Right to Fair Trial in Ghana Criminal Proceedings

Eric Appiah Yeboah

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DIRECTOR DE LA TESI

Professor Roberto Toniatti

Professor González Pascual, María Isabel

DEPARTMENT DE DRET

Dedication

To my wife Margaret and three daughters Stephanie, Esperanza, and Britney.

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This dissertation has certainly come into reality after a long walk and journey to discover the extent at which the right to fair trial in Ghana is compromised and constrained to the detriment of the accused within the criminal justice system. Honestly, I could not have possibly completed this dissertation without the rich support and help of numerous academics, professionals, friends, colleagues, and family whom I would be very ungrateful if I fail to thank and acknowledge.

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Abstract

Fair trial in the criminal process of Ghana has been violated, constrained and compromised because procedural rights of the accused remain unenforceable. The current legal instruments within the liberal framework for protection are misguided, and the existing instruments do not guarantee the right here in question. The dissertation discusses procedural rights that interrelate with the principle of equality of arms. I advocate that the system fails to put the criminally accused on equal balance and relative equality with the state prosecution. For interest of justice, I suggest that legal aid lawyers should be assigned to represent the unrepresented accused at the state expense where the accused has no means to pay. This remains dormant, basic and in superficial application in Ghana. How imperative customary law proceedings as a complement to the English system has been unfolded; and the distinguishing features between Ghana and England/Wales criminal law procedure; impact of the African Charter and European Convention over the domestic criminal proceedings of Ghana and England/Wales has been analysed.

Resumen

Juicio justo en el proceso penal de Ghana ha sido violada, constreñido y comprometida debido a los derechos procesales o de procedimiento de los acusados sigue siendo inaplicable. Los instrumentos legales actuales dentro del marco liberal para la protección son equivocados, y los instrumentos existentes no garantizan la cuestión en el presente documento derecha. Se analizan los derechos de procedimiento que se interrelacionan con el principio de igualdad de armas. Abogo por que el sistema no puede poner el acusado penalmente en igualdad de equilibrio y la igualdad en relación con la fiscalía estatal. Por el interés de la justicia, sugiero que abogados de oficio deben ser asignados para representar al acusado sin representación a expensas del estado en el que el imputado no tiene que pagar. Este permanece latente, básico y en aplicación superficial en Ghana. La necesidad imperiosa de un procedimiento de derecho consuetudinario como complemento al sistema de Inglés ha sido desplegada; y las características distintivas entre Ghana e Inglaterra / Gales del procedimiento penal; impacto de la Carta Africana y el Convenio Europeo sobre el proceso penal interno de Ghana e Inglaterra / Gales ha sido analizado.

Prologue

The dissertation precisely is centered on the right to fair trial in Ghana with respect to procedural rights in the criminal trial proceedings from the pre to the post-trial stages. The research argues that the right in question is compromised and constrained in Ghana, and judicial interpretation and support for guaranteeing fair trial rights has been very weak to the detriment of the accused person in Ghana. This often results into unfair conviction and longer detention under remand custody without due process of the law. The presumption that the purpose of the criminal justice system is to punish the offender for their guilt and set the innocent free is legally arguable even if the sentence is proportional to the crime committed. Notwithstanding, justice would never be served without procedural justice and fairness for the interest of justice. It has been argued that a breach of the one of the three stages of the trial affects the entire proceedings resulting to miscarriage of justice.

The dissertation compares the Ghana and England (UK) criminal procedure thereby observing and illustrating the distinguish features between the two systems and the extent of the impacts of the African Charter over Ghana criminal procedural rights; and the European Convention on Human Rights over England and Wales criminal law and procedural rights. It considers how the customary law adjudication of criminal/civil cases functions alongside the state court system in Ghana.

The conclusion affirms that the current legal institutions and instruments are weak and inadequate to guarantee the right to fair trial in Ghana as compared to the UK and therefore recommends the need for re-enactment of legal mechanisms to replace the inefficient and unenforced system in order to improve access to justice and fairness.

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Chapter 1

GENERAL INTRODUCTION AND THE CENTRAL THEME OF THE DISSERTATION

1.0. Introduction[1]

The thesis is geared towards an investigation which is intended to introduce and expose its readers to the Ghana system of fair trial and the mechanisms which guarantee such a right and its functionality to avoid procedure errors for interest of justice. In order to use this investigation as a mirror to its readers, the United Kingdom (England and Wales) would be used as a case study in comparison to Ghana by diving deep into the Criminal law procedure and Justice System, and how fair trial issues are dealt with. The comparative part of the investigation shall be limited to England and Wales because the Ghana legal system is an imported English legal system with common features to the United Kingdom; and also the UK being a party to the European Convention on Human Rights, makes it crucial and a perfect much in spite of the existing distinguishing features between the two systems. Reflective examples from the two countries would enlighten the understanding of the readers. It reveals the inefficiencies of the Gha-

[1] Citation of cases in Ghana cited in the dissertation is formatted in the same way as it is done in the Commonwealth countries or in the Common Law system. For instance, an example of a case in Ghana is the ***NPP v Attorney-General [1993] 2 GLR 35, SC***. Normally, cases cite the parties, year of judgment, court, and case number. Cases contains the Year of the decision which are usually square bracketed [Year] , but sometimes the year of the decision might not be the same as the year the case was reported. Cases contain the abbreviated tittle of the Court, and the decision number. The conjunction "versus" is abbreviated to- "v". Explanation to the case ***NPP v Attorney-General [1993] 2 GLR 35, SC*** signify a report of the case and the judgment can be found in the 1993 volumes, Vol. 2, of the Ghana Law Report series called the Supreme Court cases beginning at page 35.

na system and the constant violation of the right to fair trial and illegal detention and abuse in the criminal trial procedure.

The presumption that the purposes of the criminal justice system is to punish the offender for their guilt and set the innocent free is purely and legally arguable, even if the sentence is proportional to the crime committed, justice would never be said to have been done without procedural justice and fairness[2]. Consequently, the rules and procedures that regulate the conduct of criminal trials could be said to serve two purposes. They ought to ensure, as far as possible, that trials (and, to some extent, the preceding investigation along with any plea negotiations) lead to accurate outcomes, and that they are conducted in a manner that is consistent with fundamental principles of fairness and justice. Hence, the value of procedural fairness in the criminal process is not the discovery of the historical truth alone, but the assurance that the process respects and guarantees the recognition of the right of the criminally accused, which is strengthened and safeguarded by constitutional procedural rights. This spells out prescriptively and descriptively, the procedural steps that guarantee the accused an opportunity to the defence of a criminal charge. This enables the accused to present a case without substantial disadvantage and to his/her detriment in comparison to the prosecution. These objectives substantially overlap, in the sense that rules and procedures that conform to the demands of procedural fairness will often — though perhaps not always — yield more accurate outcomes; the argument is that the rules and procedures regulating the course of the criminal trial should be shaped not only by these, occasionally abstract, principles and values, but also by the inevitable practical constraints and deficiencies of the fact-

[2] Wasek-Wiaderek The Principle of "Equality of Arms" in Criminal Procedure under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries (2000) 9.

finding process. A serious commitment to the idea of a fair trial requires the development of rules and procedures that accommodate empirical revelations concerning the tendencies and capacities of the actors involved in the trial process[3].

Fair trial as a principle ensures administration of justice guaranteed in the constitutions of every democratic society in this civilized world .The right to fair trial is an essential right in all countries respecting the rule of law. A trial in these countries that is deemed unfair will typically be restarted, or its verdict voided. This means that Fair Trial should be perceived as a "human right issue" and therefore international concern which should comply and be measured by international norms, and not only a "domestic criminal justice issue" as acclaimed. Therefore such a right should be safeguarded and protected by both legislative enactments and judicial interpretation through the use of domestic and international instruments.

In Ghana the right to a fair trial in the criminal procedure is established under the Constitution 1992[4], and International Human Rights Conventions ratified, signed or acceded by Ghana[5]. Ghana accept individual complaints to the Afri-

[3] See Gary Edmond and Kent Roach, 'A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence' (2011) 61 University of Toronto Law Journal 343; and Gary Edmond & Andrew Roberts: Sydney Law Review (Vol. 33:359).

[4] The Fourth Republican Constitution 1992 of Ghana Chapter 5, Article 19(1).

[5] Universal Declaration of Human Rights1948: International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 signed and ratified 7 Sep 2000; International Bill of Human Rights, signed on 7 Sep 2000, Prevention of Discrimination on the Basis of Race, Religion, or Belief; and Protection of Minorities, signed on 8 Sep 1966; Women's Human Rights, signed on the 17 July 1980 and ratified on 2 Jan 1986 ; Slavery and Slavery-Like Practices, succeeded on 3 Mar 1963; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 signed and ratified 7 Sep 2000; Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990. Signed on the 29 Jan 1990 and ratified on the 5 Feb 1990; Freedom of Association and Protection of the Right

can Court of human rights, and therefore the *African Charter of Human and People's Rights* (ACHPR)[6] also prescribes and makes a provision to protect the right to fair trial. Yet this right is most at times compromised and exponentially abused in Ghana.

Actually judicial interpretation and support for guaranteeing fair trial rights has been very weak and criticized by many institutional bodies such as Non- Governmental Organizations (NGO's), legal experts, and human right activists. The fact that there is very few relevant case law available when a consideration is given to legal data bases in Ghana and most of the African countries despite the outcry of the violations of such a right, makes the numerous criticisms substantiate. Cases of unfair trials are numerous, meanwhile, very small number of them even reaches the higher courts[7] of the country for an appeal against their conviction for lack of financial means to hire a defence lawyer, left alone to the

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to Organise Convention (ILO No. 87), 68 U.N.T.S. 17, entered into force July 4, 1950; Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55, entered into force May 1, 1932 ratified on the 20 May 1957; Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, acceded in 18 Mar 1963; Convention on Nationality, Statelessness, and the Rights of Aliens entered into force Dec. 13, 1975, acceded on 7 Sep 2000; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951, acceded 24 Dec 1958; ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 90, entered into force July 1, 2002, signed 18 Jul 1998 and ratified on the 20 Dec 1999; Law of Armed Conflict; ratified and acceded on 2 Aug 1958; Convention on Terrorism and Human Rights, acceded on 10 Nov 1987; Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 13 February 1946, accession 5 Aug 1958; African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, accession on 24 Jan 1989; Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), 9 Jun 1998.

[6] African Charter on Human and People's Rights (often referred to as the Banjul Charter) adopted June 27, 1981, entered into force October 21, 1986; [hereinafter African Charter] (http://www.oau-oua.org/oau_info/rights.htm .

[7] The Regional Tribunals, High Court, Appeal Court, and Supreme Court of the land.

international courts which have jurisdictions[8] to deal with cases regarding abuses and violations of the right here in question.

For instance, in the case of *Tsatsu Tsikata v. Ghana [2006]*[9] the complainant in accordance with article 55 of the *African Charter on Human and Peoples' Rights* (African Charter), submitted the communication against the Republic, alleging that the latter is in the process of trying him for 'willfully causing financial loss to the state contrary to section 179A (3) of the Criminal Code, 1960 (Act 29); an act which did not constitute an offence at the time of the commission. He alleges that this is contrary to article 19(5) of the Constitution of Ghana, which prohibits retroactive criminalization, and article 7(2) of the African Charter. He further alleges that in the course of his trial, he has been denied the right to a fair trial, in violation of article 7(1) of the African Charter when the trial judge of the High Court of Accra overruled his counsel's submission of 'no-case-to-answer', without giving reasons; thereby violating his 'right to be presumed innocent until proven guilty by a competent court or tribunal', as well as right to have the violations of his fundamental rights redressed. He alleges that the Court of Appeal thereby denied him his right to defence guaranteed under article 7(1) (c) of the African Charter. Though this case was declared inadmissible by the Secretariat of the African Commission for non-exhaustion of local remedies, the Commission confirmed the violations complaint by the plaintiff by saying:

[8] The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat)- in accordance with article 55 of the African Charter on Human and Peoples' Rights (African Charter); and ECOWAS Court of Human Rights.

[9] Tsikata v Ghana (2006) AHRLR 112 (ACHPR 2006), Communication 322/2006, Tsatsu Tsikata v Republic of Ghana, Decided at the 40th ordinary session, November 2006, 21st Activity Report, and Complaint on the right to a fair trial declared inadmissible due to non-exhaustion of local remedies.

> *"…although the communication presents a prima facie case of a series of violations of the African Charter, a close look at the file and the submissions indicate that the complainant is yet to exhaust all the local remedies available to him…"*[10]

This is because the trial was still pending. In this regard, the Commission referred to a similar case of *Kenya Human Rights Commission v Kenya [2000]*[11], where it had held that cases pending before the courts of Kenya should not be brought to the Commission if the complainants had therefore not exhausted all available local remedies in accordance with Article 56(5) and (6) of the African Charter.

As a matter of urgency, there is the need to examine why cases of unfair trial in Ghana are reportedly so high yet just a handful of such cases reach the higher courts for appeals against such decisions of the first instance courts. This is definitely a factor which should be investigated, and that is exactly what the thesis is to redress. For example, it is interesting to question why the case of Tsikata of Ghana reached the African Commission so quickly during the proceedings, when procedure's unfairness was easily perceived while the case was pending at the Appeal Court of Ghana? This might be because the complainant, a legal academic had access to justice. Another question is what about the indigent in the society when their cases are dealt with unfairly by the judiciary and such have no legal representation or counsel to direct them? The simple answer is

[10] Tsikata v Ghana (2006) AHRLR 112 (ACHPR 2006).
[11] [(2000) AHRLR 133 (ACHPR 1995)]

that such cases might end there at the domestic level to the detriment of the accused.

