity, natural justice, and good conscience.

Question: did the Supreme Court Ordinance of 1876 take away judicial power from the Chiefs? See OPPON V AKINIE, where it was held that the Ordinance did not take away power from the chiefs

Commented [a17]: 1866: Abolished and replaced with the "Court of Civil and Criminal Justice" which was presided over by a chief magistrate

Commented [a18]: Actually a High Court; decisions could be overturned by British Court of Appeal and House of Lords.

Commented [a19]: Lower level courts were manned by civil servants

Commented [a20]: Structure of court system introduced is what exists today

Commented [a21]: Called Acts after independence and now called Decrees under military rule called Laws under PNDC rule

Commented [sq22]:

Commented [sq23]: Trial courts and tribunals of Ghana

Evolution of the court system from 1957 - 1992

Court structure from independence in 1957-1960

Immediately before the Gold Coast became an independent country, the courts comprised principally the Supreme Court of Judicature and the magistrates' courts. The Supreme Court was presided over by the Chief Justice who sat with judges appointed from time to time by the Governor. Below the Supreme Court were the magistrates' courts and juvenile court which exercised summary jurisdiction. Appeals form the magistrates' courts went to the Supreme Court. Whilst appeals from the Supreme Court went to the West African Court for Appeal, and eventually from there to the Judicial Committee of the Privy Council. In addition to the courts discussed above, there existed a number of statutory native courts which had sprung out of the traditional native court system.

Commented [sq24]: Courts ordinance, cap 4, sections 3 and 44

Commented [sq25]: Cap 4, section 39

At the time of independence in 1957, the structure of the courts were as follows:

- The Supreme court consisting of the Court Appeal and the High Court; and
- The magistrate and juvenile courts

By this structure, the Court of Appeal became the final appellant court of Ghana. The following changes were effected to the structure between 1958 and 1960:

- The Court of Appeal Ordinance was passed. It abolished appeals to the West African Court of Appeal

- The post commissioner of assize and civil pleas was created. The commissioners tried certain criminal civil offences but were, inter alia, barred from hearing appeals from magistrates' courts in criminal courts. Only citizens of Ghana who were lawyers with a minimum experience of five years' practice at the Bar were qualified to be appointed commissioners
- Local courts were created to replace the native courts. They were presided over by local court magistrates. Although they exercised judicial functions, the courts were placed under the Ministry of Interior

Court structure under the first republic-1960-1966

When Ghana became republic in 1960, a new Courts Act was passed. It set out the court structure as follows:

- The supreme court
- The high court
- The circuit courts
- The district and juvenile courts and
- The local courts

CA 9 abolished the post of commissioner of assize and civil pleas. It also repealed the courts Ordinance, Cap 4 as amended, as well as the Court for Appeal Ordinance. The 1960 Republican Constitution abolished appeals to the Privy Council and the Supreme Court thus became the final appellate court of the land. The Convention Peoples' Party Government of the late Dr. Kwame Nkrumah also passed the Criminal Procedure which established a special criminal division of High Court. This was a very powerful court set up to try certain specified criminal offences. Its decisions were final. The difference between this court and all other adjudicating bodies set up by subsequent governments to try specified criminal offences was that Dr Nkrumah's special criminal courts were presided over by a criticizing judge and two other panel members. That court tried only one case-**STATE V OTCHERE**

Other inferior courts that sprang up during the period are the rent tribunals and rent committees which were established under the Rent Act, 1963 and related regulations. There to try civil suits involving landlords and tenants. These courts had concurrent which are still in existence are presided over by rent officers who are tribunals do not form part of the Judicial Service but rather under the Ministry of Works and Housing. The decisions of these tribunals are however appealable to the district courts.

Court structure under the Second Republic: 1969-1972

The second republic was ushered in by the 1969 constitution. Article 102(4) of that constitution and the consequential Courts Act, 1971 provided the court structure as follows:

- The Supreme Court
- The Court of Appeal
- The High Court
- The circuit court
- The district court grade I and the juvenile court and
- The district court grade II

The Supreme Court once more become the final appellate court of the land. The Supreme Court, the Court of Appeal and the High Court comprised the Superior Courts of Judicature; while the circuit court, the district court and the juvenile court comprised the inferior courts. The constitution made provision for the establishment of special adjudicating bodies to adjudicate over chieftaincy disputes. They were the judicial committees of divisional councils, judicial committees of traditional, judicial committees of the regional House of chiefs.

Court structure under the Armed Forces Revolutionary Council Government: June to September 1979

The Armed Forces Revolutionary Council (AFRC) Government, which was headed by Flt Lt JJ Rawlings, did not affect any change in the court structure as it existed immediately before June 1979. However, that military regime set up a special court under the armed forces revolutionary council (special courts) decree to try specified criminal offences. The court was to be composed of a judge advocate and adult Ghanaians 'able to speak and read the English language with a degree of proficiency' that would enable them to actively participate in proceedings. It decisions were final and not appealable to any court. By a subsequent amendment, it was decreed that all its decisions were valid notwithstanding any defect in the composition of the panel.

Not much was known of the special court or who actually sat to try cases in them. The operations and procedures of these courts were shrouded in mystery, but people were known to have been fined, imprisoned, executed of had their properties confiscated by orders from those courts. In one case, namely, **REPUBLIC V DIRECTOR PRISONS; EX PARTE SHACKLEFORD** where a warrant was alleged to have been issued and signed from the court, the signature of the official who authorized the warrant could not be deciphered and the name of the signatory unknown. In that case, the accused was incarcerated for having been tried by that court. He denied knowledge of any trial. An application for an order of habeas corpus was opposed by the State for the reason that he was tried, convicted and sentences for three years by the special court. No record of the trial could be produced. The application was handled by Cecilia Koranteng-Addow J.

She granted the application and ordered the release the applicant forthwith. She was one of the three judges who were murdered during the rule of the Provisional National Defence Council. Some political scientist cite this case as one of the court cases the judge handled by which incurred the wrath of some soldiers and for which she was abducted in the night from her residence in June 1982 and murdered in a military range where her charred body was later found. Before handling over to a civilian government, the AFRC established a special tribunal by the Armed Forces Revolutionary Council Decree, 1979 which took over and continued the trial of cases pending before the special courts and tribunals established by the AFRC government.

Court structure under the third republic: 1979-1981

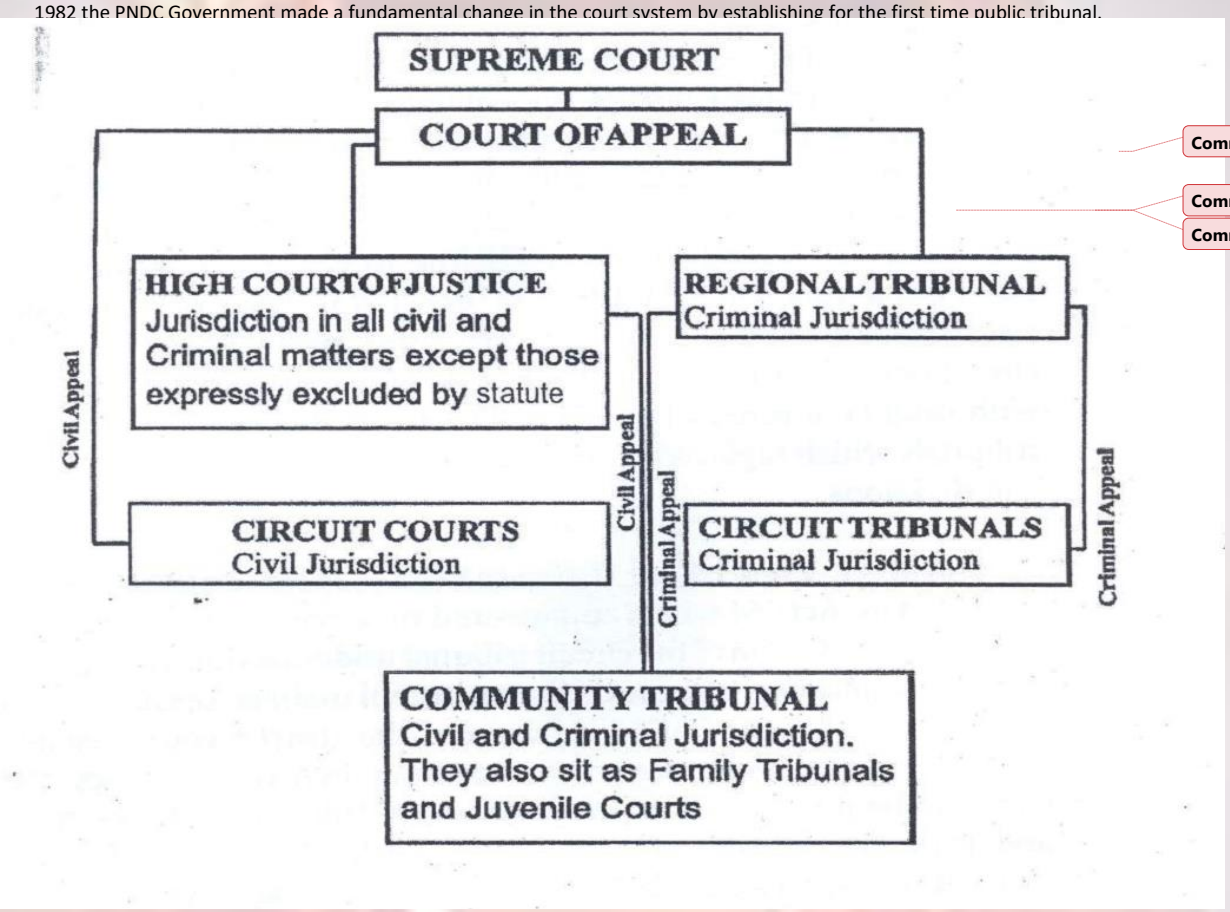
Between 1979 and 1981, a third civilian government of the Third Republic headed by President Hilla Liman. It was ushered in by the 1979 constitution. Under that constitution, the structure and hierarchy of the courts remained the same as they existed under the 1969 constitution and act 372. Section 17 of the transitional provisions of the 1979 constitution granted immunity to the government and officers for actions taken during that military regime of the AFRC. By implication, AFRCD 23 and the 1979 constitution abolished all other special courts established by the Armed Forces Revolutionary Council. The structure and hierarchy of the courts under the 1979 constitution became as follows:

- The supreme court;
- The court of appeal;
- The high court;
- The circuit court;
- The district court grade I; and
- The district court grade II

Court structure under the provisional national defence council government: 1981-1992

The court structure under the Third Republic was intact when the army took over the governance in December 1981. The army officers who led the change of government established the Provisional National defence council. Between 1981 and 1992, the

courts continued to operate as they were doing under the previous civilian government that he ONDC replaced. Additionally, in 1982 the PNDC Government made a fundamental change in the court system by establishing for the first time public tribunal.