The thesis is to respond to the question of why the lack of relevant case law in criminal matters and proceedings regarding fair trial in Ghana. This is due to lack of legal aid in Ghana to have access to criminal justice. Another reason and probably the causes of it is that judicial interpretation and fair procedure in Ghana is a young instrument, which lack proper enforcement to protect and safeguard such rights. The aim is to inform the governments and the general public of possible irregularities in criminal procedure and to prompt action to bring practice into line with international standards. Due to lack of individual access to justice, historical and supposedly provisional circumstances do not contribute to establishing a widely shared legal and judicial culture strongly connected to a remedial approach.

The introduction of the dissertation is divided into two parts which distinguishes between the theoretical and the historical aspects and the sources of laws in Ghana. The introductory part also unfolds the methodological approach used in the dissertation in the course of data and survey collections in Ghana and the United Kingdom. The interview questions employed in the methodology is available at appendix 1; the questionnaires used is also available at appendix 2; and therefore the results and responses are represented on a diagram and could be located at the appendix 3 of the dissertation. The approach of the methodology employed in the research was interviews, observation, questionnaire, and documentary analysis. Diagrams and the results of the comparative survey of Ghana and the United Kingdom (England and Wales) criminal law and procedure are provided at appendix 1-3 of the dissertation.

The dissertation consists of 5 Chapters. Chapter 1 is an introductory part and examines the main title of the dissertation. The introductory part of the thesis focuses on two dimensions which are theoretical and historical legal framework of Ghana. It also identifies the methodology used in the research for obtaining the available statistics and data provided at the appendix 1-3 of the dissertation. The chapter briefly describes and highlights human rights laws in criminal proceedings; constitutional law in Ghana; Ghana legal system, African Charter and other international instruments like the ECOWAS Court of Justice; as well as the European Human Rights Court and Convention's impact over the domestic criminal procedure and law of England and Wales.

The principal task of Chapter 2 is to examine briefly the analytical framework of fair trial and procedural rights in the criminal procedure of Ghana; and the courts enforcements of fundamental human rights. Under this chapter I have tried to identify what the flaws in the Ghana criminal proceedings are by relying on case law, and in certain cases, proposals and recommendations with regards to how to improve the system has been made. The Chapter also focuses and pragmatically examines and tests the paradigm of rule of law in Ghana by reflecting on the Supreme Court ruling on the case of *NPP vs. NDC 2012* to test the procedure fairness at the appellate court.

The 3rd Chapter of the research unfolds the customary and traditional courts adjudication of cases in Ghana which function alongside the official/state courts.
Chapter 4 unfolds the UK criminal procedure and justice system.
Chapter 5 is a comparative case study of Ghana and the United Kingdom (England & Wales) criminal law procedure and justice system. It focuses on the distinguishing features of the Ghana and UK legal systems by using a methodolo-

gy of data collection techniques such as surveys, experiments and secondary data analysis. Within the final chapter, a subtitle is devoted to the general conclusion of the comparative aspect of the dissertation.

It is therefore against this background the project is set to investigate to unveil the functioning and shortcomings in the justice system of Ghana. Apparently, the right to fair trial in Ghana is prima facie the most violated and inter alia, the accused in criminal cases are detained for so long without due process of the law which suffices the fact that the said right is compromised. Therefore why the 1992 Constitution and the Criminal Code (1960) (Act 29 and 30) procedure do not provide adequate remedies to cube unfair trial are the questions that need to be looked at.

Per the above discussion, the next line of action would be to examine the methodology of the research survey.

1.0.1 Methodology of the Research Survey

The methodology underpinning the research is a mixture of both qualitative and quantitative methods, and the reason is that as a researcher the only means to know what people do under certain circumstances is to watch a number of people under those circumstances and therefore obtain qualitative information about their experiences, views and feelings of those individuals.

The methodology used in obtaining the data and relevant information regarding the Ghana and UK criminal law procedure were: **interviews, observations, questionnaires, and documentary analysis**. The conceptual framework is to investigate the current legal instruments and institutions at the domestic level; thereby pointing out their failure in each context they have been applied, in the light of the hypothesis that the current institutional legal instruments within the liberal framework for the protection of fair trial are misguided in Ghana and therefore they need to be reviewed and replaced by other instruments relying on a different concept. The problem is the functioning of the pre-trial, trial, and the post-trial rights of the accused. The question herein is:

(1) Are the existing instruments the only tools to ensure fair trial?

(2) Which instruments will be needed?

The goal of the investigation is to answer these questions and to perform an in-depth analysis of the current legal instruments encompassing their conceptual, substantial and procedural aspects with a critical assessment. This investigation will highlight their shortcoming and weakness in terms of protection of the right to fair trial of the accused. The research procedure enabled me to obtain prescriptive analysis including recommendations in response to weaknesses and shortfalls identified in the course of information gathering to find out the legal processes by which some accused persons passed through before ending up in

jail. The outcome of the research will confirm the theoretical assumption and demonstrate the weakness of them, and the object is to justify the claims and demands of the right to fair trial. In the dissertation as a whole, I have explained what the flaws of the Ghana criminal proceedings dubbed adherence to right to fair trial by relying on case law, but not on scholarly work, and have therefore basically used cases that are more explanatory of the case. Admittedly, same method and system has been used with regards to the British system by relying on case laws more relevant in dealing with the UK fair trial regime but not on scholarly work. The use of relevant case laws has been used to explain the main problems in Ghana criminal proceedings, and in certain cases, recommendations on how to improve the Ghana system in my opinion has been given. Certainly, my interest in the British case is to draw experience to the Ghana case. In certain cases, I have made proposals regarding the British system but not so many because that is not my main focus and interest, but rather Ghana.

Methodology used in obtaining the available data and statistics shall be observed into much detail.

a. Interviews

I adopted interviews as a means to gather relevant information from the informants who are professionals through a guided conversation between them and me. As I interviewed, and they responded, I watched for misunderstandings, ambiguity and defensiveness. I encourage them to ask any questions that they have as they respond to the items. I asked them how they would restate the questions that are difficult to understand or answer. The professionals included judges from magistrates courts to Supreme Court –Ghana (specialised criminal

Court judges and human rights High Court judges), legal academics, lawyers (private criminal defence advocates and solicitors, legal department of Ghana prisons headquarters), prosecutors (State Attorneys), Crown Prosecution Service –London, Metropolitan Police Station- Sutton, London, Director of Public Prosecution- Ghana, Director of Ghana legal aid, prisons officers, police officers, probation officers, and inmates both those on remand custody waiting for trial and inmates convicted and therefore sentenced. Traditional and customary law judges (Chiefs) were also interviewed. Questions discussed during the interviews are produced at the annex- appendix 1 of the dissertation.

In fact, the knowledge, experiences and answers of the informants deepened my understanding and enabled me to some extent know for myself what practically is going on. The next technique of the methodology is observation.

b. Observations

Under these circumstances, I accompanied criminal defence advocates at the Birds Solicitors in London who are criminal defence specialist to courts to observe how cases are tried and sentenced at the magistrate's courts, and Crown Courts. I observed the role of the prosecutors and the defence advocate, and judges during trials. How appeals are done was also observed under this process. In Ghana I observed cases been heard at the magistrate's court, Circuit Court, High Court, and how appeals submitted to the Supreme Court are reviewed through a Supreme Court judge who was appointed by the Chief Justice upon my request to support me in the research. Again I observed how chiefs at the customary courts adjudicate cases such as assault, rape and defilement. I accompanied lawyers to the police station to view how bails are applied, and then visited prisons several times just to see how human rights norms are upheld. As

a matter of fact my ethical concerns arose through this observational study both in London and Ghana. Another methodological approach used in the research was administration of questionnaires to professionals.

c. Questionnaires

Questionnaires were administered in the research both in the UK and in Ghana which was intended to collect standardised and therefore comparable information from a number of professionals such as judges, academics, lawyers, prosecutors, police officers, and prison officers. This though enabled me to collect both quantitative and qualitative data; it did not provide me much detail information in qualitative responses because too much detailed questions always put people away from participating. Also many did not return the questionnaire as at now.

The questionnaires used to test the UK and Ghana criminal procedure and justice system is produced at the appendix 2.

Admittedly, the outcome and feedback of the questionnaire is represented in a diagram and par chat format which is the result of the comparative survey, and reproduced at the appendix 3 of the dissertation. Documentary analysis is again another method used in the cause of the survey.

d. Documentary Analysis

My analysis of legal documents involved obtaining data from existing documentary sources and under observation as they are tangible materials containing facts and ideas. Documents that were analysed include Newspapers articles, Government policy records- such as legal aid statistics, Crown Prosecution Service materials and websites, prosecution data and information, textbooks, case laws, criminal procedure laws and codes, constitutions, prisons statistics, and statutory instruments. It is however imperative to consider the weaknesses and strength of the research approach.

1.0.2 Weaknesses and Strengths of the Research Approach

a. It could be observed that the participants of judges and academics in the survey as a whole are very few and therefore their answers do not reflect views from the majority of such calibre of professionals.

b. In Ghana I could not get the police to participate in the completion of the questionnaire, due to protocols I was subjected to go through, and therefore time did not permit me. Therefore one weakness is that it does not reflect the views of the police who do much of the investigation in criminal cases and charge of an offence; and above all does prosecutorial roles at the Magistrate Court, Circuit Courts, and Juvenile Courts. However, cross section of the police were interviewed and therefore do not think their inability to participate in the questionnaire survey has much adverse effects on its outcome. The reason being that the participation of professional lawyers in Ghana was 58%, judges 10%, and academicians 5%, as com-

pared to England and Wales's lawyers' participation of 62%, judges 4% and academicians 2%.

c. My visit to Brixton prisons in London was in fact observational; but after my visit to Ghana prisons at Sunyani where I interacted with inmates on remands and those convicted and hence serving their sentences as they were brought to me for an interview with the help of the prison officers designated for the purpose by the Regional Prisons Commander, I was able to refer 15 cases in total to the judicial review committee at the High Court, Sunyani where the lawyer in charge discussed all the cases with me, took them up, and promised to work on them and involve other lawyers on pro bono for those accused to have justice. The cases involved 10 terrible remanded cases waiting for trial in custody for periods between 4-11 years. Majority of the cases were on suspect murder, rape, defilement and armed robbery. The other 5 convicted cases for the interest of justice need appeals against their sentences. So at least the survey would enable 15 inmates rotten in jail without procedural rights have the right to be heard and have access to justice and fair trial.

1.1.0 Constitutional Development and Legal System in Ghana

Per the central theme of the thesis which is Right to Fair Trial in Ghana Criminal Proceedings; the historical introductory part examines the constitutional development and the legal system of Ghana, thus the Acts and constitutions, courts; native courts, and ordinances. These sections consider the historical background of the constitutional developments. The second part also examines

the legal system, under which the courts operate. The conclusion affirms that the intermittent military regimes which suspended the legitimate constitutions such as the 1960, 1969, and the 1979 did not respect the fundamental concepts of a constitution such as constitutional supremacy, the doctrine of separation of powers, independence of the judiciary, and the principle of rule of law during the pre- independence and post-independence period and therefore between the first and fourth republican constitutions of Ghana. Meanwhile, the constitution 1992, guarantees all the above under listed fundamental concepts, and ensures separation of functions between the three organs of government such as the executive, legislature and the judiciary, of which the judicial system is based on the English common law.

1.1.1. Constitutional Development of Ghana

It could be observed that the period before independence in the history of Ghana had a fused system whereby the Acts, Agreements, Bonds, Ordinance, and later Constitutions were enacted to deal with situations and to govern with. However, they were formulated, controlled, enforced and interpreted by the same entity. The Ghana Independence Act, 1957[12] embodied the new Constitu-

[12] The Ghana Independence Act, 1957: 1957 Ghana (Constitution) Order in Council, (S.I. 1957, No. 277; L.N. 47): This received Royal Assent on 7th February 1957, and came into force on 6th March, 1957. The long title described it as An act to make provision for and in connection with, the attainment by the Gold Coast of fully responsible status within the British Commonwealth of Nations. The effect of the opening words was to place all the four territories on an equal footing as the dominions of Her Majesty in her capacity as Queen of Ghana. On 8/3/57 Ghana became a member of the United Nations Organization.

tion of Independent Ghana[13], apart from Legislative powers contained in the 1st Schedule to the Independence Act. The most important new features were the establishment of the *Executive* branch of government and the *National Assembly*. *Chieftaincy* was also maintained. The Constitution contained a provision that the offices of chiefs in Ghana existing by customary law and usage, is hereby guaranteed. A House of Chiefs was required to be established in each region. The 1957 constitution again established the *Courts of Justice*: the constitution affirmed and instituted the courts under the Courts (Amendment) Ordinance 1967[14] which divided the Supreme Court into the High Court of Justice and the Court of Appeal with effect from 6th March, 1957. Appeals to West African Court of Appeal (WACA) were abolished but jurisdiction of the Privy Council continued.

After the Ghana Independence Act, 1957, Ghana had had four different Constitutions (1960, 1969, 1979, and 1992) from the first republican constitution in 1960, till the fourth republican constitution in 1992 which is still in force and had never been suspended. In 1960, the 1957 Ghana Independence Act was repealed [15] and Ghana was declared a sovereign unitary Republic under article 4(1) of the Constitution of the Republic of Ghana, 1960[16].

[13] Ghana was the first country in Black Africa, South of the Sahara, to achieve political Independence from Britain on 6 March 1957.
[14] (No.17) S.2 .
[15] For a detailed account of the earlier constitutional evolution of Ghana before 1957: see Bennion, FAR, The Constitutional Law of Ghana, London Butterworth's, 1962 at pages 1-73. See also L Rubin & P Murray, Constitution & Government of Ghana (2nd Ed), 1964 Sweet & Maxwell, London, chapter 1 on "From Colony to Republic." Also, the 1957 Act was repealed by the Constitution (Consequential Provisions) Act, 1960 (CA 8).
[16] Dr Kwame Nkrumah was appointed the First President. He was chosen as such before the enactment of the Constitution in a Plebiscite conducted in accordance with the principle set out in article 1 of the Constitution, 1960.

This government was overthrown six (6) years after coming into power by a military junta *National Liberation Council* (NLC) on the 24th February 1966 in a coup d'état[17]. The NLC was in power until 22nd of August 1969, when the NLC was dissolved under section 1 of the *Constitution (Consequential and Transitional Provisions) Decree, 1969.*[18]

A new Constitution was enacted by the Constituent Assembly, which was the Constitution, 1969 which brought the *Progress Party* (PP) government led by Dr. Kofi Abrefa Busia as Prime Minister and Mr. Edward Akufo Addo as President. The constitution 1969 was unique in content and principle. The clarity of the constitution compelled Archer CJ in his dissenting opinion in the case of *New Patriotic Party* v *Attorney-General [1993] (31st December Case)32*[19] where his lordship said:

> *"Chapter 9 of the Constitution, 1969 vested the judicial power of Ghana in the Judiciary. Article 102 (3) of the Constitution, 1969 guaranteed the independence of the judiciary. For the first time in the legal history of this country, the American concept of the doctrine of separation of powers could be discerned throughout that document, namely, the powers of the legislature, the executive and the judiciary."*[20]

[17] The Council was constituted by Lt Gen J A Ankrah (chairman); J W K Harlley, esq, (deputy chairman); and five other members, namely, Colonel E K Kotoka; B A Yakubu, esq, Deputy Commissioner of Police; Colonel A K Ocran; J E O Nunoo, esq Assistant Commissioner of Police; and Major AA Afrifa.

[18] *(NLCD 406).*

[19] [1993-94] 2 GLR 35, SC.

[20] Ibid pages 43-44.

The Constitution, 1969 was also suspended through a coup d'état led by General I.K Acheampong's *National Redemption Council* (NRC) 1972. After that the NRC was also overthrown in a palace coup by the *Supreme Military Council* (SMC) headed by General Fred Akuffo on 5 July 1978. Again, the SMC was also overthrown in yet another coup on 4th of June 1979 by the *Armed Forces Revolutionary Council* (AFRC) led by Flt Lt JJ Rawlings. Then the third Republican Government was established under the Constitution, 1979, led by Dr. Hilla Limann's *People's National Party* (PNP). The AFRC handed over power to the administration on the 24th of September, 1979 and overthrew it on the 31st December 1981 through the *Provisional National Defence Council* (PNDC) headed by Flt Lt JJ Rawlings, the same and very entity who had headed the 1979 AFRC military regime. The PNDC happened to be the ultimate military regime in the political and constitutional history of Ghana. After eleven years, came the establishment of the Fourth Republican Constitution of 1992[21].

The Fourth Republican Constitution from 1992 has so far stood the test of time. It has not been suspended till today. During these military take overs, the constitutions of 1957, 1960, 1969, and 1979 were abrogated. Politics of Ghana takes place in a framework of a presidential representative democratic republic, whereby the President of Ghana is both head of state and head of government, and of a multi-party system.

Since the enactment of the 1992 constitution Ghana has since continuously enjoyed democratic rule till now, whereby through General Elections under the

[21] For a detailed account of the process leading to the promulgation of the 1992 Constitution: see Dr K Afari-Djan: "The Making of the Fourth Republican Constitution" Friedrich Ebert Foundation, Accra, Ghana, 1995. Also see Dr Seth Yeboa Bimpong- Buta: The Role of the Supreme Court in the Development of Constitutional Law in Ghana, Ph.D. thesis work 2005, university of South Africa.

supervision of the Ghana Electoral Commission, the power of government has been in the hands of the two major political parties in the country such as the *New Patriotic Party* (NPP) and the *National Democratic Congress* (NDC) with normally always one ruling as the majority in parliament and the other as the minority in parliament for (24) years.

It should also be stressed that the Fourth Republican Constitution, 1992 like the Third Republican Constitution of 1969 established the Presidential System of Government - with the powers of State distributed amongst the three arms of government - the *executive*, the *legislature* and the *judiciary*. Thus under article 58(1) and 60(1) of the Constitution 1992, the executive authority of the State is vested in the President assisted by the Vice-President[22]. Both the President and the Vice-President and not less than ten and not more than nineteen Ministers of State constitute the Cabinet which assists the President in determining the general policy of the government[23].

Again, like the Constitution, 1969 the President appoints the Ministers of State from among members of Parliament or persons qualified to be elected as Members of Parliament, except that the majority of the Ministers should, under article 78(1) be appointed from among the members of Parliament with the prior approval of Parliament[24]. It should be noted, by way of contrast, that whereas under the Constitution, 1969, article 65(1) and (2), Ministers of State were not

[22] Constitution, articles 58(1) and 60(1).

[23] Ibid article 76(1) and (2). See also Dr Seth Yeboa Bimpong- Buta: The Role of the Supreme Court in the Development of Constitutional Law in Ghana, pp.30-33.

[24] In the case of *J H Mensah* v *Attorney-General* [1996-97] SCGLR 320, the Supreme Court held that the effect of articles 78 (1) and 79 (1) of the Constitution, 1992 was that persons nominated by the President for appointment as ministers or deputy ministers, whether retained or not, required the prior approval of Parliament; that the articles did not draw a distinction between fresh and re-appointed ministers; neither did they exempt any category of nominees from the requirement of prior approval.

required to be members of Parliament, the Constitution, 1992, article 78(1) requires that the majority of the ministers should rather be appointed from amongst members of Parliament.

With respect to the power of the legislature, the Constitution 1992 like the Constitution 1979 provides in article 93(2) that the legislative power of the State shall be vested in Parliament elected under that Constitution. With regard to the exercise of judicial power, article 125(3) provides that judicial power shall be vested in the judiciary and that no other body apart from the judiciary shall have or be given final judicial power. It is quite clear then, that the Constitution, 1992 like the Constitutions of 1960, 1969 and 1979, put in place a very viable democratic system of government.

But during the suspension of the above constitutions, whether the judiciary was permitted to function and if judicial independence and rule of law was upheld at all will be realised later as the research proceed to look at the Ghana legal systems in the next discussion.

1.1.2 Ghana Legal System

This part of the thesis will examine the legal system of Ghana which is under the judicial branch and organ of the government spearheaded by the Supreme Court; the sources of laws in Ghana, and the judicial system which is mandated to supervise and to deal with cases being it criminal or civil in the light of the constitution of Ghana[25] and the criminal procedure[26]. From the period 1925 upwards, the Queen's judicial officers sits with the chiefs, molding the customs

[25] The 1992 Constitution of Ghana.
[26] The criminal Procedure Code 1960 (Act 29 and Act 30).

of the country to the general principles of British Law[27] to resolve cases both civil and criminal and this has been evolutional. Ghana operates a legal system that is based on common law system. The court system consists of the higher courts, lower Courts, and the traditional courts. Higher courts are: Supreme Court (highest court of appeal in civil and criminal matters), Court of Appeal, High Court, and ten Regional Tribunals. Then the Lower Courts: includes circuit courts and tribunals, community tribunals, juvenile and family tribunals.

Traditional native courts: the traditional courts consist of the National House of Chiefs, Regional Houses of Chiefs, and Traditional Councils. Islamic law is partially applied by customary courts under broader category of customary law in Ghana. Ghana's legal system is blended with the traditional courts and the common law structure which functions alongside each other. For instance in criminal law procedure, or civil cases adjudicated by chiefs at the local traditional courts, cases are easily transferable to the other lower courts but cases involving the chiefs once the traditional council of the chiefs are unable to resolve at the regional or national levels, straight away appeals are sent to supreme court for hearing. Having discovered the legal system under which the judiciary operates, the next topic to be discussed will be the sources of laws in Ghana.

[27] See Native Authority and Native Courts Ordinances 1935. In 1935, the Chief Commissioners for Ashanti and Northern Territories were added to the Executive Council. The Ashanti Confederacy was restored and Nana Osei Agyeman Prempeh was designated as the first "Asantehene" (Paramount Chief of the Asante Kingdom) under the British Government.

1.1.3 Sources of Laws in Ghana

The primary sources of law in Ghana are: the Constitution, Legislation and the Common law. Meanwhile the secondary sources are: writings about law in books, especially scholarly works, Legal periodicals/ journals, government publications, law reform documents, parliamentary debate, Newspapers containing edited law reports such as The Times, The Guardian, The Independent and Financial Times in England, and general publications[28].

As established under the 1992 Constitution of Ghana article 11 (1)[29] and like its predecessors Constitutions such as the 1960, 1969, and 1979[30] constitutions of Ghana, the primary sources of law are defined strictly- *"The laws of Ghana shall comprise:*

> *(a) This Constitution;*
> *(b) Enactments made by or under the authority of the Parliament established by this Constitution;*
> *(c) Any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.*
> *(d) The existing law; and*
> *(e) The common law.*[31]

Considering the laws of Ghana by definition, it is established under the above construction in article 11 (1) of the 1992 constitution that the laws of Ghana

[28] See Seth Yeboa Bimpong- Buta: Role of the Supreme Court in the development of the constitution of Ghana; and Thomas O'Malley, op cit chapters 1 and 4 for details of what constitutes primary and secondary sources of law.
[29] The Fourth Republican, 1992 Constitution of Ghana.
[30] See Constitutions, 1960, art 40; Constitution, 1969, art 126 and Constitution, 1979, art 4(1) of Ghana.
[31] Article 11(1) of the Constitution of Ghana 1992.

comprises of the *"existing law"* and the *"Common law".* These have been further defined under the 1992 constitution article 11 (2) as:

> "*The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature"*[32]

Meanwhile the rules of *customary law* as sources of the law in Ghana has clearly been emphasized as *"the rules of law, which by custom are applicable to particular communities in Ghana"*[33]

Also, the "existing law" as spelt out is meant and stated as:

> *"The existing law shall, except as otherwise provided in clause (1) of this article, comprise the written and unwritten laws of Ghana as they existed immediately before the coming into force of this Constitution, and any Act, Decree, law or statutory instrument issued or made before that date, which is to come into force on or after that*

[32] For a detailed examination of what is meant by "the rules of law generally known as the common law and the rules generally known as the doctrines of equity": See Bimpong-Buta, S Y "Sources of Law in Ghana" (1983-86) 15 RGL 129 at 136-138; see also Henry J Abraham, The Judicial Process, Oxford University Press, 1968 (2nd ed) at page 10. On application in Ghana of the English rules of common law and the doctrines of equity: see Ghana Court of Appeal decisions in In re Abotsi; Kwao v Nortey [1984-86] 1 GLR 144; and Amaning alias Angu v Angu II [1984-86] 1 GLR 309.

[33] Article 11(3) of the 1992 Constitution of Ghana.

date… the existing law shall not be affected by the coming into force of this Constitution."[34]

An examples of a case whereby customary law was affirmed by the decision of the Supreme Court is in *re Adum Stool; Agyei v Fori [1998-1999]*[35]. This case throws further light on the existence of "*customary law*" in Ghana. In this case, the *Judicial Committee of the Kumasi Traditional Council* (KTC) gave a judgment in favour of the defendant which was a Chieftaincy affair relying on a custom known as the "*ayete custom*"[36]. This decision was over turned by the *Judicial Committee of the National House of Chiefs* upon an appeal by the plaintiff. Then the defendant again appealed to the Supreme Court over the decision of the National House of Chiefs; and the Supreme Court dismissed the appeal and upheld the decision of the National House of Chiefs.

Regarding the *"existing laws*" in Ghana, in the case of *Ellis v Attorney- General* [2000][37] the Supreme Court upheld an enactment which was the Hemang Lands (Acquisition and Compensation) Law, 1992 (PNDCL 294) to be an existing law where the plaintiff prayed the Court to declare the PNDCL 294 to be unlawful for being inconsistent and in contravention with the 1992 Constitution.

An equally important case where the Supreme Court in Ghana held a case in the Spirit of the Chieftaincy Act, 1971 (Act 370), to be construed as an *existing law* and therefore not in contravention with any provision of the Constitution 1979 was in the case of *Kangah v Kyere [1982]*[38].

[34] Chapter Fourth article 11 (4) and (5), 1992 Constitution of Ghana.
[35] [1998-1999] SCGLR 191.
[36] Succession to the Adum Stool of Kumasi, Ashanti was patrimonial and under the ayete custom, a particular house or family was customarily entitled to supply wives to the occupant of the stool.
[37] [2000] SCGLR 24.
[38] [1982-1983] 1 GLR 649, SC.