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2002-2011

By various amendments of act 459 which have been explained in paragraphs 5 and 6 supra, the structure and hierarchy of the courts and tribunals as at time this edition went to press in 2011 were as follows:

The superior courts and lower courts

As already stated, the 1992 constitution, article 126 made provision for the superior and lower courts.

Superior courts

The Supreme Court

This is the highest court in Ghana which also doubles as the constitutional court. Apart from election petitions, the Supreme Court is the final appellate court of the land. It had supervisory jurisdiction over all courts in the country-article 132 and exclusive jurisdiction to determine whether or not an official document should be produced in court-article 135. In addition, it has original jurisdiction in all matters relating to the enforcement or interpretation of any provision of the 1992 constitution and any case arising out of the issue whether or not an enactment was made in excess of the powers conferred on Parliament or any other authority. Its composition, jurisdiction and powers are detailed out in articles 128-135 of the 1992 constitution as well as in act 459, sections 1-9. The four main means by which cases may be filed in the Supreme Court are:

- By appeals under articles 129 and 131(from the Court of Appeal, the judicial committee of the National House of Chiefs or the High Court(treason cases)
- By an application for the judicial review or prerogative wits under article 132
- For the review of its decisions under article 133 and

- By the invocation of its original jurisdiction on constitutional matters-under article 130 by a writ for the interpretation or enforcement of a provision in the 1992 constitution, a declaration on the legality of an enactment, a reference by way of a cases stated by a court below, or for the determination on the production of an official document in court under article 154

The court is not bound to follow its previous decisions or decision of other courts-article 129

The court is duly constituted by five of its members on appeals, on an issue relating to the production of an official document, on an application for prerogative writs; or by seven or more of its members when it reviews its decision. By directives issued by the Chief Justice, the court is constituted by nine or more of its members when it hears any constitutional case. There are no divisions in the Supreme Court.

The court of appeal

The court of appeal is immediately below the Supreme Court. It hears only appeals from decisions or orders of the High Court, the Regional Tribunal and the circuit court (in civil matters only). It has no supervisory or original jurisdiction-**TAKYI V GHASSOUB (GHANA) LTD.**

The court is duly constituted by three of its members sitting on any of the matters over which it has jurisdiction. It has two main Divisions, namely, the Civil and Criminal Divisions. The power, composition and jurisdiction of the court are detailed out in **articles 136- 138** of the 1992 constitution and in Act 459, **section 10-11**.

The Court of Appeal is the final appellate court in election petitions, to the exclusion of the Supreme Court-**IN RE PARLIAMENTARY ELECTION WULENSI CONSITUENCY ZAKARIA V NYAMIKAN**, which held that there is no right of appeal from the Court of Appeal from an election petition determined by the High Court under **article 99(1)** of the 1992 Constitution. Election petition apart, all decisions of the court of Appeal are appealable to the Supreme Court, **section 131(1).**

The high court of justice

The High Court is immediately below the Court of Appeal but comes above the circuit court. It had original civil and criminal jurisdictions in all matters except those expressly excluded by the constitution or by statute. It has supervisory jurisdictions over all lower courts and any lower adjudicating authority-article 141. All decisions of the High Court are appealable to the Court of Appeal

Masters of the High Court

Act 459, section 22 has provisions on the appointment of Masters of the High Court by the Chief Justice. The position is reserved for lawyers of not less than ten years standing at the Bar. Currently there are no masters at post.

The lower courts

Circuit courts

The court is positioned immediately below the High Court and the Regional Tribunal but above the district court. It forms part of the lower courts. When the tribunals were first established under the 1992 constitution, the circuit court had only civil jurisdiction while the circuit tribunal had criminal jurisdiction. Act 464, section 1 conferred on the circuit court the power to exercise the criminal jurisdiction which was exercised by the circuit tribunals. This power was confirmed by act 620, section 696). When the circuit tribunals were tribunals were abolished by Act 620, section 6(5), the circuit court took over the jurisdictions but within the

limits of act 459 as amended by act 464 and act 620. It has jurisdiction over contracts and torts actions and recovery of liquidated sum not exceeding GH₵10.000, actions involving occupation, possession and title tot land and landlord and tenant cases. It is presided over by a single circuit court judge. The powers, composition and jurisdiction of the court are detailed out in act 459, section 40-42 as amended by act 464 and act 620. In the regional capitals, some of the circuit courts have divisions such as Armed Robbery Division and Narcotic Division.

Circuit tribunals

This was a court which used to try only criminal cases. It was presided over by a panel of three members, the chairman of whom had the same qualification as a circuit court judge, that is a minimum of five years' experience as a lawyer. Its powers, composition and jurisdiction were set out in act 459, section 43-45. It was ranked on the same level as a circuit court. The court was abolished by act 620, section 6(5).

Community tribunal

When act 459 was passed in 1992, the community tribunal was the lowest court of the land. It replaced the district courts grades I and II. It tried both civil and criminal cases. It was presided over by a panel of three members, the chairman of whom was a lawyer preferably f three years' standing or a person with judicial or legal experience. The other two panel members were not required to be trained lawyers. Its powers, composition and jurisdiction were set out in act 459, section 46-53. The court was abolished by act 620, section 6(7).

District court

Act 459, section 46(1) established the community tribunals in 1993 to replace the district courts. In the same year, act 464 was passed. By act 464, the district court grade I, which was in existence before the coming into force of act 464, was re-established to exercise the jurisdiction conferred on the community tribunals.

In 2002, act 620, section 6(7) amended act 459 and abolished the community tribunals. That left intact the district courts as established by act 459 and act 464.

It follows from the foregoing that the district courts replaced and exercised the jurisdiction and functions of the community tribunals: act 620, section 6(8) and act 464, section 3. The jurisdictions of the district courts, whether presided over by a career magistrate or a lawyer magistrate, are the same and are set out in act 620, sections 47, 48,49,5 and 51. All district courts apply the district court rules, 2009 (CI 59) to try civil cases and the criminal and other offences (procedure) act 1960 (act 30) to try criminal cases.

The district court has three divisions. They are the general division which handles general matters at the district court, the juvenile court which tried criminal cases involving people aged below eighteen years.

The traditional council*

It has a traditional council whose president is the paramount chief of the area. The judicial committee of the tradition council has jurisdiction to hear cases involving chiefs below the rank of paramount chiefs. That committee is made up of five members but it is duly constituted by not less than three of its members for the determination of disputes. It has no appellate jurisdiction. It tries disputes involving chiefs below the status of paramount chiefs or the Asantehene. The procedure for the trial of cases is regulated by the chieftaincy (proceedings and functions) (traditional councils) regulations, 1972(LI 798)

The judicial committees of the regional houses of chiefs have original jurisdiction over disputes involving paramount chiefs, paramount queen mothers and the Asantehene. Those committees hear appeals from decisions of judicial committees of traditional councils. The original and appellate jurisdictions of these committees are exercised by not less than three of its members. Appeals from the decisions of judicial committees of the regional houses of chiefs go to the judicial committee of the national house of chiefs. The procedure for trial and hearing of cases at the judicial committees of the regional houses of chiefs are regulated by the chieftaincy (national and regional houses of chiefs) procedure rules, 1972 (CI 27)

The judicial committee of the national house of chiefs tries causes or matters affecting chiefs who are paramount chiefs, paramount queen mothers or the Asantehene, including disputes involving paramount chiefs which cannot be tried by the judicial committees of regional houses operating within the region where the chiefs are paramount chiefs. It hears appeals from decisions of judicial committees of regional houses of chiefs. Appeals from decisions of the judicial committee of national house of chiefs go to the Supreme Court. The procedure for trial and hearing of appeals in the judicial committee of national house of chiefs is regulated by CI 27.

Legal method

OUTLINE OF THE CIVIL PROCESS

Most of the time the civil process is commenced by a simple letter, of which you explain to your client and demand recompense. You must ensure that the letter cannot be used against your client. If the letter does not produce the expected result however, the letter should contain some threats to take appropriate steps as some people will also say to sue.

Commented [sq29]: To commence an action is not the same as beginning an action. Commencing involves invoking the jurisdiction of the court.

To commence, one must have a cause of action vested in him and against the defendant. To have a cause of action the plaintiff must have legal competence to institute or defend an action.

If you must seek the intervention of a court, there are preliminary matters which should be done:

From the time a writ is issued in the high court to the time the parties appear before a judge can be six months. There are built in time frames which ensure that parties prepare fairly before the case is called and so that the matter can take off expeditiously.

The first preliminary point is your client's cause of action. LETANG V. COOPER. There are some facts which when they have been proven in a court of law will entitle the one who proves them to succeed a claim. If the claim is in contract for a breach, therefore to establish a set of facts which when proved will entitle the client for a breach of contract. The question is what is my clients claim? When your client has no cause of action you prove the facts for nothing. Case brief exercise comes in, thus your client tells you a story, what are the facts. So if the facts cannot be justified, you advise him that he has no cause of action.

Commented [sq30]:

If you are satisfied that your client has a cause of action the next question is against whom, the defendant. If you bring the action against the wrong person the case will be thrown out. In contract, with capacity, a minor has capacity in certain areas. So if it is against a minor in respect of a sports car, and you issue a writ against the minor, the case will be thrown out since the child has no capacity to contract, so a guardian will have been better. MILLER V AG

Commented [sq31]:

The person whom the action is going to be brought should be a person known to the law. Under the university of Ghana act, act 806, only 3 people to be served, the chancellor, the chairman of the university council and the vice chancellor. A writ cannot be served to the halls.

Two person exists in the eyes of the law: the natural person and the artificial person.

The third consideration is whether the problem or the complaint is JUSTICIABLE.

JUSTICIABILITY

The court as a structure in our legal system cannot handle all our problems. For example, not having money to buy kenkey does not entitle one to go to court seeking a declaration that one needs money. Therefore the problem is not justiciable. Some problems are better suited for a mallam, bishop, pope etc., because they can provide pastoral services.