It's understood that the common law and the principles of the English law of precedence which has become part of the laws of Ghana, refer to the core rules of English customary law which have been recognized by English courts[39]. The doctrines of equity also mean the principles of justice which were originally developed by the court of chancery before 1875[40]; nevertheless these as part of the sources of laws in Ghana have enriched its legal fundamentals, culture and phenomena. Customary law is very essential to the indigenous people and it applies only to the same ethnic group or community as each ethnic group has its applicable customary law recognized by the legal system concerned under the national jurisdiction. Having observed the sources of law in Ghana, the judicial system of Ghana under which the legal frame work functions shall be looked into in order to unfold its structure and how effective it protects the established legal norms. Hence at this historical and introductory part of the dissertation, I shall be dealing with the judicial system in Ghana.

1.1.4 The Judicial System in Ghana

The 1971 Courts Act (Act 372) now repealed by the Courts Act 1993 (Act 459)[41] created a unified court system in Ghana which consisted of (i) the Superior Courts of Judicature made up of the Supreme Court, the Court of Appeal and the High Court of Justice; and (ii) inferior courts made up of the circuit

[39] WB Odgers *The Common Law of England* (Sweet & Maxwell London 1920); CHS Fifoot *History and sources of the common Law*: Tort and Contract (Stevens and Sons London 1949); J Indermaur *Principles of the Common Law* (Stevens and Haynes London 1901).
[40] EHT Snell: *Principles of Equity* (Butterworth's London 1990).
[41] The Ghana Legal Directory; and Judicial Service.

court, district court grades I and II and juvenile courts and such other traditional courts such as the National House of Chiefs, Regional Houses of Chiefs and local traditional councils as might be established by law[42].

The unified court system as existed under the 1969 constitution of Ghana was restored by the 1979 constitution as well. Under the 1979 constitution article 114(5), the judiciary was defined as consisting of the superior and inferior courts with Supreme Court as its final appellate and review court in Ghana.
Meanwhile, as from the 31st December 1981, following the enactment of the PNDC (Establishment) Proclamation, 1981, sections 9(1(a) and 10(1) created a dual court system in Ghana which was:

(i) the regular courts, consisting of the courts in existence immediately before the 31st December 1981, thus, the superior and inferior courts established under article 114(5) of the then suspended Constitution, 1979; and

(ii) A system of public tribunals which consisted of the National, Regional, District and Community Public Tribunals.

Those public tribunals[43], under section 10 of the Proclamation, 1981 operated independently of the regular courts for the trial and punishment of offences

[42] See: Bimpong-Buta, S Y 'The Court System under the 1992 Constitution: Jurisdiction and Powers of the Courts' in Lectures in Continuing Legal Education, Bimpong-Buta, S Y (ed), Ghana Bar Association, Accra (1997) at pp 3-7.
Also, see: detailed account of the Court System established in the then Gold Coast under the Supreme Court Ordinance, 1876 to the present Court System established under the Courts Act, 1993 (Act 459): see Yeboah, K Y "The Courts Act, 1993 (Act 459): New Elements", chapter 4 in Lectures in Continuing Legal Education, supra. For the evaluation of the court system from Independence to 1992: see also Brobbey, S A, Practice and Procedure in the Trial Courts and Tribunals, Vol 1 pp. 8-20, Black Mask Ltd, 2000 Cantonments, Accra.

[43] They were courts established by the then military government (PNDC Government) to trial cases both criminal and civil alongside the conventional courts.

specified by law[44]. The administration of the public tribunals was vested in the Public Tribunal Board - consisting of not less than five members and not more than fifteen members of the public appointed by the PNDC.[45] Under the Public Tribunal Law, 1984 (PNDCL 78), appeals from the decisions of the Community, District and Regional Public Tribunals, terminated at the National Public Tribunal subject to the final right to apply for review by the national tribunal of its own decision. This meant that, the regular courts had no jurisdiction to deal with appeals from the decisions of the public tribunals.

Also, under section 24 of the PNDCL 78, decisions of the public tribunals could not be questioned by any of the prerogatives orders such as *certiorari* and *mandamus* issued by the High Court[46]. This made one late notable Jurist to Comment on the status of the public tribunals under the then judicial System as:

> *"Thus it was that when the public tribunals were established they constituted a system of their own, uncontrolled in any way by the Chief Justice and completely insulated from any supervisory jurisdiction of the regular courts. They were controlled*

[44] Bimpong-Buta, 2005: "the Role of the Supreme Court in the Development of Constitutional Law in Ghana" pp. 42-48.
[45] See sections 1 and 2 of the now repealed Public Tribunals Law, 1984 (PNDCL 78).
[46] See Seth Yeboa Bimpong- Buta's notes, 2005 page 43. It was precisely for these reasons that the Ghana Bar Association, as a policy, passed a resolution boycotting the proceedings of the public tribunals throughout their existence and called upon its members not to appear before any of the public tribunals. However, some members refused to comply with the resolution in open defiance.

by the National Public Tribunals Board and ultimately by the PNDC itself."[47]

Nevertheless, the Judicial Council, which was headed by the Chief Justice, continued under article 131(3) of the Constitution, 1979 to control the regular courts. These two parallel courts which functioned independently[48] were abolished following the re-introduction of the integrated, unified court system by the Constitution, 1992. Currently the public tribunal system as conceived and operated under the Public Tribunals Law, 1984 (PNDC 78), was completely abolished, but the concept of lay persons being involved in the administration of the criminal justice as members of a tribunal was retained albeit in an attenuated form. The cumulative effect of the provisions of the Constitution, 1992, art 126 and the Courts Act, 1993 (Act 459), before its amendment by the Courts (Amendment) Act, 2002 (Act 620), was to create a unified judiciary. It is stated that the Judiciary consists of:

(a) The Superior Courts of Judicature comprising:

(i) The Supreme Court which consists of the Chief Justice and ten other Justices is the final court of appeal and has jurisdiction over matters relating to the enforcement or the interpretation of constitutional law;

(ii) The Court of Appeal, which includes the chief justice and not fewer than ten other judges, has jurisdiction to hear and to determine appeals

[47] Late K.Y. Yeboah: the then Senior Lecturer, Faculty of Law, University of Ghana in " The Courts Act, 1993 (Act 459): New Elements" chapter 4 in Ghana Bar Association Lectures in Continuing Legal Education (supra) at page 127.

[48] The regular courts and the public tribunals.

from any judgment, decree, or High Court of Justice order;

(iii) The High Court which consists of the chief justice and not fewer than twenty other justices, and such other Justice of the Superior Court of Judicature as the Chief Justice may, by writing signed by him, request to sit as High Court Justice for any period. The high court has jurisdiction in all matters, civil and criminal, other than those involving treason.

(b) Such lower courts or tribunals as Parliament may by law establish.

For purposes of expediting judicial administration, without compromise to the integrity of the adjudicatory principles, fast track courts of the status of High Courts are also in place with distinct Court rules. Also to facilitate business transactions specially designated commercial courts of a High Court status are in place to adjudicate commercial disputes.[49]

It must be observed that the procedure of the former public tribunals under the PNDC 78 was informal while the tribunals created under the Courts Acts, (Act 459) were formal and therefore different from the national, regional, district and community public tribunals established under the PNDC 78 in terms of status, procedure and jurisdiction. The Act 459 maintained the term "tribunals" but

[49] Under the Constitution, 1992, art 126 and the Courts Act, 1993 (Act 459), ss 1, 10 and 23.

that was different from the "tribunals" established under the then PNDC old system of courts. The Act 459 tribunals were part of the regular courts.

Under section 44(2) of the Act 459, the Chief Justice may sit as a member of the regional tribunal as part of the regular superior courts. A regional tribunal is vested with jurisdiction under article 143 (1) of the Constitution, 1992:

> *"To try such offences against the State and the public interest as Parliament may, by law, prescribe."*

Under section 24(1) of Act 459, a regional tribunal has been vested with jurisdiction to try some specified offences including offences "*involving serious economic fraud, loss of state funds or property"* as established in the case of the *Republic v Yebbi & Avalifo[2000]*[50] . Also, a circuit tribunal established by Act 459, was a totally new court; it exercised the criminal jurisdiction previously exercised by the circuit court under the old judicial system. Again, a community tribunal established under Act 459, was not the same as the community public tribunal under the PNDC system. A community tribunal established under Act 459 exercised the civil and criminal jurisdiction of the former district courts grade 1 and 2 under the PNDC system. The decisions of all tribunals were subject to appeals ultimately to the Supreme Court as the final appellate court in Ghana, unlike the old system when the regular court has no say in the proceedings of the tribunals established by the military regime.

At present, the Courts Act, 1993 (Act 459) has been repealed by the section 6(5) and (7) of the Courts (Amendment) Act, 2002 (Act 620), and hence the

[50] [2000] SCGLR 149, SC.

lower courts now consists of Circuit Courts[51], and District Courts[52], juvenile courts, the judicial committee of the national house of chiefs, and every traditional court vested with jurisdiction to adjudicate over a cause or matter affecting chieftaincy. Whiles the Higher courts are: Supreme Court (highest court of appeal in civil and criminal matters including constitutional issues), Court of Appeal, High Court, and the ten Regional Tribunals in Ghana.

1.1.5 Independence of the Judiciary in Ghana

The judiciary of Ghana from the period of Ghana's independence[53] through the periods of military[54] takeovers in the constitutional history of Ghana could be said to be an institution without independence. The judiciary was subjected to the influence and interference of the Executive and the Legislative branches of the government most especially in the periods when Ghana was under military

[51] Under section 115 of Act 49 as amended by Act 620, the circuit court is the successor to the circuit court in existence immediately before the coming into force of Act 620. And any criminal case pending before a circuit tribunal immediately before the coming into force of Act 620, was transferred to the new circuit court created by Act 620.

[52] Under Act 459 as amended by Act 620, district courts have now replaced community tribunals. Under section 115(8) of Act 459 as amended by Act 620, any civil or criminal matter pending before a community tribunal immediately before the coming into force of Act 620, was transferred to the relevant district court for hearing and judgment.

[53] During the Nkrumah's regime (the first President after the independence of Ghana) judges were unconstitutionally and summarily dismissed from office; an example was the case of *State v Otchere [1963] 2 GLR 463.*

[54] Under the PNDC military regime from 1981- 1992, a number of judges of the superior courts were summarily dismissed from office by the executive without any legal procedure. They included the former Chief Justice of Ghana, Hon Mr. Justice Edward Wiredu, then Justice of the Court of Appeal, who was re-instated and promoted to the Supreme Court much later, upon protest and petition made to the PNDC; and Hon Mr. Justice P K Twumasi, then a Justice of the High Court, who was also re-instated and also promoted to the Court of Appeal, in his case after many years later, also upon a petition presented to the PNDC.

regimes. It could be deduced from the above discussion that as a common practice for all the military regimes[55] that had ever ruled Ghana, the government controlled both the executive and legislative organs of government which allowed the judiciary to continue their functions that the judiciary used to perform after the suspension of each constitution. The evidence of this is the establishment of the *Regional Tribunals* by the Provisional National Defence Council (PNDC) military regime which operated alongside the *Traditional Court System* and hence controlled by the PNDC government. Apparently there was no judicial independence during the military regimes of Ghana when the two court systems operated alongside the other. No matter however the court functioned, it was under the control of the executive.[56]

Under the constitution 1992, the independence of the judiciary is vested in article 125(3) of the constitution which spelt out that:

> *"The judicial power of Ghana shall be vested in the Judiciary; accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power".*

Unlike the military regime period during which the PNDC government directly and indirectly controlled the judiciary, the constitution 1992 establishes that the Chief Justice *"shall, subject to this Constitution, be the Head of the Judiciary*

[55] There have been four successful coups on the following dates: 24 February 1966 *National Liberation Council* (NLC); 13 January 1972 (*Supreme Military Council* & *National Redemption Council* (Establishment) Proclamation, 1972 (SMC/NRC); 4 June 1979 *Armed Forces Revolutionary Council* (AFRC); and 31 December 1981 *Provisional National Defence Council* (PNDC).

[56] See Baron Montesquieu (1689-1755, when living in England from 1729-31, in "De l'Esprit des Lois (1748).

and shall be responsible for the administration and supervision of the Judiciary"[57]. Concerning the jurisdiction of the judiciary, the constitution affirms it to be "*in all matters civil and criminal, including matters relating to this constitution and such other jurisdiction as Parliament may, by law, confer on it"*[58]. It is therefore important to note that in exercising the judicial powers of the state, as affirmed by article 125(1) and 127(1) of the constitution 1992, the judiciary shall be subject to the constitution only and not to the control or direction of any person and authority[59].

Furtherance guarantee of the judicial independence from both the executive and legislature is under the article 127(2), which states that:

> "*Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfered with Judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution*".

[57] Chapter eleven article 125(4) of the constitution 1992, Ghana.
[58] See article 125(5) of the constitution 1992, Ghana.
[59] Judicial Power: means not only the power to decide claims but also the power to enforce decisions of the courts: see Republic v Court of Appeal; ex parte Agyekum [1982-83] 1 GLR 688, SC and Akainyah v The Republic [1968] GLR 548, CA. See also Read, J S "Judicial Power and the Constitution of Ghana" (1971) 3 RGL 107 at 118-128; see also Amidu, A B K, "The Scope and Effect of Judicial Power in the Enforcement and Defence of the Constitution, 1992" (1991-92) 18 RGL 120 at 128-130 and 135.

Also in discharging their duties assigned to them as justices of a Superior court, *"...any person exercising judicial power shall not be liable to any action or suit for any act or omission by him in the exercise of the judicial power"*[60]. Above all, under article 127(5) of the constitution, "*salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Justice of the superior court or any judicial officer or other person exercising judicial power, shall not be varied to his disadvantage".* The right procedure for the appointment, removal, retirement and resignation of justices of the Superior Courts and Chairmen of Regional Tribunals which is security of tenure is well stated under articles 144 to 146 of the constitution 1992. An instance where article 146 was put to test was in the case of *Tuffuor v Attorney-General {1980}*[61]; and *Ghana Bar Association v Attorney-General {2003-2004}*[62] where a procedure other than that specified in article 146 regarding the removal of justices of the Superior Courts was rejected. This in contrast was not so in the case of *Nartey v Attorney-General & Justice Adade {1996-1997}*[63] where the Supreme Court by a majority decision of three to two, granted inter alia that justice Adade ought to retire by citing a previous decision of the Supreme Court in *Yovuyibor v Attorney- General {1993-1994}*[64].

In the conclusion, it is imperative to establish that judicial independence in Ghana is partial and in many instances, it only take judges who are bold, selfless, moral and firm to resist pressure from government officials who intends to influence decisions of the courts. It is not only the politicians who try to influ-

[60] See article 127(3) of the constitution 1992, Ghana.
[61] [1980] GLR 637.
[62] [2003-2004] SCGLR 250, SC.
[63] [1996-97] SCGLR 63.
[64] [1993-94] 2 GLR 343.

ence judicial decisions but the most powerful traditional chiefs also, and the worst part of the case is judges who allow themselves to be influenced by taken bribes[65] from the worthy at the expense of justice and fairness.

These bring into question if judicial independence is guaranteed at all in Ghana where judges are under political pressure for fear of victimization, stigmatization, and intimidation for discharging their duties. Failure to uphold the independence of the judiciary is a social canker which resists and runs counter to the principles of democracy and observance of the rule of law which is a fundamental concept of every constitution.

1.2. Human Right Laws in Criminal Proceedings

Criminal procedure refers to the adjudication process of the criminal law. Criminal procedure differs dramatically by jurisdiction; and usually, the process generally begins with a formal criminal charge and results in the ***conviction or acquittal*** of the defendant when the law takes it cause at the court. Currently, in many countries with a democratic system and the rule of law, criminal procedure puts the burden of proof on the prosecution – that is, it is up to the prosecution to prove that the defendant is guilty beyond any reasonable doubt, as opposed to having the defence prove that s/he is innocent, and any doubt is resolved in favour of the defendant. This provision, known as the presumption of innocence, is required by Article 6 of the *European Convention on Human*

[65] 20 judges and magistrates have been sacked in Ghana by the Chief Justice after being found guilty of bribery. 12 High Court Judges were also suspended out of which 7 have been sacked stemming from the bribery allegations from a documentary made by an investigative journalist Mr. Anas Ameyaw Anas in October 2015: BBC News 8 December 2015; and General News of Tuesday 8 December 2015- Ghana.

Rights, and it is included in other human rights documents of the African Charter. However, in practice it operates somewhat differently in different countries.
It is very important to understand that the clear distinction between civil law and criminal law is that, under criminal law, the state plays a major role in dealing with a crime. Therefore criminal law is in effect, a crime against the state which is pursued by the state prosecution.
Crime is simply defined as a "conduct forbidden by the state". Punishment is meted out to any person who violates the rules of criminal law, and the state enforces those rules[66].

Criminal procedure in actual sense prescribed procedures substantiated and rooted in the national constitutions, which spells out how, why, when, and the manner in which legal process should be dealt with. This becomes a problem in the instances where a nation is governed without a constitution and also where the nation has a constitution but the executives, legislatives and the most privilege in the society have no respect for it.
Similarly, where constitutional provisions are upheld and therefore democratic principles respected, such jurisdictions allow the defendant the right to legal counsel and provide any defendant who cannot afford their own lawyer with a lawyer paid for at the public expense (which is in some countries called a *"court-appointed lawyer"* or "*abogado de oficio*" in Spain)[67] which is a procedural right affirming equality of arms.

[66] Peter Robertson, A guide to criminal law, pp. 27.
[67] Israel, Jerold H.; Kamisar, Yale; LaFave, Wayne R. (2003). Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text. St. Paul, MN: West Publishing. ISBN 0-314-14669-5; and An example of this kind is the Criminal Procedure and Investigations Act 1996 of the United Kingdom; The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010; The Criminal Procedure (Majority Verdicts) Act (Northern Ireland) 1971; The Criminal Procedure Amendment Act, 2008 of South Africa; The Criminal Pro-

Human rights norms are legally applicable in criminal proceedings and enforceable rights to which people are entitled in the virtue of their humanity rather than dependent on citizenship[68] or whether under a bound or free. Human rights are "commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being."[69] Human rights are thus conceived as universal (applicable everywhere) and egalitarian (the same for everyone). These rights may exist as natural rights or as legal rights, in local, regional, national, and international law.[70] The doctrine of human rights in international practice, within international law, global and regional institutions, in the policies of states and in the activities of non-governmental organizations, has been a cornerstone of public policy around the world. The idea of human rights[71] states, "If the public discourse of peacetime global society can be said to have a common moral language, it is that of human rights." Despite this, the strong claims made by the doctrine of human rights continue to provoke considerable skepticism and debates about the content, nature and justifications of human rights to this day. Indeed, the question of what is meant by a "right" is itself controversial and the subject of continued philosophical debate.[72] Many of the basic ideas that animated the human rights movement developed in the aftermath of the Second World War and the atrocities[73] of the *Holocaust,* culminating in the adoption of the *Universal Declaration of Human Rights (UDHR)* in Paris by the United Nations General Assembly in 1948. The

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cedure Act 2010 of Republic of Ireland; Criminal Procedure Act Chapter 80, Laws of the Federation of Nigeria 1990; The Criminal Procedure Act 1930 of Kenya; and the Criminal Procedure Code 1960 (Act 30) of Ghana.

[68] See W.J.Stewart, Collins Dictionary of Law, 2nd (Ed.) pages 192-193.

[69] Sepulveda et al. 2004, p.3.

[70] Nickel 2010, the Stanford Encyclopedia of Philosophy (fall 2010 Ed.).

[71] Beitz 2009, page 1.

[72] Shaw 2008, page 265.

[73] Snyder 2010, page 45.

ancient world did not possess the concept of universal human rights.[74]. It has been established in the preamble to the UDHR that *"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..."*[75]
Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups. Human rights set forth ***principles*** such as the principle of universal inherence. This means that every human being has certain rights, capable of being enumerated and defined, which are not conferred on him by any ruler, nor earned or acquired by purchase, but which inhere in him by virtue of his humanity alone. Again human rights profoundly contain the principle of inalienability. In this sense, no human being can be deprived of any of those rights, by the act of any ruler or even by his own act. The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions.

[74] Freeman 2002, pages. 15-17.
[75] 1st sentence of the Preamble to the Universal Declaration of Human Rights, 1948.

The *1993 Vienna World Conference on Human Rights*, for example, noted that it is the duty of states to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems. All states have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties, reflecting consent of States which creates legal obligations for them and giving concrete expression to universality. Some fundamental human rights norms enjoy universal protection by customary international law across all boundaries and civilizations. The premise that human rights are inalienable means they should not be taken away, except in specific situations and according to due process of the law. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

Human rights also consist of the **rule of law** where when rights conflicts with each other, the conflicts must be resolved by the consistent, independent and impartial application of just laws in accordance with just procedure, and above all human rights are indivisible. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others. Non-discrimination is a cross-cutting principle in international human rights law. The principle is present in all the major human rights treaties and provides the central theme of some of international human rights conventions such as the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination against Women*.

The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, and color and so on. The principle of non-discrimination is complemented by the principle of equality, as stated in the Universal Declara-

tion of Human Rights: *"All human beings are born free and equal in dignity and rights."* [76]

Human rights entail both rights and obligations which states should enforced. This signifies that:

1). States assume obligations and duties under international law to respect, to protect and to fulfill human rights.

- the obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights.
- the obligation to protect requires States to protect individuals and groups against human rights abuses.
- the obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.

At the individual level, while we are entitled our human rights, we should also respect the human rights of others.

Meanwhile, *International human rights law* is a body of international laws designed to promote and protect human rights at the international, regional and domestic levels. As a form of international law, international human rights law is primarily made up of treaties, agreements between states intended to have binding legal effect between the parties that have agreed to them; and *customary international law*, are rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way. Other international human rights instruments while not legally binding contribute to the implementation, understanding and development of international human rights law and have been recognised as a source of political obligation[77].

[76] Article 1 of the Universal Declaration of Human Rights 1948.

[77] Provost, René (2002), International human rights and humanitarian law, Cambridge, UK: Cambridge University Press. p. 8

Enforcement of international human rights law can occur on domestic, regional or an international level. States that ratify human rights treaties commit themselves to respecting those rights and ensuring that their domestic law is compatible with international legislation.

In Ghana, the rights declared as constituting fundamental human rights and freedoms is protected under the Chapter five (5) of the Constitution of Ghana[78] . It is established under the constitution 1992 that, where a person is arrested and detained upon reasonable suspicion of having committed or about to commit an offence, he is entitled to be tried within a reasonable time- Article 14[79]. Also the right to equality before the law and freedom from discrimination is established under Article 17[80], and the *right to fair trial* is established under Article 19 of the constitution 1992. Human right laws are so important for criminal proceedings in Ghana to avert errors and lack of enforcement to guarantee fair trial. To a greater extent, human rights instruments have provided:

1). the attention and focus on the protections afforded persons in the context of the administration of criminal justice. These safeguards are important protections against abuses of power which affect the life, liberty, and physical integrity of individuals[81]. Without these protections and limitations on the potential abusive exercise of power by states, democracy could not exist. Thus, there is an inseparable link between the protection of individual and collective human

[78] The Fourth Republican Constitution 1992 of Ghana Chapter 5, Article 19(1).
[79] The Constitution of Ghana 1992 arts 15(3), 19(1).
[80] The Fourth Republican Constitution 1992 of Ghana.
[81] See International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. See, e.g., Haji N.A. Noor Muhammad, Due Process of Law for Persons Accused of Crime, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 138, 140 (Louis Henkin ed., 1981) (protection against arbitrary arrest forms the central feature of any system of guarantees of the liberty of the individual).

rights and democracy. The field of battle in which democracy and human rights are tested is the administration of criminal justice, which encompasses all processes and practices by which a state affects, curtails, or removes basic rights[82] ascribed to humanity.

2). More importantly, most human rights take a similar path to international recognition as a result of international human right laws. At the international level, the rights are enunciated in nonbinding international instruments[83]. Next, the rights are more specifically defined in international instruments which have some legally binding effect. Then the rights are included in a specialized international instrument, and finally, become the object of a binding international instrument which criminalises violations of that right and provides for some enforcement of those rights. Due to the existence of human right laws, individual rights are protected within the criminal process, and therefore protections have risen to the level of "general principles" of international law[84], while other protections have been incorporated into international instruments which criminalise the violations of the protected right[85].

3). Also international human rights law have been able to penetrate into areas that in the past have been deemed to be wholly within the domestic realm and

[82] It should be noted that the state's policies and practices are conducted and carried out by individuals. See generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, 235-47 (1992) (discussing the imputability of individual action to the state).

[83] *I*d.

[84] See, e.g., M. Cherif Bassiouni & Daniel Derby, The Crime of Torture, in 1 INTERNATIONAL CRIMINAL LAW 363, 379 82 (M. Cherif Bassiouni ed., 1986).

[85] Bassiouni, supra note 9, at 195; see generally Muhammad, supra note 4, at 139 (regarding the binding and nonbinding nature of the Universal Declaration and the ICCPR). For example, the Universal Declaration contains many nonbinding principles that nations "should" observe as well as other rights which have become binding through their incorporation into national constitutions. See ROBERTSON & MERRILLS; supra note 2, at 27.

law.[86] International Human rights law has caused national constitutions with respect to practices within the context of the administration of criminal justice, to be in line with international norms so as to be able to safeguard the respect for the right of humanity notwithstanding national sovereignty, and constitutional supremacy. Albeit, such an international norm and instrument; is what has made the right to fair trial, one of the most prevalent to human liberty and dignity.

Ghana as a member of the United Nations and the African Union, as well as a partner to the European Union is bound to ratify many international treaties. The African Charter is much more needed in Ghana to regularize and enforced the protection of human rights.[87] Meanwhile, in Ghana though certain rights are enshrined in the constitution and statutes, they are not given any effect. Judges overlook those rights most often and exercise discretion regarding whether to enforce such rights or not during criminal proceedings.

In the typical African community and most especially in Ghana, the greater part of the community has lost confidence in the criminal justice and the judicial system due to bribery and corruption. It is often complained that when a crimi-

[86] See Henkin; supra note 6, at 2.