HOW DO WE DETERMINE JUSTICIABILITY

- Does the lawmaker provide rules which allows the court to define with sufficient clarity, standards for the resolution of that particular problem? If the answer is affirmative then the problem is justiciable.
- Next is what court. Thus which court has jurisdiction in the matter? The different jurisdictions available within the various courts are stipulated in the courts act and even the constitution as –the high court has jurisdiction in all civil and criminal matters. If you go to the wrong court the court will tell you that it has no jurisdiction. You must know the process also, if it is by way of summon, you should do so. Reform by CI47 wanted to correct the technicalities to civil procedures but it could not do so because of the constitution. There are 4 main processes: writ of summons, originating summons, originating motion…
- Whether the action of the client is STATUTE –BARRED; trespass is within 6 years, negligence is 3 years, and action against the president is 3 years after he has left office. If the action is brought after this time frame, then it is statute barred. NRCD54 is our litigation policy. If it is an election petition is 21 days.
- The evidence that you will use at the trial. Do you have evidence? Can you have access to the people who have evidence? Your star witness, can you have him? Without evidence the court cannot help you.
- If the matter interferes with the relationships that has been structured among the various organs of government, it is not justiciable
- Matter may not be justiciable because issue at stake involves too large a percentage of policy, because job of the courts is not to formulate policy. So if there is too much policy in the issue, it will come to the conclusion that not justiciable.

When you push a non-justiciable matter onto the court, the court loses its credibility.

The next matter is, which court has jurisdiction in this matter? We have a Courts Act which itemizes the respective jurisdiction of the various courts so you know which court you go to.

Geographical area also matters. Must be where defendant is.

Must also look at statute of limitations. Client may have case but may have slept on his rights for too long. If he has, will have to file an application for an extension of time – which explains why client has slept on rights for so long.

Last preliminary matter will be the process to be used. What is the process to be used to initiate action? There are two processes: petitions or writ of summons. Electoral disputes are commenced by a petition. Under CI 47, all civil actions otherwise declared by statute should be commenced by a writ of summons **(Order 2, Rule 2 of CI 47).**

Writ of summons is formal printed document sold in court premises but increasingly prepared in the firms. If you prepare it yourself, when you go to court, has to be signed by chief justice. If you buy from court premises, already signed by chief justice

On writ you are to provide your name, occupational and residential address of you and of the person against whom you are going to bring the action. If you issue writ against wrong person, they will come to court and have the writ set aside. Rules require that you endorse writ. What you state as your claim is your endorsement. Writ is defective without the claim because other party must know what you want.

DATE **SUIT No.**

IN THE HIGH COURT OF JUSTICE

BETWEEN

Name of Plaintiff Plaintiff

AND

Name of Defendant Defendant

To

AN ACTION having been commenced against you by the issue of this writ by the above-

Named plaintiff.

YOU ARE HEREBY COMMANDED that within EIGHT DAYS after the service of this writ on you inclusive of the day of service you do cause an appearance to be entered for you.

Commented [sq32]: This is a formal document by which a defendant is informed by the Chief Justice that an action has been commenced against him by a named plaintiff. It commands the defendant to "cause an appearance to be entered" within a specified time- usually 8 days – if the defendant wishes to dispute the plaintiff's claim. Otherwise judgment will be given against him in his absence without further notice.

Commented [sq33]: Order 2 rule 3

EX PARTE KOMBAT
The addresses of two defendants was not given in the writ. Taylor J. was of the view that the address of the defendant was an essential feature of the writ of summons and that being so the writ would seem invalid.

Commented [sq34]: Order 2 rule 3

AND TAKE NOTICE that in default of your so doing, judgment may be given in your absence without further notice to you.

Dated this day of (month) (year)

Chief Justice of Ghana

Letter written without prejudice cannot be tended as evidence.

When you file writ, defendant has 7 days from date of notice to file statement of defense.

-Man serves you writ, you have 8 days to enter appearance.

-Statement of Claim – you have 14 days to enter appearance.

-Rule says person has 14 days to file defense from time to end of appearance.

-Pleadings are closed. Parties must appear before judge as to how trial will proceed, who carries burden of proof, and all those administrative details relating to the trial.

ORIGINATING NOTICE OF MOTION

This is generally adopted where a statute provides for the making of an application to a court but does not provide for the manner in which it is to be made and there are no rules of court concerning the procedure.

It is titled in the matter in which the question arises or in the matter of the Act under which the statute is made. The Arbitrations Act for instance provides access to Court by way of an injunction – "IN THE MATTER OF AN INJUNCTION UNDER THE ARBITRATION ACT".

It is prepared in the normal way and relief must be requested; moved by counsel and evidence given by affidavit.

Commented [sq35]: A reservation made on a statement or offer that it is not an admission or cannot otherwise be used against the issuing party in future dealings or litigation with any determinative legal effect.

Commented [sq36]:

PETITIONS (as a means of commencing an action)

A written application in the nature of a pleading which sets out a party's case in detail. There is no prescribed form it should follow, but its form is well settled by long usage. A writ is defined by **O. 82 r. 3** to include a petition. A petition originates an action and concludes with a prayer asking for what the petitioner he is entitled to. Per **O. 65 r. 2** all proceedings for divorce etc. under the Matrimonial Causes Act shall commence by petition.

What happens when you commence a proceeding with a writ instead of a petition?

Order 81 rule 1 states that where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall not be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order in it.

CONCURRENT WRITS - O.2 r. 8

Sometimes for the purpose of service or where the original of the writ is lost before service, it is desirable to have a duplicate of the original writ. In such a case a concurrent writ may be issued.

A concurrent writ must be a true copy of the original bearing necessary differences according to the purpose for which it is used. It must be sealed by "concurrent"… with and official stamp. It must bear the date of the original, but only valid from the date of its own issue and remains valid so long as the original remains in force. LOKKO V LOKKO

Commented [sq37]:

SERVICE OF WRITS

Modes of Service

Service is generally effected by bailiffs or registered process servers. Not by lawyers or by the plaintiff or any other person. This will invalidate the writ.

The writ must be served separately and personally on each defendant, unless such service is accepted under any particular rule or enactment or an alternate method is authorised. Service on a lawyer who has given a written undertaking to accept service on behalf of a defendant is deemed to be valid service on the defendant.

Commented [sq38]: O. 7 r. 2 & 12

A defendant who files and unconditional appearance although he has not been served with a writ is deemed to have been duly served on the date he filed the appearance. I.e. if you enter appearance before you are served, you are deemed to have been served. If the defendant entered a conditional appearance …

Personal service is effected by leaving a copy of the writ with the person who is meant to be served. When personal service is hindered in any manner, leaving the writ as near as practicable to the person to be served will constitute sufficient service.

Commented [sq39]: O. 7 r. 3

Service on a body corporate may be effected by service on the chairman, president, or any head of the body, or on the MD, secretary (i.e… secretary appointed under the Company's code), treasurer or similar officer of it.

Commented [sq40]: O. 7 r. 5

In the case of a firm of partners, per **O. 6 r. 3,** the writ may be served on any one or more of the partners or at the place of business, on anyone in control or management of the business there.

In the case of a stool or skin, the one to be served is the occupant, secretary or linguist. Where the stool is vacant, the regent or caretaker (when in doubt serve as many people as are eligible).

For a family, it should be the head of family, caretaker of property or a principal member.

PROOF OF SERVICE – O. 7 r. 11

All courts are required to keep a process book for recording service of documents by bailiffs and registered servers. An entry in the book or an office copy of it is a prima facie evidence of the matters stated in it.

Affidavit of service, signed by the person who effected service constitutes a prima facie evidence of service. The affidavit must state the following:

Commented [sq41]: O. 7 r. 9

a) on whom the document was served

b) day, date and hour of service

c) where and how it was served

If service was by registered post, the affidavit must state;

a) by whom the document was posted

b) registration number of the letter

c) name and address of intended recipient

d) certificate of posting from the post office must be exhibited with the affidavit of service (see also **O. 8 r. 9)**

Step 2

PLEADINGS

Pleadings are formal documents which have to be prepared at the beginning of litigation. They are essential for the fair trial of an action and saving of time at the trial. The saving of time keeps down costs of litigation. A plaintiff is entitled to know what defences he has to meet and a defendant what claims are being made against him. If the parties do not know, unnecessary evidence may be got together and led or, even worse, necessary evidence may not be led. Pleadings regulate what questions may be asked of witnesses in cross examination**.**

Commented [sq42]: Formal allegations by parties to a law suit of their respective claims and defences with the intended purpose of providing notice of what is to be expected at the trial **-Order 83 rule 3**

Poku v. Frimpong per Azu Crabbe
"The pleadings consist of the statement of claim delivered by the plaintiff; the statement of defence, which is the answer of the defendant; the reply, which is the plaintiff's answer to the defence; and all subsequent pleadings, which are rarely delivered, such as the rejoinder, the surrejoinder, the rebutter and the surrebutter."

Pleadings starts with statement of claim. Lawyers prepare writ and statement of claim at same time and file it. However, notation will show that writ (10:15am for instance), statement of claim (10:16am). You are supposed to file writ and serve it and then statement of claim. In CI 47, you are supposed to file together and serve it.

Commented [sq43]: Order 2, rule 6,7- No writ shall be issued unless it is filed with a statement of claim

It is in statement of claim that you provide factual basis of the course of action.

1.) You must state your facts in paragraph, each paragraph containing as much as possible only one fact.

2.) If the facts that you state are contained in a document, you must plead the existence and date of that document.

3.) You are not supposed to plead the law in your statement of claim, just the facts.

Commented [sq44]: We have to have a statement of claim, must be in paragraphs.
-Paragraph 1 will say Plaintiff is first year law student in Ghana.
-Paragraph 2 will say defendant is also law student in University of Ghana.
-Paragraph 3 will say plaintiff and defendant met at law school interview etc.

Plaintiff	**Defendant**
Writ	Appearance
Statement of Claim	Statement of Defense
Reply	
Pleadings Closed	

If plaintiff enters appearance, then exchange of documents called pleading will take place. The defendant also presents statement of defence which answers point for point claims and assertions raised. Statement of defense also has to be in paragraphs and must relate to statement of claim. The reply arises from the statement of defense. If there is anything more to be said, a reply can be filed after the statement of defence.

Importance/Role That Pleadings Play in Trial System

1. Gives sufficient notice of the nature of the case so parties know exactly what the matters in dispute are.
2. Gives sufficient notice of the evidence to prepare so that the parties know exactly what facts to prove at the trial.
3. Prevent surprises
4. Limit the generality of the pleadings, the claim or the evidence and tie the hands of the party so he cannot go into matters not pleaded.
5. Ascertain the nature of the controversy to determine the most appropriate mode of trial.
6. Limit and define the issue to be tried thereby placing on record what are the precise questions raised in the action.
7. Limit and define which discovery is required.
8. Pleadings provide a public record of the controversy.