[87] The web site of the UN High Commissioner for Human Rights has a list of those nations that have ratified the ICCPR at: http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv 4.html. Depending on the regional human rights instrument(s) that a state is bound by, the corresponding provisions of such treaties should be taken into account as well. For European states the most important instrument would be the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 5, 1950 [hereinafter European Convention] (http://www.coe.fr/eng/legaltxt/5e.htm). For Latin and North American states it would be the American Convention on Human Rights, November 22, 1969 [hereinafter American Convention] (http://www.cidh.oas.org/Básicos/Basic%20Documents/enbas3.htm), while for the African states it would be the African Charter on Human and People's Rights, adopted June 27, 1981, entered into force October 21, 1986 [hereinafter African Charter] (http://www.oau-oua.org/oau_info/rights.htm).

nal or a suspected criminal is reported to the police and arrest is made, those that even result to a conviction and have money to pay for their freedom, are always seen on the streets after spending few days in prison. The public have a misconception that the legal system and the police inadequately provide the justice needed and therefore this has resulted into self-punishing the criminal suspect or the accused by beating, or stoning them to death or sometimes setting them on fire with a petrol before the police arrives at the scene. There are many instances in Ghana for example when suspects are painfully killed for stealing a mobile phone on the street or in the market place before the police arrive and no prosecution follows. Some consider this to be an alternative justice; meanwhile right to fair trial is for both innocent and guilty people. The seriousness of the unlawful actions of such perpetrators is that they also hinders and infringes on the right of the accused for a fair hearing and trial. This illegitimate action violates other important rights of the individuals such as the right to life and physical integrity of the person. Certainly, people are killed on the streets without given the opportunity to be tried by a competent court for a mere suspicion of a crime. Meanwhile, the criminal justice system in Ghana acknowledges that individuals must be protected from certain depredations against their person. Obviously the coming into being of the human rights instruments and norms both at the international and domestic levels is overwhelming and for that matter its importance cannot be underestimated. This is why the effectual functioning of human right laws in Ghana should not be malfunctioned, whiles the legitimacy and confidence of the trial system must be restored. Furthermore it is obvious that the whole system lacks legitimacy as a matter of fact in the African courts.

1.3. Regional and International Human Right Systems

This part shall examine the African Charter and Commission, and ECOWAS to understand how far such regional human rights instruments as an authority have been able to enhance the enforcement of the rights in question which Ghana as a party, has ratified. Since part of the dissertation deals with the UK (England and Wales) criminal law procedure as a comparative case study to Ghana, and the UK is a party to the European Convention on Human Rights, the impact of the ECHR on the UK criminal law shall be discussed on brief excursus.

1.3.1. The African Charter

The African Charter is an imperative regional instrument for the protection of human rights and therefore the Commission. The African Charter on Human and Peoples' Rights (**ACHPR**) is an instrument operating through legal mechanisms and international norms for monitoring and implementing human rights in Africa and particularly in Ghana. This is under the auspices of the African Union (**AU**), the then Organization of African Unity (**OAU**). The African Union is based on the principle of respect for human rights. As established at the preamble of the charter, fundamental human rights stem from the attributes of human beings which justify their national and international protection, and on the other hand the reality and respect of people's rights should necessarily guarantee human rights. The charter firmly perceives as a duty (among states party to the charter) to promote and protect human rights and freedoms taking into

account the importance traditionally attached to these rights and freedoms in Africa[88]. Under Article 1 of the charter, it is established that:

> *"Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."*[89]

This has the binding effect and implication that member states should incorporate the charter into national laws and see to it that domestic legislations would be drafted and enforced in line with or in accordance to the wording of the charter in order to operate impliedly in the national institutions for the protection of human rights. The constituent documents emphasize the role of human rights within the region and within the organisation, claiming the promotion of rights as one of its aims as established under Article 2 of the charter[90] .

It is of great importance as Ghana and for that matter Africa at large is known for political instabilities which intensifies political hatred and inequality when opinions are divided, and when distinctions arises, ruling governments usually infringes on the rights of their political opponents thereby preventing them from enjoying rights and freedoms entitled to humans if not properly guaranteed in the national constitutions as obliged by international instruments and norms**.** For instance, this was the case during the ruling of the Nkrumah's government, the PNDC government, and all the military regimes in Ghana. There was no

[88] Preamble to the African Charter: (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

[89] Chapter I on Human Rights and People: Article 1 of the African Charter 1986.

[90] Article 2 of the Charter: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status".

equality as prescribed under the article 3 (1) and (2) of the charter which states that "*every individual shall be equal before the law... and shall be entitled to equal protection of the law*"[91]. An example of this was Nkrumah's *Detention without Trial Act 1958* which caused many innocent citizens loses their lives at the "***Nsawam***"[92] prisons of Ghana. Individuals were subjected to treatment that affected their lives whiles others lived under fear, contrary to article 4 of the charter[93].

More significantly and relevant to the criminal system in Ghana and Africa as a whole is that there is lack of enforcement, and hence the law enforcement bodies resort to and capitalises on harsh punishments as mechanism to retrieve information from the criminal accused during the pre-trial stage. An example of the lack of enforcement is the case of *Charles Antwi v The Republic [2015]* where the accused that happens to be mentally ill was arrested on the 26th of July 2015 and sentenced on the 28th of July 2015 within two days for 10 years by a Circuit Court judge for unlawful possession of firearm intending to kill without any legal representation for the accused throughout such a quick proceeding. The accused from the period of the police interrogation and charge to court was denied an access to a lawyer to counsel him but was kept in police custody and from custody to court and straight away to the prison. Hence article 5[94] of the charter maintains and sustains the dignity of the suspect.

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[91] Article 3 (1) and (2) of the African charter.

[92] The most popular and dangerous prison center in Ghana where lives of great political prisoners have been destroyed by political rivals in power.

[93] Article 4 of the Charter: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".

[94] Article 5 of the African Charter: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

Individual's right to liberty and the security of their person has been a problem in Ghana and Africa at large. Along the line, agents of the state such as the Bureau of National Investigations (BNI)[95] could secretly arrest and put under detention individuals who could not be heard or seen nor appear before any court. Example of this was the atrocities and the killings of the renowned Superior Court justices in Ghana under the AFRC regime in 1979[96] which was described by its leader Mr. Rawlings as *"house-cleaning exercise"* in 1982 which resulted to the abduction, killing and disappearance of over 300 Ghanaians picked by government agents and soldiers from their homes[97].

To avoid reoccurrence in Ghana and Africa, the charter, prohibits arbitrarily arrest and detention under Article 6[98] of the charter.

The Article 7 of the African Charter directly relates to the central theme of the dissertation- right to fair trial, which ensures that the right legal procedure regarding criminal trials shall be guided by an acceptable approved international

[95] The BNI is legally a creature of The Security and Intelligence Agencies Act (Act 526) 1996 having been continued in existence by section 10 of that Act. The BNI's role as defined in the constitution is that it is an internal intelligence agency of Ghana. Among the duties of the BNI are dealing with organized crime and providing intelligence to counter threats to national security.

[96] The Armed Forces Revolutionary Council (AFRC) was the government of Ghana from June 4, 1979 to September 24, 1979. It came to power in a bloody coup that removed the Supreme Military Council, another military regime, from power.

[97] The killings of the Supreme Court justices in 1982 (Cecilia Koranteng Addo, Frederick Sarkodie, and Kwadjo Agyei Agyepong), military officers Major Sam Acquah and Major Dasana Nantogmah and the killings and disappearance of over 300 other Ghanaians occurred in his time in Ghana's history. Also see Jerry Rawlings: A Threat to Ghana Democracy? The African Executive 17-24 February 2010. See again Ghana Media Feature Article of Monday, 30 June 2008 by Isaac Ato Mensah: The murder of the judges – The Akufo-Addo connection. The photos of the memorial built in front of the Supreme Court building in Ghana in honour of the judges who were killed for defending the rule of law is available at appendix 4 of the dissertation.

[98] See African Charter Article 6: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

norm to ensure judicial competence and respect to the said right. The Article 7 stipulates that:

> *"1. Every individual shall have the right to have his cause heard. This comprises:*
> *(a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
> *(b) The right to be presumed innocent until proved guilty by a competent court or tribunal;*
> *(c) The right to defense, including the right to be defended by counsel of his choice;*
> *(d) The right to be tried within a reasonable time by an impartial court or tribunal"*[99]

As measures of safeguard, the charter establishes an Organization of African Commission on Human and Peoples' Rights (ACmHPR) tasked with the promotion and protection of rights within the region under the article 30. Therefore for the protection of human rights, African laws, traditions, and practices, the charter ensures that, such may also be relied upon as far as they are consistent with international norms on human and peoples' rights (Art 61). The African Court[100] of Human Rights enforces the functionality of the Charter for the pro-

[99] Article 7 (1) (a, b, c, and d) of the African charter 1986 The above article 7 of the Africa Charter has been adopted and reproduced in the 1992 constitution of Ghana at article 19. This shall be dealt with much more into details at the analytical part of the dissertation which is chapter 2.

[100] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. Article 1: Establishment of the Court: There shall be established within the Organisation of African Unity an African Court on Human and

tection of peoples' rights. The court currently sits in Arusha- Tanzania. The Charter entered into force in 1986[101]. It enshrines the African concept of rights and aims to be accessible to African philosophy[102] and the world at large.

The African Human Rights Case Law Database includes ***283 cases*** decided by domestic courts, courts of sub-regional intergovernmental organisations such as ECOWAS and Southern African Development Community Tribunal (SADCT); the African Commission on Human and Peoples' Rights (ACmHPR); the African Court on Human and Peoples' Rights (AfCHPR); and United Nations treaty monitoring bodies. The database covers cases dealing with human rights in more than 40 African countries[103].

In summary, the breakdown of all the ***283*** human rights cases that have been decided by other regional instruments in addition to the African Commissions' ***218 cases*** are; the ECOWAS Community Court of Justice ***17 cases***; SADC Tribunal ***15 cases***; the East African Court of Justice (EACJ) ***6 cases***; the African Court on Human and Peoples' Rights ***26 cases;*** and the African Committee of Experts on the Rights and Welfare of the Child ***1 case[104]***. Among the ***283*** cases dealt with, ***130*** cases relates to Article 7 of the treaty/charter which is the right to have one's cause heard- **fair trial**. The ACmHPR's competence to hear and determine complaints against state parties is regulated by Articles 47-59 and its jurisdiction is compulsory and automatic. Outcome of the cases so far submitted

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Peoples' Rights (hereinafter referred to as 'the Court'), the organisation, jurisdiction and functioning of which shall be governed by the present Protocol.

[101] Also sometimes called the "Banjul Charter", the African Charter was adopted in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986. CAB/LEG/67/3/Rev 5
For the documents leading up to the adoption of the African Charter, see www.up.ac.za/chr. Also reprinted in Human Rights Law in Africa Series 1999, p 65 and further.

[102] Rhona K.M. Smith: Text Book on International Human Rights: The African Union.

[103] African Human Rights Case Law Database: Center for Human Rights, University of Pretoria.

[104] See African Human Rights case law Analyser: Collection of decisions from the African human Rights Systems. www.caselaw.ihrda.org/search.

to the commission and other regional instruments are stated below in a table form.

Outcomes of Cases Submitted

NO.	**TYPE OF CASE**	**APPLICA-TIONS**
1.	Amendment of Application	1
2.	Amicable Settlement	6
3.	Article 58(1) referral - (serious and massive)	11
4.	Decided on Merits	99
5.	Dismissed	5
6.	File Closed	15
7.	Joinder of Cases	2
8.	Lack of Diligent Prosecution	5
9.	Objection Dismissed	1
10.	Objection Partially Dismissed	1
11.	Order for Time Extension	1
12.	Order for Amicus Curiae	1
13.	Outcome Inconclusive	14
14.	Postponed '*sine die'*	5
15.	Provisional Measures	25
16.	Rejected at Seizure Stage	2
17.	Review on Admissibility	1
18.	Review on Merits	1
19.	Ruled Inadmissible	104
20.	Withdrawn	8
21.	**TOTAL**	**308**

Ghana has submitted in total just six (6) cases and 1 withdrawn to the African Commission of which cases decided on merits is one (1), decided on provisional measures is one (1), ruled inadmissible is four (4), and withdrawn one (1). All the cases submitted relates more to article 7(1) and (2) of the African Charter which keywords are right to have one's cause heard -article 7(1), due process -article 7(1), right to trial in reasonable time – article 7(1), prohibition of retroactive laws and punishments article 7(2); arbitrary detention, detention without trial, illegal arrest, harassment dismissal, damages, right to free expression -article 9(2); and right to leave a country -article 12(2).

For instance, in the case of *Dr Kodji Kofi/Ghana 1988* which was a Communication on arrest and detention without trial, the African Commission established under article 30 of the African Charter that considering that the communication is directed against a state which is not a party to the African Charter; declares the communication inadmissible.[105] It is surprising to observe that no case has been submitted to the African Court of human rights or the ECOWAS community court of justice.

In general the standards against which a human right especially the right to fair trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But, they may also be found in documents which, though not formally binding, can be taken to express the direc-

[105] Meeting at its Fourth Ordinary Session from 17 to 26 October 1988; came out with this decision. Article 101 of the Rules of Procedure.

tion in which the law is evolving[106]. In order to avoid possible challenges to the legal nature of the standards employed in evaluating human rights and the fairness of a trial, monitors should refer to norms of undisputedly legal origin. These are:

(i) The laws of the country in which the trial is being held, and how human rights instruments are protected;

(ii) The human rights treaties to which that country is a party, and

(iii) Norms of customary international law[107].