In other words, the function of pleadings is to ascertain with precision, the matters in which the parties differ, the points on which they agree and thus to arrive at certain clear issues on which the parties desire a judicial decision.

Although the parties are not required to disclose evidence which will be used to establish the case at trial, he is required to give his opponent a sufficient outline of his case.

Hammond v. Odoi per Crabbe JSC

'Pleadings do not only define the issues between the parties for the final decision of the court at the trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars of the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is making. They limit the ambit and range of the discovery of documents and the interrogatories that may be ordered.

They show on their face whether a reasonable cause of action or defence is disclosed. They provide a guide for the proper mode of trial and particularly for the trial of preliminary issues of law or of fact. They demonstrate upon which party the burden of proof lies, and who has the right to open the case. They act as a measure for comparing the evidence of a party with the case which he had pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial. They provide the basis for the defence of res judicata in subsequent proceedings by reference to the record in the earlier proceedings."

FORM OF PLEADING – O. 11 r. 6

Each pleading should be marked on its face with the year of issue and suit number; the title of the action; the relevant court, town and region, the description of the pleading and the date and time of filing.

It must be divided into paragraphs and consecutively dates, sums and numbers may be stated in words, figures or both. Not necessarily, though desirable that a pleading be drawn or settled by a lawyer.

If the party settles the pleading, he must endorse it with his name and address it with his name and address and he must sign at the end of it. If a lawyer settles, he must sign at the end of it, endorse with his name, firm name and business address.

Stage 2: Trial

Directions have been given, date of hearing has been given, and issues to be dealt with have been settled and it is on these issues that evidence will be expected to be led.

Commented [sq45]: Directions are given by the court of how the case is going to be heard. Each side is required to send copies of documents mentioned by each party.

The direction stage of the trial is to afford the court the opportunity to look back and take stock of the issues and ensure that the pleadings are in order and that the case is fit and ready for trial. It is also the stage at which the court looks forward and considers the manner in which evidence is to be presented with the aim of shortening the length of the trial and saving costs.

Evidence will be in 3 parts,

1.) **Evidence-in-chief**- this is where you tell your story. Counsel would take you through your story, providing evidence to support facts you have stated. Your lawyer cannot ask leading questions.

2.) **Cross Examination-** You will be cross-examined on story by the other side if they want to and the decision to do so is a professional decision. In cross examination, they can ask you leading questions. Cross-examination can be used to put their story through your mouth, and also, test your credibility.

3.) **Re-Examination:** This comes after cross-examination. It is an opportunity for your lawyer to correct your answers which appear misleading or ambiguous.

After this, the parties address the court. It can be in writing or can be oral. Address is your chance to attract potential clients.

The fact that you initiate civil action does not mean you should continue it. You can discontinue at any time before judgment. If other party has filed, can only discontinue with 'leave' of court and can be granted with liberty to come back (can re-litigate afresh), if without liberty, you cannot come back to particular matter. Usually, person initiated against is person who wants it without liberty. Generally, courts will grant with liberty.

Similarly, you can amend your pleadings at any stage. You cannot amend your pleadings in order to put up a completely different defense, or to take your opponent completely by surprise. Subject to those, you can amend at any time. You can do amendment by hand if not more than certain number of words or else will have to file a new application.

Stage 3

When judgment is given, you have to enter judgment. You do that by filing an entry of judgment. For common law system operating by writ, entry of judgment is important. You must file judgment in registry. It is very important or else you cannot act on judgment. If you do not enter judgment within the stipulated time in the rules, you cannot enforce the judgment.

Commented [sq46]: A judgment is the official decision of a court of law upon the respective rights and claims of the parties to an action litigated in court and submitted for its determination. A final judgment is one that disposes of the subject matter of a controversy or determines the litigation as to all the parties on its merits. An interlocutory judgment merely establishes the right of a party to recover in general terms; determine some preliminary or subordinate point or plea; settles some step question or default arising in the course of the action but does not adjudicate the ultimate rights of the parties or finally put the case out of the court. **Order 41**

Tools of employment are the last you can take from a person. You cannot deprive of employment.

i.) **Writ of fieri facias-** This authorizes the registrar to seize and sell the judgment debtors property sufficient to satisfy the judgment debt, post judgment interest if any and execution costs. The items seized are then sold usually by public auction. Under s. 17(2) of the Auction Sales Law (PNDCL 230) an auction sale resulting from a judgment debt "shall be subject to a reserve price to be determined by the court which gave the judgment." That is the lowest price at which the property can be sold. The judgment creditor will, after the property has been seized, cause it to be valued by a valuer who would prepare a valuation report that will assess the property seized and state the market or commercial value and the forced sale value.

The judgment debtor can challenge the value presented by the judgment creditor by submitting a rival valuation to the court. These values will guide the court upon the application to set down the reserve price. When the reserve price is set down the property would be sold at a public auction. The judgment creditor and debtor may agree that in lieu of a public auction the property be sold be a private treaty (O. 30 r. 2 with respect to land).

ii.) **Garnishee Order-** If the judgment debtor is himself the creditor of another known as the garnishee, it is possible to obtain an order that the garnishee should pay the judgment creditor. This is known as a garnishee order and is obtained in two stages.

In the first stage the judgment creditor will obtain ex parte an "order to show cause" also called a "garnishee order nisi," which attaches the debt due to the judgment debtor and commands the garnishee to attend court at the time and place specified in the order and show cause why he should not pay the debt directly to the judgment creditor. Copies of the order must be served personally on the garnishee and the judgment debtor unless the court otherwise orders, at least seven days before the return date. The order binds the garnishee as soon as it is served on him.

If on the return date the garnishee does not appear or dispute liability, the judge would usually make the order absolute.

If at the hearing the garnishee disputes liability the court may summarily determine the issue or give directions for it to be tried. A bank account is an obvious target for garnishee proceedings however any order would only be made on the credit balance if any.

iii.) **Charging Order, Stop Order-** This provides the judgment creditor with an equivalent of a mortgage over land specified in the order. Thus subject to any prior mortgages or charges affecting that land, the judgment creditor becomes a secured creditor. Subsequently if the judgment debt remains unpaid, the judgment creditor can apply for an order for the sale of the land so charged (O. 59) so that the judgment may be satisfied out of the proceeds of sale remaining after discharge of any prior mortgage or charge

Commented [koa47]: To perfect this one would have to register the charge under Act 122 and also if the judgment debtor is a company

By similar procedure a judgment creditor can also obtain a charging order on a udgment debtors beneficial interest in any security of the following kind

- Government stock standing in the name of the AG

- Stock of any company registered
- Any dividend payable on such stock

iv.) **Committal-** The court has general power to punish contempt by committing the offender to prison. This power extends to disobedience of a judgment or order of a court. Like sequestration, committal may be ordered for refusal, failure or neglect to obey a judgement or order when a time for performance is specified and for disobedience of a prohibitive order. The application is made by motion supported by an affidavit which states among others the grounds for the application.

v.) **Sequestration-** If a time for performance is specified in or has been added to a judgment or order whether for payment of money for giving of possession of land, for delivery of goods or for any other act for e.g. abatement of a nuisance or delivery of an account, and the defendant fails neglects or refuses to obey within the time limited a writ of sequestration may be issued against his property or against the property of any director or officer of a corporate defendant. This also applies to a person who disobeys a judgment or order requiring him to abstain from doing an act. Before the sequestration can issue, a copy of the judgment or order endorsed with a notice to the effect that if the party neglects to obey or disobeys he is liable to the process of execution must be served personally on him before the expiration of the time for compliance. Such service may be dispensed with if the court thinks it just: for example if he already had notice of the judgment or order and is evading formal service. Upon the issue of the writ, sequestrators will enter onto the land of the person in contempt and sequester and receive rents and profits of his property and detain them until the contempt is cleared.

Moneys coming into the hands of the sequestraters may be applied to meet the demand of the party prosecuting the writ.

Stage 4: Appeal

If the defendant is not happy with judgment, notice of an appeal has to be filed. The lawyer prepares it. It must contain the grounds of the appeal. Whether the appeal is against judgment as a whole or part of it, and the people against whom outcome of any appeal can work.

After that you appear before the registrar and the parties agree on which of the records used in the trial will be sent to the Appellate Court.

Everything you agreed on will be compiled into a record and sent to Appellate Court and they will use only that in the record.

An appeal is a rehearing. A notice of the appeal is important. The preparation of the grounds of appeal can be difficult. Generally speaking, you are supposed to put appeal and arguments in writing. Initially, done orally. This is supposed to assist in expeditious discharge of appeals. On the hearing of the appeal, appellate court is not bound to hear any of you. Then they give judgment and when they do that, you can make appeal to Supreme Court and you go through same process. In exceptional cases, after judgment of Supreme Court, review jurisdiction of Supreme Court.

Criminal Procedure

The criminal process is normally set in motion with a complaint to the police or appropriate law enforcement agency. Investigation may end the matter either because no substance to the complaint is found, or does not involve commission of any crime known to our law.

Police have to find out whether commission of any offence is in our written law – Criminal Code, Act 29. Suppose investigations prove to be well founded and suspicion cast in direction of someone, then we say that person is a suspect. Person may be asked to write a 'cautioned statement.' Our law prevents self-incrimination and person must be told that whatever he writes may be used in trial if there is a trial.

It is possible that level of suspicion/involvement may be sufficiently grave for person to be charged. Police may give what is known as 'Police Enquiry Bail.'

Under **article 14** of the 1992 constitution a person who is arrested, restricted or detained shall be informed immediately, in a language that he understands, of the reasons for his arrest, restriction or detention and of his right to a lawyer of his choice.

Articles 14 and 19 on arrest.

An arrest is not effected by asking a person to come to the police station. Investigation must provide enough information before police effect arrest. In proper functioning of criminal process, there must be evidence before arresting you, not arrest you, and then look for the evidence. They have to explain in ordinary, everyday language why they are arresting you – Cannot give just any reason, as in CHRISTIE V. LEACHINSKY. You must be charged and brought before the court within 48 hours. If not, you must be put on police enquiry bail. With this kind of bail, some money is deposited in court and you are required to keep reporting at the police station. Trial can be either summary or an indictment. Once charged, you have to be arraigned before the court.

Arraignment involves 3 steps/events. Arraignment means,

1.) The calling of accused person into dock. Every courtroom must have a dock for accused persons and a dock for witnesses. In Ghana, we have only one – when it is witness, we call it witness box, when it is accused person, we call it dock.

2.) Reading charge to the accused person

3.) Taking plea of the accused person

Then the person may be returned to custody. If person has a good defense attorney, will apply for bail. When the person's plea is being taken, person has four, plus one, options.

1.) Can plead guilty. Law requires that should be done very clearly. Very often, people plead "guilty with explanation" but that is not known to our law. Court usually asks that explanation be recorded. If from the explanation, accused person is guilty but should influence punishment, guilty plea should be recorded.

2.) Can take a plea to jurisdiction of Court. Generally speaking, our criminal law operates territorially so may be saying that his offence is one in which no court has power to try, or particular court in which he is being tried has no power to try him. Courts are limited by territory as well as jurisdiction.

3.) You may take a plea of **AUTRE FOIS ARQUIT**

4.) Not Guilty Plea: Denial of the charge. If you deny the charge, then we need a trial to determine if guilty. Sometimes when charge is read to person, he refuses to take a plea. Court is supposed to take a mini-investigation is conducted to see whether the person is sane or is just playing games. If the person is found to be okay, a not guilty plea is entered and trial proceeds.

Trial on indictment is a two stage.

1.) **Winnowing Stage** – The Committal Stage

Commented [sq48]: Please find info on this kind of bail

Commented [sq49]:

Commented [sq50]: Difference between summary and indictment can be explained as the difference between serious offences and less serious offences, although in the law, it is possible to try a serious offence summarily.

Commented [sq51]: In both cases, person saying already tried for that offence and has been acquitted, or already tried and convicted. To succeed, must show that tried for same offence by a court of competent authority. Therefore, to be tried again for that offense will violate constitutional provision against double jeopardy.

2.) **Actual Trial:** Where there is credible evidence

Committal proceedings can usually take place before a magistrate and it is a preliminary inquiry to see whether accused has a case. At the committal hearing, prosecution required to provide committal court with

1.) **A Bill of Indictment:** In the past, the bill would be by a special paper. It is simply the document that contains the charges against the accused person. If it is a summary trial, that same sheet is called a charge sheet.

2.) Second document is **Summary of Evidence:** It contains a list of witnesses if the case should go on trial and summary of evidence that witnesses will give. It contains a list of all witnesses.

At the hearing, the parties, the prosecution and the accused person, may address the court, but there is no obligation to do so.

KWAKYE AND ANOTHER V. STATE

Commented [sq52]:

The duty of the committal court is to examine the Bill of Indictment and Summary of Evidence, and to determine whether there is a case to be answered for trial. If so, the case goes to trial.

KUMAH V. REPUBLIC

Commented [sq53]:

EX PARTE KUMAH

Commented [sq54]:

While examining these documents, committal magistrate may ask accused person if he wants to make a statement, but he is under no obligation to make a statement.

Each offence in our law has constituent elements so if magistrate finds that the prosecution has no witness to produce evidence to support these elements, then case cannot go to trial.

After committing, the committal court may ask the accused person if he has any witnesses he will be calling at the trial, but he is under no obligation to do so.

Balance favors accused person at committal stage because prosecuting side forced to display all its cards while accused person does not.

Once the person is committed, trial will come. The prosecution will plead evidence, call its witnesses, accused person will have chance to examine, case of prosecution will close.

Accused person has 2 options – to open his/her defense, and then the accused person will rest/close his defense. Other option of accused person is to submit a plea of 'No Case." If you feel that prosecution has not made a case that requires for you to defend yourself, you can submit a 'No Case' so that trial can be aborted etc. If it is overruled, it does not mean that you still have to give evidence.

Overruling is not necessarily to say accused person is guilty. It is merely informing him that it has on record some evidence that requires at least some explanation from the accused.

When there can be 2 opinions of evidence adduced by the prosecution, a submission of no case must fail. It is only when you have one inescapable conclusion/holding by the applicant that the submission will succeed.

In a criminal trial, the Attorney General always has the chance to address the court last. The Attorney General is the nominal head of the profession. And generally speaking, the Attorney General hardly goes to the Court himself. When the Attorney General is in Court, it means that the matter affecting the very foundations of the Republic is in Court.

Question of whether prosecution produced evidence beyond reasonable doubt is question that the trial court decides at the end of a case.

Section 11 of NRCD 223 addresses the burden of proof in criminal cases and it leaves no doubt that the prosecution must prove its case beyond reasonable doubt.

After judgment, appeal can be made all the way to Supreme Court. Appeal can be against conviction and sentence, or sentence alone. Both defense and prosecution can appeal against sentence.

There are 3 judges for treason, Chairman and Tribunal in case of Regional, Judge and Assessors.

In case of trial by jury, division of labor is divided between jury and judge. The judge is in charge of legal questions that arise from trial, and the jury determines questions of fact. Jury trial is compulsory for all between the ages of 25-60. You may find yourself in jail if summoned for jury trial and you do not go.

In case of trial by judge and jury, the whole process is not managed by only professionals. It allows members of society to determine the facts of a case and to generate confidence in the trial process. You participate in the trial using skills that you use in your ordinary day to day life.

Our jury panel is made up of 7. In other jurisdictions, it is 12. They select a foreman. When selection is taking place, accused person can object to 3, without giving reasons at all. It is called PEREMPTORY CHALLENGE. The state does not have that right and must challenge for cause. Accused can also object for cause after exhausting his 3 options.

If trial is by judge and assessors, the assessor's job is to advise the judge but in a trial by judge and assessors, the judge is judge of both fact and law.

There are some exceptions from jury duty;

1.) The President and Ministers of Parliament

2.) Judges, District Magistrates

3.) Legal Practitioners in actual practice and all other court officers

4.) Registered medical practitioners and registered dentists

5.) Registered pharmacists in actual practice

6.) Prison officers and warders

7.) Police Officers

8.) Officers and other members of the armed forces on full pay

9.) Public Officers (other than those engaged in clerical duties)employed in the Medical, Posts and Telecommunications, Customs and Excise, or Railway Department under the Takoradi Harbor Authority

10.) Persons actually officiating as priests or ministers of their respective religions

11.) Schoolmasters actually engaged in teaching in a school

12.) Persons employed in any public electric telegraph office or in any electric power station

13.) Diplomatic and consular representatives and all salaried functionaries of foreign governments

14.) Editors of daily newspapers

15.) Other persons exempted by the Chief Justice

Bail: 2 types of bail

1.) Bail which is granted by the courts

2.) Bail pending appeal

Lecture

-The most difficult part of the bail is bail pending appeal.

-As a general rule, think carefully before applying for it.

-Sentence to be served must be considered, and likely length of time it will take to hear an appeal.

-Bail pending appeal not a good idea because when your client has been living relatively freely and the appeal is heard and is unsuccessful, and he will have to go to jail, the look the client will give you is one of utter anger. Let's say the trial takes 7 years and the person has been on bail, and taken to jail to serve 18 months sentence, the person would have been out a long time ago.

-If appeal successful and he was in jail, constitution guarantees him compensation.

-On question of bail, read **Republic v. Gorman** and others

NATURE OF LAW/FUNCTION OF LAW- REFER TO JURISPRUDENCE NOTES.

Judicial Precedence

It is a system of binding precedence. A decision has to follow whether the latter courts or adjudication courts agrees with it or not. In IN RE SCHWEPPS LTD AGREEMENT, the court of appeal majority decision was2-1, Wilma LJ dissented and court ordered

discovery of documents in the case. The same three judges gave judgement RE AUTOMATIC TELEPHONE ELECTRIC CO LTD which had similar facts, this time there was a unanimous decision. It was stated that a different decision would have been held but as Wilma was bound by the decision in the previous case they could not depart from the previous decision. The doctrine of judicial precedent must be differentiated from another concept which looks like it but it's not. This concept is called res judicata. Parties to the litigated dispute cannot reopen the same matter after the process of appeal had been exhausted or time set for appeal had expired.

Article 11(2) of our constitution states the sources of our law, and case law is a very important source of law rules laid down by judges in giving judgment. Judges in subsequent cases must have regard to these rules. Doctrine of judicial precedent says that like cases should be treated alike. It is sometimes referred to as stare decisis, that is, "keep to what has been decided previously."

A judge's decision on a particular case constitutes precedent. Where the precedent has coercive effect, the court is obliged to decide the case in the same even if judge can give good reason for not doing so.

Requirements

- Hierarchical system of courts with rules that determine inter relationships between them

Article 136(5) and section 10(5) of the courts act provides that the Court of Appeal is bound by its own previous decisions. All courts lower than the Court of Appeal are bound to follow the decisions of the Court of Appeal. The court of appeal is only bound by its decisions that are not contrary to the decision of the supreme court.it is not bound by its decision where that decision is inconsistent with the decision of the Supreme Court

By virtue of **Article 129(2)** of constitution and **Section 2** of the Courts Act, Supreme Court is not bound to follow the decision of any other court but **129(3)** provides that previous decisions of the Supreme Court are normally binding on it but it may depart from it when it appears right to do so. All other courts shall be bound to follow decisions of Supreme Court on questions of law.

Judicial precedence ensures certainty in the law, predictability and uniformity. Sometimes certainty and predictability is not everything. Sometimes justice and flexibility, adaptability, the ability is also important and that is why the Supreme Court is the highest court and given that power where circumstances demand to change the law. On the other hand the constitution is saying that only the Supreme Court is given that power.

The high court is not bound by its previous decision but courts lower than the high court are bound by the decisions of the high court. So the magistrate and circuit courts are bound by the decision of the high court but the high court is not bound by its previous decision. This is because of the several high courts in Ghana about 50, and each high court judge has obviously the same power.

What about a situation where there are two divergent views of opinion on an issue. In that case, lower court which is bound by courts with conflicting decisions, is bound to choose which of those decision he/she finds more persuasive. If there are 2 Court of Appeal conflicting decisions, High Court will choose.

ATTAH V. ESSON

Commented [sq55]:

ABEYE V. AKATIA AND ANOR.

The decisions of inferior courts like the circuit and magistrate courts are not binding.

The persuasive nature of decisions or authority

Apart from the hierarchy and the constitutional and statutory provisions, decisions which are binding may be persuasive. Thus the decisions of the Court of Appeal or High Court on legal questions may have a persuasive authority on the decision of the Supreme Court.

The decisions of a foreign court have no binding effect on the decision of Ghanaian courts but they may have persuasive authority.