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[106] Non-binding documents of relevance to the conduct of criminal proceedings and to ascertaining fair trial standards include: the Basic Principles for the Treatment of Prisoners, UN General Assembly resolution 45/111, December 14, 1990 [hereinafter Basic Principles on Prisoners]; Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31, 1957 and resolution 2076 (LXII), May 13, 1977 [hereinafter Standard Minimum Rules]; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9, 1988 [hereinafter Body of Principles]; Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990 [hereinafter Basic Principles on Lawyers]; Basic Principles on the Independence of the Judiciary, UN General Assembly resolution 40/32, November 29, 1985 and resolution 40/146, December 13, 1985 [hereinafter Basic Principles on the Judiciary]; UN Standard Minimum Rules for the Administration of Juvenile Justice, UN General Assembly resolution 40/33, November 29, 1985; Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 17, 1979; Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990; Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, UN Economic and Social Council recommended resolution 1989/65, May 24, 1989; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27- September 7, 1990; UN Rules for the Protection of Juveniles Deprived of Their Liberty, UN General Assembly resolution 45/113, December 14, 1990; etc. Also relevant is the Draft Body of Principles on the Right to a Fair Trial and a Remedy, Annex II, in The Final Report, *supra* notes 1. For trial observation in OSCE countries the human rights provisions of the final documents from review conferences would also be important as a source of standards (see www.osce.org).

[107] The provisions of the Universal Declaration of Human Rights, (UN General Assembly reslution 217A (III), December 10, 1948 [hereinafter UDHR]), are for the most part considered declarative of customary international law and may be of paramount importance if a state has not ratified or acceded to the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (UN General Assembly Resolution 39/46, December

For instance highlighting on a human rights laws regarding fair trial, before observing a trial the relevant materials pertaining to domestic legislation in the country have to be considered due to the various legal systems and legal orders involved. In Ghana, the minimum list would comprise:

i). the chapter five of the state's Constitution 1992, especially its provisions on human rights and the judicial system;

ii) Its Criminal Code and Code of Criminal Procedure of 1960, Act 30, and Act 29; statutes on the establishment and jurisdiction of the courts and on the public prosecutor's office, and

iii) Landmark court decisions pertaining to human rights, particularly in common law countries. This ensures whether the applicable provisions of domestic law guaranteeing a fair trial have been implemented and, if so, to what extent. It is well known that while constitutions and statutes generally provide for some measure of fairness in criminal proceedings, implementation by the courts is often not adequate. There is other international instrument such as the Economic Community of West African States (ECOWAS); which also helps to promote and protect human rights through it established ECOWAS Court of Justice. In our next discussion, the legal framework of the ECOWAS Court of Justice and procedure will be examined to see how it protects human rights and especially the right to fair trial in Ghana and the West African region in general.

10, 1984, entered into force June 26, 1987 [hereinafter Torture Convention]), or any regional human rights instrument. The most directly relevant articles of the UDHR are 5, 9, 10 and 11. As customary international law will most probably be used as a supplementary source of a state's obligations in ensuring the right to a fair trial, it will not be further considered.

1.3.2. The ECOWAS Court of Justice

The ECOWAS Court of Justice is the judicial organ of (ECOWAS) and is charged with resolving disputes related to the Community's treaty, protocols and conventions. The ECOWAS Community Court of Justice[108] has competence to hear individual complaints of alleged human rights violations. The ECOWAS Court of Justice was created pursuant to the Revised Treaty of the Economic Community of West African States of 1993, and is headquartered in Abuja, Nigeria. The court provides advisory opinions on the meaning of Community law and has the jurisdiction to examine cases involving:

- an alleged failure by a Member State to comply with Community law;
- a dispute relating to the interpretation and application of Community acts;
- dispute between Community institutions and their officials;
- Community liability
- human rights violations, and
- the legality of Community laws and policies.

The Court gained "jurisdiction to determine case[s] of violation[s] of **human rights** that occur in any Member State" in 2005[109]. The supplementary protocol 2005 requires under article 39 that:

> *"The Community Court of Justice shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human*

[108] Founded on May 28, 1975, under the Treaty of Lagos for the purpose of promoting economic integration across the region, ECOWAS comprises fifteen West African countries: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

[109] See the implementation of Supplementary Protocol A/SP.1/01/05, which followed the adoption of Protocol A/SP1/12/01 on Democracy and Good Governance.

rights, after all attempts to resolve the matter at the national level have failed".[110]

The Court's decisions on human rights matters interpret the **African Charter on Human and Peoples' Rights**, considered by Article 1(h) of Protocol A/SP1/12/01 to contain "constitutional principles shared by all Member States" as legally binding on ECOWAS Member States. Corporations and individuals can submit complaints alleging human rights violations by the Community or Member State actors. The said article 1 (h) stipulates that:

"The rights set out in the African Charter on Human and People's Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights"[111].

Under the procedure and rules of the ECOWAS Court of Justice, there is no domestic exhaustion of remedies requirement limiting the Court's jurisdiction, meaning individuals do not need to pursue national judicial remedies before bringing a claim to the ECOWAS Court of Justice. Rather, the principal requirements are that the application not be anonymous and that the matter is not pending before another international court. An example of such a situation was

[110] Article 39: Protocol A/P.1/7/91 adopted in Abuja on 6 July 1991

[111] Article 1 (h) of the Constitutional convergence Principles: Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security.

in the case of *Hadijatou Mani Koraou v Niger [2008]*[112] which a case was regarding a woman held in slavery for nine years. As part of the measures to enforce the protection of rights, it is established under articles 34 and 35 that:

> *"Member States and the Executive Secretariat shall endeavour to adopt at national and regional levels, practical modalities for the enforcement of the rule of law, human rights, justice and good governance*[113]*. ... Shall establish independent national institutions to promote and protect human rights"*[114].

More so under Article 24 of the 2005 Protocol, the execution of a judgment of the Court must be in the form of a Writ of Execution, and the Chief Registrar is required to submit this Writ to the member state. The member state is required to execute the judgment according to its national courts. The member state must also determine the national authority to execute the Court's judgment and inform the Court of the relevant authority. Importantly, under article 45 (1) of the ECOWAS Court of Justice supplementary protocol 2005, in order to maintain the vigor and institutional order in the legal framework of rights protection in the sub-region, it is further established that:

> *"In the event that democracy is abruptly brought to an end by any means or where there is massive violation of Human Rights in a Member State, ECOWAS may impose sanctions on the State concerned".*

[112] Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008.
[113] Article 34 (1) of the Supplementary Protocol A/SP.1/01/05.
[114] Article 35 (1) of the Supplementary Protocol A/SP.1/01/05.

Moreover, under the rule of Procedure by the ECOWAS court, article 28 (1), agents, advisers, lawyers appearing before any judicial authority to which the court has addressed letters of rogatory for hearing shall enjoy immunity in respect of words spoken or written by them concerning the case or the parties. Article 28 (2) (a) also ensures that:

> *"Papers and documents relating to the proceedings shall be exempted from both search and seizure; in the event of a dispute, the customs official or police may seal such papers and documents and shall then be forwarded immediately to the court for inspection in the presence of the chief registrar and the person concerned".*

The African human rights case law database of the ECOWAS Court of Justice contains more than 80 cases[115] regarding human rights but only one case concerns Ghana which was between *Kemi Pinheiro v Republic of Ghana [2012]*.[116] The applicant a community citizen of Nigerian nationality claimed violation of his rights. On the 25th August, 2010, the applicant filed an application against the defendant (the republic) pursuant to articles 7, 12, 20, 22, and 23 of the African Charter on Human and Peoples' Rights; article 1 of Protocol[117]; and articles 1, 2, and 12 of the ECOWAS Protocol[118]. In the application, the applicant sought for the relief on a declaration (inter alia) that the Ghana Law School of the Republic of Ghana in denying the plaintiff access to qualifying examina-

[115] African Human Rights Case Law Database: See Center for Human Rights University of Pretoria; www1.chr.up.ac.za
[116] SUIT NO: ECW/CCJ/APP/07/1 0; and JUDGEMENT NO: ECW/CCJ/JUD/11/12.
[117] A/P.3/5/82 of the ECOWAS; Protocol on Free Movement of Persons, Right of Residence and Establishment.
[118] A/SP .*1215190* on Free Movement of Persons, Rights of Residence and Establishment.

tions violated the principles enshrined in Article 2, paragraph 2 of the ECOWAS Treaty. After hearing the parties in an open hearing, the court held that the applicant has no legal capacity to file an action against a Member State for failure to honour its obligations arising from Community texts. Therefore, the action was dismissed.

Another important case decided by the ECOWAS Court of justice on due process is the case of *Manneh v. Gambia [2008]*[119]. The plaintiff a community citizen and a national of the Republic of The Gambia presented the claim against the defendant a member state of (ECOWAS) through her counsels and seek the relief. According to the facts contained in the plaintiff's application, the plaintiff a journalist in Banjul, The Gambia was arrested and detained under bad and dehumanising conditions and denied access to adequate medical care.

In line with article 43 of the Court's Rules of Procedure, upon deliberations by the court, a decision was reached and the court found that the applicant was arrested without being charged, never told the reasons for his arrest, let alone the fact that it was in accord with a previously laid down law. The Court held that these acts clearly violate the provisions of articles 2, 6 and 7(1) of the African Charter on Human and Peoples' Rights. Furthermore, in view of the fact that these violations of the applicant's human rights were caused by the defendant, which refused to appear in Court, it entitles the applicant to damages. Consequently, the ECOWAS Court of justice under its jurisdiction enforces and promotes the legal framework of the African Charter and on the other hand, international courts decisions regarding the protection of human rights, serves as an authority. For example, the ECOWAS Court in the case of *Manneh v. Gambia [2008] (supra),* when considering the award of damages stated that:

[119] Judgment No. ECW/CCJ/JUD/03/08, 5 June 2008)

"*Although this Court is not bound by the precedents of other international courts, it can draw some useful lessons from their judgments, especially when the issues involved are similar: in other words, such decisions can be of persuasive value to this Court".*

Briefly, the ECOWAS Court therefore made several references to the European Court of Human Rights decisions such as *Selmouni v France [2005]*[120], *Cenbauer v Croatia [2005]*[121]; and *Silver and Others v. United Kingdom*[122], all regarding the awards of damages.

Therefore the Court considers that this violation should be terminated and the dignity of the applicant's person is to be restored. The court adjudged the plaintiff to be entitled to the costs of this application to be borne by the defendant, as will be assessed, under and by virtue of article 66 of the Court's Rules of Procedure. Also the court declares this application to be admissible in human rights and the Court enters judgment for the plaintiff against the defendant, who is liable for this violation; and consequently, orders that the Republic releases the plaintiff from unlawful detention; restored his freedom of movement; pay the plaintiff the sum of US$100,000 as damages; and the defendant to pay the costs of this action to be assessed. It is of no doubt that cases of illegal detention abounds in Ghana but because such victims have no means to be heard of or proceed to the court or international court for hearing, they remain as if they do not exist. Surprisingly, no case on due process has been submitted to the ECOWAS Court from Ghana which of cause triggers the question of whether

[120] [2005] CHR 237.
[121] [2005] CHR 429.
[122] 5 EHRR 347, 61 Eur Ct HR (ser A); other cases of the European court referred to included: In Anufrijeva and Another v Southwark London Borough Council; R (Mambakasa) v Secretary of State for the Home Office; R(N) v Secretary of State for the Home Office[2004] QB 1124; R (Greenfield) v Secretary of State for the Home Department [2005] UKHL 14.

there are no such violations in the country. This confirms the hypothesis that many people in Ghana including legal professionals are not aware of the proceedings and procedure at the international courts such as the ECOWAS Court or the African Court of human rights[123].

Now having briefly examined the African Charter and the ECOWAS Court of Human Rights as one of the important regional instruments to protect rights of the people in Ghana and the sub-region, the next line of discussion will deal with the impact of regional human rights instruments by considering the African Charter and the ECOWAS Court on Ghana criminal law and procedure.

1.3.3 Impact of African Charter /ECOWAS Court on the Ghana Criminal Law and Procedure

The African Charter on Human and People's Rights, as well as the **African Court of Human and Peoples' Rights** (**AfCHPR**) has been emerged within the region to guarantee the protection of human rights. The AfCHPR was established by the Protocol to the African Charter which established the African Court (the Court Protocol) which entered into force in 2004. This part shall be limited to examine the positive impact it has been able to affect in the protection of the right to fair trial in Ghana through the domestic policies and the criminal law procedure. As of April 2014, just 27 of the African Union's 54 members have ratified and are parties to the Court. The African Union discour-

[123] During a research survey I embarked between June to September 2015, many lawyers in Ghana admitted to me that they do not know the proceedings nor the procedures of the aforementioned regional courts, notwithstanding their awareness of its existence in the region.

ages prosecution of human rights abuses in the international Criminal Court, hoping that they would be tried by the AfCHPR instead; but the AfCHPR has achieved very little[124]. The Court also has jurisdiction to hear cases instituted by individuals and non-governmental organizations with observer status before the African Commission, provided that the relevant State has made the necessary declaration under Article 34 of the Protocol to allow these complaints, described in Article 5(3). To date, seven (7) States have accepted the Court's jurisdiction to receive complaints referred by individuals and NGOs; among them is Ghana[125].