Per section **115(1) of the courts act**, succession of courts, the decision of the Supreme Court under the 1979 constitution is of the same standing as the decision of the Supreme Court in 1992.

What is the status of the court of appeal when it was the highest court or the last court some time ago? The answer is in two folds: One that decision is binding on the court of appeal now and it is only persuasive in relation to the Supreme Court.

What is binding in a decision?

Articles 129(3) and 135: note that it says all other courts shall be bound to follow the decisions of the Supreme Court on QUESTIONS ON LAW… Thus it is only the decisions in questions of law that are binding. But even on the questions of law, a decisions may contain different kinds of statement on issues of law and we can divide them. The first thing to note is that when you take any decision or opinion in terms of the law it is likely to have three sections.

- Ratio Decidendi- holding
- Dictum
- Obiter Dictum/ dicta

The ratio is about the same as the holding of the court. Before or in the course of arriving at the holding and stating the decision, there is analyses of the law , previous decisions etc. This is what is called dictum if it is one or dicta, where it is more than one.

Then there may be this situation where the judges may talk about other things which are of no relevance to the matter before him, thus it is not the holding in the case. This is the obiter

ASIEDU V. REPUBLIC

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"Sitting as an additional High Court judge, I take it that what binds me is not everything said by the Court of Appeal whether it be necessary to the conclusion arrived at by the Court or not. It is only that which was necessary to the conclusion that forms part of the decision which is binding."

For the lawyer and the judge and the legal academic, you should be able to determine what the court decided or what is the ratio or rationes-(plural) is which is the legal answer to a legal issue which is arising from the facts of the law in a particular case.

A crucial part for determining this is what the material facts are. What legal issue or issues therefore arise from the facts and it is the answers to these legal questions which is the ratio of the case. Generally, the position is that the more the facts in your formulation of the decision then the narrower the decision.

It can also be argued that this majority decision was a decision given per incuria. That is it had ignored a statutory provision on a point decided by the court. It cannot and should not be a binding precedent on question of proof on a submission of no case stage.

When public policy changes, when there is a change in social philosophy, when there are changed circumstances, it may provide a basis for a departure from what had been previously decided.

RE KOFI ANTOBAM

Commented [sq57]:

The other thing is that subsequent cases may change the ratio in the case.

Is the precedent distinguishable?

This determines whether the facts and the circumstances in the previous case are the same and similar in the subsequent case and therefore the previous decision is binding or whether there are significant material and legal differences such that the decision is not binding. Thus if the subsequent case is distinguishable from the previous then the previous decision is not binding.

What is the weight of the authority?

At the level particularly of persuasive authority and in the context of determining the ration and whether the case is distinguishable you must determine what the weight of the authority is. Thus what power the authority has.

- Firstly, you have to determine whether it is a unanimous decision or a majority decision. Clearly a unanimous decision has more weight than the majority. If it is a majority decision, you have to examine the nature of the majority is it 5 -2 or 6- 1. The higher the majority the more powerful the decision. For instance the decision of 4-3 is not as powerful as the 7-0.

- The question of which judges or judge is involved in the decision is another crucial matter involved in the decision. For instance the dissent by Lord Atkin in **LIVERSIDE V. ANDERSON**, which became acceptable subsequently.

The power of the Supreme Court to depart from its decision is different from that of review (same parties, same case, same court, same judge or judges). An example is that of **TSIKATA V. AG**. This is totally different from what 129(3) talks about. Thus where there is different case, different parties, similar facts, this is not review but a totally new case. So the power of the court to depart from its previous decision is totally different from the power to depart from the decision. In this circumstance, the court is composed of the same number of judges and would not increase the number of the judges since this is not review. This matter has ended but with review it is has not ended but to another level.

When was the case decided?

Was it a long time ago or fairly recently? For instance if the case was decided a long time ago, it may have a lot of weight since it is old, and has not been challenged. On the other hand if learning has changed and situations as well it may not be considered.

Another matter is the reputation of the authority, has it been criticised by writers, has it been approved or disapproved in dicta or obiter?

Advantages and disadvantages of stare decisis

The advantage is that it makes the system stable, predictable but perhaps going to the other extreme it makes the system rigid and inflexibility.

Advantages

A system of precedent promotes the private ordering of legal affairs and under this you can have various types. If you are a lawyer you can advise your client with reasonable certainty what the law on a particular issue is. So that the client can organize his/her affairs accordingly. You have to advise your client in a way so as not to break the law or in a manner which is consistent with the law. This would enable them to plan their legal affairs. Some people don't seek lawyers for advice, they only come when there is trouble. In that case, you can put a case brief together on your opinion. It promotes alternative dispute resolution. It encourages private settlement of disputes so that the matter does not go to court.

It promotes fair adjudication of disputes. It does this is a number of ways. It helps in the areas where there is no dispute. Exactly what matter should go to court? It narrows down the issues in controversy and makes for fair adjudication. For each issue, there would be cases of which the law had been established. This would provide the law for that particular matter and prevent the re-litigating of issues as well as narrowing them down. It promotes fairness by reducing the personal element and reducing the area of discretion and thereby ensuring uniformity, an important element of the judiciary system, cutting down arbitrariness. It also reduces the possibilities of public expectations-the expectations of parties in a litigation being better managed.

Thirdly it promotes public confidence in the judiciary in the administration of justice. It is easier for the public to accept that the decision is fair or good for the public to have confidence in the system if judges, courts are bound. There is a certain order. This decision is arising because the Supreme Court decided it not because judge A is one of the judges. The system places a restraint on the judge. You see the reasoned nature of the decision and the authorities relied on. That ensures more public confidence.

Disadvantages

First is that the system turns to be backward looking rather than forward looking. It perpetuates what has been done already rather than responding to changes in the society, environment and world. Confronted with a case, the starting point would be reference to a previous law instead of in the like that Ghana has changed…

The second one is that judicial change in the law tends to depend on the accident of litigation. The law would be the same unless somehow the litigation goes all the way to the Supreme Court and the Court decides to change the law. This makes the law anachronistic.

The third one is that the law become technical. Sometimes it is difficult to determine what the holding and the ratio is.

BENNEH CASE

REPUBLIC V. GORMAN

TSATSU TSIKATA V. REPUBLIC (Criminal Appeal Number J3/4/2004) decided 8th November, 2004.

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Remedies

Categories of Remedies

-Public remedies are those that you can get against institutions of state, acting or purporting to act for state.

-Private remedies are those that you get against individuals.

Declaration and injunction

The declaration and injunction may be examined in either in legal method or constitutional law or nowhere. First the declaration and the injunction are really private law remedies. But they are increasingly very important in public law issues, human rights issues, administrative law etc.

The declaration is the authoritative statement by a court of law as to the state of the law in relation to the particular situation or the relationship between the parties. Thus it is a definitive statement of the law. So it is a declarative by the court.

The first is that you want the court to declare that you are the owner of this piece of land. Etc.

Under public law, an example is a declaration under **article 2** of the constitution. **SHALABI V. ATTORNEY GENERAL, NPP V. ATTORNEY GENERAL.** As we saw in **SALLAH V AG** the declaration alone can be powerful.

Injunction

Whereas the declaration is a common law remedy the injunction is an equitable remedy. Somebody is trespassing on your land you don't want just damages you want the person to stop trespassing on your land.

An injunction is an order of a court directing a named person to do or refraining from doing certain specified acts. From that statement it is clear that an injunction can be mandatory, positive requiring the performance of certain act or prohibitive, negative a restraining order requiring that certain acts should not be done. Injunction is available to private litigation (breach of contract, nuisance, defamation…) as well as public (human rights, constitution law…).

Mandatory injunction

NPP v IGP

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NPP v GBC

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Prohibitive injunction

NPP v AG- to prevent 31st December from being declared as a public holiday

NPP V RAWLINGS-should not hold the elections

ROSEMARY EKWAM V. PIANIM

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An injunction may be permanent or interim. Permanent injunction is issued at the end of the trial. An interim of interlocutory is an order of the court to freeze a certain situation to arrest the execution or doing or the consequences of an action by omission during the pendency of the action but during the pendency of the action it is important that certain things are frozen so that the court can determine the rights of parties. In the area of private law, someone put a stone on your land and you go to court for a declaration that the land is yours. But this Case can take two or three years and let's say the person has started building. That means that during these two years he would have finished building. So then you apply to the court for an interim injunction to preserve the status while the court is determining who is the owner of the land. An interlocutory injunction unlike the permanent injunction can be issued to both parties whereas the permanent injunction can only be granted for the losing party. In the area of public law and constitution law examples of interim injunctions include **NPP V AG, BALOGUN V MINISTER OF INTERIOR, LARDAN V AG, NPP V ELECTORAL COMMISSION, and ROSEMARY EKWAM V KWAME PIANIM.** There should be a substantive case pending in the court before you can apply for an interim injunction. Under state proceeding act section 13 an injunction can be granted to the state.

PREROGATIVE REMEDIES

Certiorari, habeas corpus, mandamus

These are strictly public law remedies and therefore not available to private entities. Only available to constitutional bodies and government. These remedies are available in two main circumstance or under two main situations and areas. The first is the **original human rights jurisdiction art 33(1).** Anyone who claims his/her human rights has been violated can go to the high court. The high court may under clause 1 issue writs and orders such as habeas corpus, quo warranto, prohibition. The second situation where these remedies are issued in in the exercise of the **supervisory jurisdiction of the high court or supreme court**. Supervisory jurisdiction is given to the high court and Supreme Court to regulate and oversee tribunals in articles 141, 132

AGBUSI-AWUSU

KWAMI ADDO

EX PARTE TSATSU TSIKATA

Prohibition and certiorari.

An order of prohibition lies to restrain or forbid an inferior tribunal, statutory body, public person in the exercise of its functions. Certiorari on the other hand lies to quash or invalidate of nullify the decision and action which has be taken by a public official. The main difference is that certiorari looks backwards and corrects something that has already be done and prohibition looks forward in that it lies to prevent an act which has not been done. Where the action has already been done the proper remedy is a certiorari. If the thing had not been done then the appropriate remedy is prohibition but there are situations where you can apply for both. **EXPARTE AGBUSI-AWUSU, EX PARTE BANNERMAN**

Rules governing certiorari

- It lies against public person, statutory bodies, constitutional bodies, commissions of enquiry, licensing authorities(REPUBLIC v. THE REGISTRAR, MEDICAL AND DENTAL BOARD; EX PARTE CHRISTIAN, REPUBLIC V HIGH COURT: EXPARTE ABBAN), local government bodies like municipal assemblies, lands commission, chieftaincy tribunals(EX PARTE TIWAA) disciplinary bodies like University of Ghana(RIDGE V BALDWIN)

  ANISMINIC V. FOREIGN COMPENSATION COMMISSION

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REPUBLIC V. HIGH COURT; EX PARTE IFDC

- **Personal interest or locus standi (who should bring an action for certiorari or prohibition) -** The courts have held that the person who brings an action must show that he has a specific individual interest. A mere busybody cannot bring an action to court. Contrast an action arising from article 2 with that of article 33. EX PARTE KUSADA

Commented [SDQ73]:

Exhaustions of statutory remedies

These remedies can be applied without having to go through any statutory processes of appeal. You need not go through any statutory appeal processes, you can apply to the high court for certiorari for breach of natural justice. EX PARTE VANDERPUIJE, EX PARTE ARYEETEY. Where you have lodged an appeal you cannot apply for certiorari.

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Grounds

- **Breach of rules of natural justice**
- **Lack or excess of authority/jurisdiction-**The body has no power at all or it has some power or authority but this particular action by the public body is in excess of its power. In a criminal case the magistrate court has jurisdiction to try assault cases but the act also says that the magistrate court can impose a fine not exceeding a certain amount. If it imposes a higher fine it's in excess of its power. **EX PARTE BANNERMAN,** ANANE V CHRAJ
- **Error of law on the face of the record**

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Mandamus

An order of the court and lies against public persons. It requires this public or statute person who has failed to discharge his obligations to do it. It does not lie against persons. If it is a private matter, then you remedy would be the mandatory injunction. **EX PARTE ABBAN, MARBURY V MADISON.**

Secondly, when the public group has not performed its duty. It means that where there is no duty mandamus does not apply. It has be held that where the body has a discretion mandamus would not lie to exercise the discretion in a particular manner. IN RE BOTWE & MENSAH

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Thirdly, there must be a prior demand to the respondent by the appellant and the respondent fails to adhere to the appellants demand. EX PARTE ABBAN.

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There must be no other convenient or appropriate order. **EX PARTE ABBAN,** EX PARTE VANDERPUIJE-ORGLE

Commented [SDQ79]:

Quo Warranto

It is issued to retain a person from purporting or acting in an office of which he is not entitled. It is for a person who has usurped and acting in an office unlawfully.

- It limited to public offices.
- There must be an actual usurpation of powers
- The application is supported by the affidavit. The affidavit should state the full name and address, description, facts upon which the applicant relies and the grounds on which he is seeking the remedy as well as full name and address of respondent . Order 55 rule 2

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- Within seven days of the service of the motion paper and serving of the affidavit the respondent shall an affidavit of opposition. Within fourteen days of the filing of the application by the applicant, the applicant must file a statement of the case. And then there after the case is ready to be heard. The hearing of the application by the counsels of the respondent and the applicant.

Habeas Corpus

This literally means release the body. It lies to compel a public person(police, BNI, military authorities) detaining another person to produce the body of the detained person and justify the detainment. Here we are talking about public persons. Where the detaining authority fails to satisfy the court that the detention is lawful then the court would grant the discharge of the person. It is designed to check unlawful detention and interference. **RE AKOTO,** EX PARTE QUAYE MENSAH

Commented [SDQ81]:

Interpretation

In fulfilling their task of applying the law to the facts before them, the courts frequently have to interpret (i.e. decide the meaning of) statutes. Whilst it is true to say that the intention of Parliament should prevail, the courts have adopted a number of conventional practices to resolve ambiguities.

Whilst Parliament may make laws, judges interpret them. The operation of the court process may therefore be of great significance in the manner in which an Act operates.

Acts must be read as a whole. The court will therefore look at:

- The long title of the Act to ascertain the object of the Act. For example, the long title for the Housing Grants, Construction and Regeneration Act 1996 is:

  'An Act to make provision for grants and other assistance for housing purposes and about action in relation to unfit housing; to amend the law relating to construction contracts and architects; to provide grants and other assistance for regeneration and development and in connection with clearance areas; to amend the provisions relating to home energy efficiency schemes; to make provision in connection with the dissolution of urban development corporations, housing action trusts and the Commission for New Towns; and for connected purposes.'
- Punctuation and headings to a section or group of sections - but only to determine the purpose, not the scope, of the section

- Schedules listing repeals and setting out transitional arrangements

The court can also consider a number of extrinsic factors. These include dictionaries, reports of committees of the Law Commission, and judicial precedent. Since the case of **PEPPER V HART** the court has been able to refer to reports of debates or proceedings in Parliament. Lastly, there may be a dictionary column to a statute where various words used in the statute may be defined. Even in some cases, a whole act may be enacted by parliament for that purpose. For example, the English parliament has itself passed an Act, the Interpretation Act 1978, which sets out the meaning of words which shall apply unless a contrary intention is expressed or implied in a particular statute. The Act provides that 'words importing the masculine gender shall include females' and words in the singular shall include the plural and vice versa."

There are also a number of presumptions that the court will take into account in ascertaining the intentions of Parliament. These include:

- A presumption against retrospective effect of legislation
- A presumption against alteration of the law

If there is still no clear indication of what the words mean then the court will apply certain rules that have evolved out of the courts themselves. Unfortunately, the courts have not always taken a consistent approach to this task. Instead, they have taken at times radically different approaches.
It should be noted that statutory interpretation does not extend to reading words into the statute to rectify or change an Act. It is generally held that the courts cannot fill in the gaps. 'If a gap is disclosed the remedy lies in an amending Act' as for a judge to do otherwise is a 'naked usurpation of the legislative function under the thin disguise of interpretation'. **MAGOR & ST MELLONS RDC V NEWPORT CORPORATION, per lord Simmons**

Reasons why legal documents pose particular problems

- It is general. Look at the constitution of Ghana. Look at the constitution of the US – more than a 100 years old and if you have seen the document, it is much smaller than our 1992 constitution, and therefore, of necessity, the words are general, and when such situations occur, the court will have to interpret the document in the such situation that has arises. You have to interpret an Act of necessity, it is general. What is the interpretation of this provision in the act, or document, in the light of the facts that have occurred?
- Legal documents, contracts, wills, legislations, constitutions, are by their very nature not only dealing with the present, but dealing with the future. So if you take a will or a contract ,the interpretation of the document will arise sometime after the document has been drafted, maybe a number of years after, and no matter how good a draftsman you are, it is impossible to anticipate, every eventuality that will occur. Certain things will happen and you have interpret the provision in respect of what has happened. The same thing happens with legislations. Sometimes you are dealing with laws which were enacted 100 years ago but which are still applicable.

As we will see, already, issues of interpretation has already occurred – leading to constitutional review. Some people say this is not necessary, and that we can continue by the interpretation of the constitution. This is because, some people think that if they should allow amendment, then every small thing that will happen will demand amendment.

For all these reasons, the court have developed approaches, principles, presumptions to aid in the interpretation of legal matters. It used to be said that there were three main rules in the interpretation of legal documents. The literal rule, golden rule and the mischief rule.

Going back to the first one, but it has now been generally accepted that it is a mistake to refer to these three as rules because they are not rules but rather judge-made guidelines and therefore they are not binding on a court and it will be wrong to describe them as rules

More recently, these three so called rules have been collapsed into two main approaches.

The literal rule is now referred to the literalist approach to the interpretation of documents and legal materials

The next two have been sort of combined into what is now referred to as the purposive approach to the interpretation of documents.

Literal rule or the literalist approach

This rule advocates that, the words that are used in the statute or document which have to be interpreted should be given their ordinary grammatical meaning as found in the dictionary unless a statute explicitly defines some of its terms otherwise. It is most preferred that words are given their ordinary grammatical meaning and this can be done only when such meaning accorded does not lead to a manifest absurdity. In other words, the law is to read, word for word and should not divert from its true meaning.

To avoid ambiguity, legislatures often include "**definitions**" sections within a statute, which explicitly define the most important terms used in that statute. But some statutes omit a definitions section entirely, or (more commonly) fail to define a particular term. The plain meaning rule attempts to guide courts faced with litigation that turns on the meaning of a term not defined by the statute, or on that of a word found within a definition itself.

According to the plain meaning rule, absent a contrary definition within the statute, words must be given their plain, ordinary and literal meaning. If the words are clear, they must be applied, even though the intention of the legislator may have been different or the result is harsh or undesirable. The literal rule is what the law says instead of what the law means.

This is how Lord Esher put it in **R v City of London Court Judge (1892)** … If the words of an Act are clear you must follow them, even though they lead to manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity. The literal rule has been adopted, used in a number of Ghanaian cases that you are familiar with. The literal rule, the cases are

- **SALLAH V AG:** whether or not the word 'established' in section 9(1) of the transitional provisions has or should be given its literal or ordinary plain meaning to create or to bring in to existence or be given a technical legal meaning or Kelsenite meaning of giving legal validity to ……..the court held that it should be given its literal meaning of 'creating or bringing into existence' and not following the kelsenite theory of 'obtaining legal validity from'.
- **ASARE V. ATTORNEY GENERAL:** unable to perform….was given the literal meaning not able to, incapable of, not in the position to
- **J.H MENSAH V. ATTORNEY GENERAL:** whether the phrase 'prior approval' should be given its ordinary meaning. The court held that ordinary meanings cannot be applied as what happens in parliament is not the duty of the court.
- **AWOONOR WILLIAMS V. GBEDEMAH:** whether the phrase 'adjudged or otherwise declared' should be given its ordinary meaning. The court held that it should and interpreted it as meaning 'found or pronounced'
- **WHITELY V CHAPPELL:** in this case the defendant was charged under a section that made it an offence to impersonate 'any person entitled to vote'. D had pretended to be a person whose name was on the voter's list, but had died. The Court held that he was not guilty since a dead person is not, in the literal meaning of the words, 'entitled to vote'.
- **FISHER V. BELL:** The defendant had a flick knife displayed in his shop window with a price tag on it. Statute made it a criminal offence to 'offer' such flick knives for sale. His conviction was quashed as goods on display in shops are not 'offers' in the technical sense but an invitation to treat. The court applied the literal rule of statutory interpretation.

Disadvantages of the literal approach

- Restricts the role of the judge
- Provides no scope for judges to use their own opinions or prejudices

Advantages of the literal approach

- Upholds the separation of powers
- Recognises Parliament as the supreme law maker

Criticisms

1. It has been criticized that it is lazy and on a false premise that words have an ordinary meaning and that if you go to a dictionary you will find various meanings of a word. To this idea that you can find an ordinary meaning of a word or phrase which is not true, and that the meaning of the word or phrase is very much dependent on the context and be objective in certain understandings.

2. It has been suggested that the literal rule is unsuitable for the dispute situations in which issues of interpretation arise – think about Sallah v. AG, you wouldn't have thought, if you hadn't studied law, that the word 'established' has a possible Kelesnite meaning to the court.

3. There have been some commentaries that the dissenting opinion of Azu Crabbe should have been preferred.

The Golden Rule

This rule advocates that the words in the statute or document that needs interpretation should be construed to avert a manifest absurdity.

This rule may be used in two ways. It is applied most frequently in a narrow sense where there is some ambiguity or absurdity in the words themselves. For example, imagine there may be a sign saying "Do not use **lifts** in case of fire." Under the **literal interpretation** of this sign, people must never use the lifts, in case there is a fire. However, this would be an absurd result, as the intention of the person who made the sign is obviously to prevent people from using the lifts only if there is currently a fire nearby.

The second use of the golden rule is in a wider sense, to avoid a result that is obnoxious to principles of public policy, even where words have only one meaning. Section 46 of the **Administration of Estates Act 1925**, required that the court should "issue" someone's inheritance in certain circumstances. In **SIGSWORTH, RE, BEDFORD V BEDFORD** the court held that no one should profit from a crime, and so used the Golden rule to prevent an undesirable result, even though there was only one meaning of the word "issue". The facts of this case are that; a son murdered his mother and committed suicide. The courts were required to rule on who then inherited the estate, the mother's family, or the son's descendants. There was never a question of the son profiting from his crime, but as the outcome would have been binding on lower courts in the future, the court found in favour of the mother's family.

The Mischief Rule

This rule is applied in situations where words in the statute which needs interpretation are ambiguous. In such a situation one must rely on the purpose of the statute which is normally contained in the preamble of that particular statute or law. These ambiguous words are therefore interpreted in such a way as to reflect the purpose of the statute

as contained in the preamble. Within the context of law, the **mischief rule** is a rule of statutory interpretation that attempts to determine the legislator's intention. Its main aim is to determine the "mischief and defect" that the statute in question has set out to remedy, and what ruling would effectively implement this remedy. It essentially asks the question: By creating an Act of Parliament what was the "**mischief**" that the previous law did not cover? The rule was illustrated in the case of **Smith v Hughes**, where under the **Street Offences Act 1959**, it was a crime for prostitutes to "**loiter or solicit in the street for the purposes of prostitution**". The defendants were calling to men in the street from balconies and tapping on windows. They claimed they were not guilty as they were not in the "**street**." The judge applied the mischief rule to come to the conclusion that they were guilty as the intention of the Act was to cover the mischief of harassment from prostitutes.

The purposive approach

In the case of ambiguity, the literal rule cannot apply. Therefore a second principle may be employed. This is known as the 'Purposive Approach'. Under this rule words are interpreted not only in their ordinary sense but also with reference to their context and purpose. This differs from the literal approach in that while the court starts with a consideration of the literal meaning it can depart from that meaning where not to do so would give rise to a meaning contrary to the purpose of the statute.

Lord Blackburn in **River Wear Commissioners v Anderson** said 'We are to take the whole of the statute together and construe it, giving the words their ORDINARY signification, unless when so applied they produce inconsistency so great as to convince the court otherwise…and justify the court putting on some OTHER signification, which though less proper, in one the courts think the words will bear'.

You will find this in the **SAKA V LOKUMAL–** section 17(1) says that one of the reasons for which landlord may recover possession of his or her house is when he wants it for his own purpose or for the purpose of a member of his family. Section 36 then goes on to define what a member of a land law family is…..and provides that the family can include, brother or sister, parent, or children. The landlord had applied for recovery of possession that an adult child wanted the occupation. In court counsel for the tenant, argued that section 36 with the child of the landlord, it means a minor. On the other hand, counsel for the landlord said that a child is a child and that there is no qualification that the person should be a minor. It was held by the court that to interpret the child in the way of the counsel of the tenant will lead to an absurdity because the definition of the child in the section is clear and therefore there is no reason for the court to define a child as a minor.

Another rule that the courts developed because of the dissatisfaction that arises was the so called mischief rule and this was that in the interpretation of an instrument particularly per statue or a constitution, you should look at the mischief that the Act or provision sought to secure. What is the issue that this Act or provision is seeking in finding an answer to and therefore that we should find what the mischief is and interpret the provision in a manner as procured by it.

In the case popularly known as the HEYDENS CASE, the court goes on to give guidance as to how the mischief is found or established. The courts says when construing an act or something, find out what was the common law position before the act was enacted. Second, what was the mischief which the common law did not provide an answer? And thirdly, what remedy has the lawmaker provided to cure this disease.

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These two approaches, the golden rule and the mischief rule is what has now become the purposive approach.

Cases:

SAKA V LOKUMAL

AGYEI TWUM V. ATTORNEY-GENERAL & AKWETEY

EX PARTE CHRAJ (RICHARD ANANE)

MAXIMS/CANONS OF STATUTORY INTERPRETATION

Delegatus non protest delegari

This maxim prohibits, in the absence of special or express mention, a delegated authority further delegating the discharge of statutory function to another authority.

Ejusdem generis

It stipulates that, when general words follow particular words belonging to a **category**, **class** or **genus** and are specified in a particular order, the general words should be construed in the light of the particular words.

To illustrate, in **Brownsea Heaven v Poole Corporation**, it was decided that the words **"in any case"**, in a provision in the Town Police Causes Act, 1847, given power to control traffic routes in all times of public processions, rejoicings or illuminations and **in any case** when streets are thronged or liable to be obstructed, applied only to cases within the category of public processions, rejoicings and illuminations, and could not be extended to cases of ordinary day to day traffic conditions. This rule will not apply if the words in question are not specified in a particular order whether ascending or descending.

Also in the case of **Powell v Kempton Park Race Course**, general words in Section 1 of the 1863 **Betting Act** came up for interpretation. The Section made it an offense to keep a house, an office, a room or **other place** for purposes of betting. In this case, the defendant was seen betting at an open place adjacent a race course. He was arrested and prosecuted under the Act. An issue of interpretation arose and this was whether where he was betting could be interpreted in the context to mean **"other place".** It was held that on application of the **ejusdem generis rule**, the phrase "**or other place**" meant a place similar to a house, office or room and was not applicable to an uncovered enclosure adjacent a race course.

Also in the case of **State v Yankey,** The respondent was charged with careless driving under the Road Traffic Ordinance in that he drove on the University Road, Cape Coast, without due care and attention. At the trial his counsel argued that the University Road was not a public road and cited the English case of Buchanan v. Motor Insurers' Bureau. The learned magistrate held that he was bound by the case and accordingly acquitted and discharged the respondent. The State appealed against the decision on the grounds that the learned magistrate erred in holding that the University College of Cape Coast roads were not roads for the purposes of the Road Traffic Ordinance and that the learned magistrate was not bound by the English decision of Buchanan v. Motor Insurers' Bureau.The court held; Ghana courts were under the Constitution, 1960, not bound by English decisions.

"Road" includes a highway, street, lane, pavement, footway or other place whether a thoroughfare or not to which the public have access either by written permission or by tolerance of the owner. The words "other place" in the definition are so wide that they could include restricted areas like harbours, police and army barracks and college compounds where students who are members of the general public can be found.

On application of the ejusdem generis rule, Archer J wrote;

"The words "other place" in the definition is also so wide that it could include restricted areas like harbours, police and army barracks and I do not see why the definition of road should not embrace college compounds where students who are also members of the general public can be found."

Expressio unius est exclusio alterius

This means that, an express enactment shuts the door to further implication. In other words, the express mention of one thing in a statute excludes all other things not mentioned. It was held in the case of **Warden of St. Paul's v the Dean** that, if a statute expressly specifies certain exemptions, other exemptions previously claimed under common law cannot be allowed by the application of this maxim.

Generalia specialibus non derogant

This maxim can be literally translated as **'special laws will prevail over general laws'**. In such a situation, there may be in existence two statutes, both talking about one subject matter differently, the special one will prevail over the general one. For example, taking into consideration the **Evidence Decree** and **the Wills Act**, the Wills Act will be termed special law in so far as the devolution of property when someone dies testate is concerned. The evidence decree in this context will be a general law on evidence. Under the Evidence Decree, Section 31 creates a presumption that, where two people die in a circumstance where it is impossible to determine who died first, it is presumed that the older one died first. For example, should a father and a son die in a plane crash and it is impossible to determine who died first, it will be presumed that the father, who is older, died before the son. On the other hand, **section 7** of the Wills Act, also states that where a testator, and the beneficiary dies under circumstances where it cannot be determined who died first, it will be presumed that the testator predeceased the beneficiary.

A case may arise where the testator is the son (younger one) and the beneficiary is the father (older) one, and in such a circumstance, when an issue comes up as to how the property of the testator is to be administered and these two laws are brought forth, under the Evidence Decree, it will be presumed that the father, who is older, died first hence the property fallen into intestacy. On the other hand, should the wills act be brought forth then, the son, who is the testator would have been presumed to have died first hence it will be said that immediately after the death of the son, the father inherited the property before death since he is the beneficiary and, if the father had also left a will covering the devolution of that property, it would have been shared according to the dictates of that particular will, left by the father, hence the question of intestacy does not come in. Even if the father had no will, the property (i.e. the one willed by the son to the father) will be given to the surviving spouse and children of the father. In such a scenario, the court will fall on the Wills Act which is a special law and discard the Evidence Decree which is seen here as a general law.

Posteria derogant prioribus

This means that **latter laws will prevail over earlier laws** or **latter legislation will override earlier ones.** In this circumstance when two laws talking about the same thing but in different ways are cited before a judge as authorities, for example, a 1960 law and a 1990 law, by the application of this rule, the 1990 one, which is the latter, will override the 1960 law. This rule, however, does not take into consideration whether one of the rules is an earlier one or a latter one. This brings about some kind of confusion as to which one is to apply assuming that the Wills Act here is an earlier

law and the Evidence Decree is the latter one. Lord Denning attempted to cure this confusion in a case which came before him.

In that case, Lord Denning wrote, "**whenever parliament in an earlier statute, has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute, the legislature lays down a general principle, that general principle should not be taken as meant to rip up what the legislature has before provided for individually**." This simply means that, latter legislations will not override earlier legislations which are special.