The Charter guarantees rights relevant to this dissertation such as freedom from cruel, inhuman or degrading treatment or punishment under Article 5, rights to due process concerning arrest and detention at Article 6, and the right to a fair trial under Articles 7 and 25. The new court will be known as the African Court of Justice and Human Rights, after the emergence when it starts working.

The Court's (AfCHPR) first judgement on the merits of a case was issued on June 14, 2013, in *African Court of Human and Peoples' Rights, Tanganyika Law society et al. v. The United Republic of Tanzania [2011]*[126] which the applicant alleged the violation of his rights under articles 2, 10, and 13(1) of the African Charter by Tanzania. The Court ordered Tanzania to take constitutional, legislative, and all other measures necessary to remedy these violations. Also

[124]"Justice for dictators: History rules". The Economist: 21 April 2012, Retrieved 26 April .2012. Yet the African Union (AU) asks its 54 members not to co-operate with the court, and wants the Security Council to "defer" (i.e., abandon) its cases against Mr. Bashir and in Kenya. Instead, the AU says Africans should prosecute their own tyrants. But that requires properly functioning courts, a rarity on the continent. The AU's own African Court of Justice and Human and People's Rights has made almost no progress.

[125] Countries that accept the jurisdiction of the African Court are: Burkina Faso, Cote d'Ivoire, Malawi, Mali, Rwanda, and Tanzania.

[126] [2011] App. Nos 09/2011 and 11/2011.

on March 28, 2014, the Court ruled in *Ernest Zongo and Others v The Republic of Burkina Faso [2011]*[127], a newspaper editor who was murdered in 1998. The court found that Burkina Faso had failed to properly investigate the murder, and had failed in its obligations to protect journalists. The alleged violation inter alia was articles 1, 3, 4, 7, and 9 of the African Charter; and the article 66 (2) (c) of the ECOWAS Treaty.

The African Charter to be honest has not done so much in the constitutional, statutory, and policies development in Ghana after its ratification and incorporation to a lesser extent in Ghana and therefore the impact of the Charter on the Criminal law and procedural rights is minimal. However, it could be said that in one way or the other the charter has caused some changes in the protection of the individual's rights to articles 5, 6, 7 and 25 of the Charter as enumerated above.

In this regard, Ghana still has the mandatory death penalty under the Criminal Code and the Constitution[128] as punishment for treason, genocide, and murder under Article 46 of the Act 30. Also an offence of an attempted murder of a person whiles under sentence of more than three years' imprisonment shall be liable to suffer death under Article 49 of Act 29[129]. However, Ghana's adherence to the Charter has stopped the execution of offenders on death row since July 1993[130]. The African Commission on Human and Peoples' Rights (ACommHPR) has a committee and special rapporteurs working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa

[127] [2011] App. No 013/2011.
[128] See Articles 3, 19, of the Constitution, Article 180 of the Criminal Code 1960, as amended by Act No. 646 of 2003.
[129] Ghana Criminal Code Act No. 29 of 1960, art. 49, amended by Act No. 646 of 2003.
[130] Amnesty Intl., Death penalty: Countries abolitionist in practice http://www.amnesty.org/en/death-penalty/countries-abolitionist-in-practice, last accessed Oct. 14, 2012.

which is a special mechanism under ACommHPR Resolution 79, and Resolution 227[131] to monitor the use of death penalty throughout African Union (AU) Member States, and develop a framework for the abolition of the death penalty. Though Ghana has not repealed the capital punishment from the criminal code and the constitution, and still offenders are sentenced to death when convicted under such circumstances, no one has been executed since 1993 which is due to the Charter. Amnesty International reported in 2011/2012 that there were 138 prisoners on death row in Ghana (134 men and 4 women). Currently statistics is not available but it could be more as mostly prisoners await transfer to death row which might not be known. Meanwhile 14 prisoners on death row were released in July 2015 which was the republic day by the President.

Ghana has signed and ratified the African Charter on the Rights and Welfare of the Child which prohibits the execution of individuals for crimes committed while under the age of 18. The Criminal Procedural Code of 1960 (Act 30) states that juveniles cannot be given the death penalty—although it defines these as individuals under the age of 17[132]. Again, with regards to pregnant women, and women with little children facing death penalty, Ghana has ratified the Protocol to the African Convention on Human and Peoples' Rights on the Rights of Women in Africa which prohibits the execution of pregnant women. The Criminal Procedure Code provides that when a woman is convicted of an offense punishable by death and is shown to be pregnant, the trial court (or Supreme Court) shall pass a sentence of life imprisonment[133], likewise the Proto-

[131] Resolution on the Expansion of the mandate of the working group on death penalty in Africa, October 2012.
[132] Henrietta J.A.N. Mensa-Bonsu: The Annotated Criminal Procedure Code of Ghana (Act 30 of 1960), sec. 295, Black Mask LTD, 1999.
[133] Henrietta J.A.N. Mensa-Bonsu: The Annotated Criminal Procedure Code of Ghana (Act 30 of 1960), sec. 312, Black Mask LTD, 1999.

col to the African Convention on Human and Peoples' Rights on the Rights of Women in Africa, which prohibits the execution of nursing mothers.

Actually, since at least 2003, robbery offenses are no longer punishable by death[134] although the courts in Ghana continue to pronounce death sentences which probable cause might be for deterrence, and also for fact that parliament has not repealed the said articles 46 and 49 of Act 30, 1960 which pronounces death penalty and sentences. An example is in the case of *Dexter Eddie Johnson v. The Republic [2010]*[135], decided in March 2011 by the Supreme Court of Ghana. The defence raised a constitutional challenge against the mandatory death penalty applicable to murder. The Court declined to consider international and comparative law finding that the mandatory death penalty violated the prohibition on arbitrary death sentences, as well as the prohibition against cruel, inhuman or degrading treatment or punishment. Although it indicated it was sympathetic to these arguments, the Court held that the task of amending the application of the death penalty in Ghana belonged to the Parliament, not the courts. The Supreme Court confirmed that a sentence of death was mandatory upon a finding of guilt for murder. In practice death row inmates reportedly have their death sentences commuted to life imprisonment after they have served at least 10 years on death row[136].

[134] Contrast Henrietta J.A.N. Mensa-Bonsu, The Annnotated Criminal Offenses Act of Ghana, art. 149, Black Mask LTD, 5th ed., 2008 and Henrietta J.A.N. Mensa-Bonsu, The Annotated Criminal Procedure Code of Ghana (Act 30 of 1960),p. 204-205, Black Mask LTD, 1999 with Ghana Criminal Code of 1960, art. 149, amended by Act No. 646 of 2003. The older law did not differentiate between armed or unarmed robbery, and provided for the death penalty. The law (available from the U.N. Office on Drugs and Crime) labeled as the 2003 amendment law does differentiate between armed and unarmed robbery and provides the death penalty for neither.

[135] [2010] CA, No. J3/3/2010, SC.

[136] For instance in 2003, the President commuted the sentences of 179 prisoners who had served at least 10 years on death row to life imprisonment, and in honour of Ghana's 50th anniversary

Equally importantly, case laws submitted from Ghana to the African Commission of Human Rights on the other hand is an indication of the impact of the Charter over the criminal procedure with regards to the right to fair trial, though there are very few cases which were declared admissible from Ghana by the Commission. For instance, **trial within a reasonable time** is practically a problem and mostly violated in Ghana, meanwhile **grant of bails** to the accused in certain criminal offences are not possible at all which result to refusal of bail under s.96 (5) and (7) of (Act 30) of the Criminal Procedure Code (1960) as amended by Criminal Procedure Code (Amendment) Act, 2002 (Act 633), s. (7).

In the case of *Alhassan Abubakar v Ghana (supra) [2000]*[137] which was declared admissible under Article 56 of the Charter by the Commission relating to trial within reasonable time, right to return to home country, arbitrary arrest and detention, the African Commission held that Ghana has violated Articles 6 and 7(1) (d) of the Charter. Article 6 expresses that 'no one may be arbitrarily arrested or detained' whereas Article 7(1) of the Charter reads: 'Every individual shall have the right to have his cause heard. This comprises: ... (d) The right to be tried within a reasonable time ...' Mr. Alhassan Abubakar was arrested on 16 June 1985 for allegedly cooperating with political dissidents. He was detained without charge or tried for seven years until his escape from a prison hospital on 19 February 1992. The Commission held that 7 years without trial is a period which clearly violates the 'reasonable time' standard stipulated in the Charter

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of independence (May 2007), he commuted 36 death sentences to life imprisonment. In January 2009, just as Ghana was transitioning to a new government, he pardoned at least 500 prisoners (not all of whom were necessarily on death row). "All prisoners sentenced to death had their terms commuted to life and anyone on death row who has already served 10 years would have their sentence reduced to 20 years,".

[137] [2000] AHRLR 124 (ACHPR 1996), Communication 103/93, Decided at the 20th ordinary session, Oct 1996, 10th Annual Activity Report.

and therefore urges the Ghana government to take steps to repair the prejudice suffered.

Another case in point is *The Republic v Gorman and Others*[138] *(supra) [2004]* which was an appeal against the decision of the Court of Appeal rescinding bail granted to the appellants by the trial court, and hence related to bail, trial within reasonable time, and defence. In this case the African Court did not rule on it for non-exhaustion of local remedies.

Other case from Ghana to the Court include *Alfred B Cudjoe v Ghana (supra) [2000]* where the complainant alleged the violation of article 7 (right to fair trial), 4, and 15 of the African Charter; and *Tsikata v Ghana (supra) [2006]* also alleging violation of right to fair trial article 7(1) of the Charter, article 7(1) (c) right to defence, article 7(1) (b)-presumption of innocent, and article 7(2). The two above cases were declared inadmissible due to non-exhaustion of internal remedies. Meanwhile internal remedies in Ghana are not easily obtained and even impossible for those without representation. Surprisingly, as at now Ghana has not passed any specific legislation to give effect to the African Charter.

In *New Patriotic Party v Inspector-General of Police, (Supra)* [1993], the Supreme Court of Ghana found s. 7 to be in violation not only of the Ghana Constitution, but also of the African Charter where ARCHER , CJ added that:

> *Ghana is a signatory to this African Charter and Member of the OAU and parties to the Charter are expected to recognise the rights, duties, and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to the rights and duties. I do not think that the fact that Ghana has not passed specific legis-*

[138] Mohammed Ibrahim Kamil, John David Logan, Frank David Laverick, Alan William Hodgson, and Leonhard Herb (Supreme Court of Ghana, 7 July 2004, Criminal appeal J/3/3/2004)

lation to give effect to the Charter means that the Charter cannot be relied upon.

Considering the *dictum* of Archer CJ in the above case, it seems therefore that the Courts in Ghana may no longer require incorporation of human rights instruments ratified by Ghana before its application, but it is certain that failure to incorporate the Charter would mean that the instruments may be given effect to at the discretion of the judge only which in such circumstances, would result in violations of the right in question- fair trial.

The African Commission through the Charter as an instrument has not achieved a lot when it comes to considering the impact it has so far effected on the domestic human rights laws in Ghana, as a young institution most especially on the right to fair trial. Nevertheless, it has established some special mechanisms to supervise the member states by performing Principal Functions such as:

- conduct country visits to Member States to investigate the enforcement of human rights;
- make recommendations to Member States to guide them toward the fulfillment of their international obligations;
- lend expertise to the Commission when it is considering communications that concern the special mechanism's mandate;
- submit annual reports to the Commission detailing its activities;
- propose that the Commission send urgent appeals to Member States regarding imminent human rights violations;
- send letters to State officials requesting information regarding human rights violations;
- analyze States' domestic laws and their compliance with international standards;
- engage in promotional activities, including seminars, workshops, and expert meetings; and,

- Collaborate with civil society organizations and international human rights bodies.

More so the ECOWAS Community Court of Justice, of which Ghana is a party, has competence to hear individual complaints of alleged human rights violations. This regional Court also collaborates with African Court of Human Rights and Commission**.** The Court's decisions on human rights matters interpret the African Charter on Human and Peoples' Rights, considered by Article 1(h) of Protocol A/SP1/12/01 to contain "constitutional principles shared by all Member States" as legally binding on ECOWAS Member States. The Court gained "jurisdiction to determine case[s] of violation[s] of human rights that occur in any Member State" in 2005 with the implementation of Supplementary Protocol A/SP.1/01/05, and Protocol A/SP1/12/01 which gives the Court "the power to hear, inter alia, cases relating to violations of human rights…" Corporations and individuals can submit complaints alleging human rights violations by the Community or Member State actors.

In contrast to the African Court of Human Rights, there is **no** domestic exhaustion of remedies requirement limiting the ECOWAS Court's jurisdiction, meaning individuals do not need to pursue national judicial remedies before bringing a claim to the ECOWAS Court of Justice. Rather, the principal requirements are that the application not be anonymous and that the matter is not pending before another international court as established in *Hadijatou Mani Koraou v Niger (supra) [2008]*.

As already explained, sadly, there is only one case brought against Ghana at the ECOWAS Court of Justice which is *Kemi Pinheiro v Republic of Ghana (supra)[2012]*. The applicant alleges violations of articles 7, 12, 20, 22, and

23, of the African Charter, and article 1of Protocol (A/P.3/5/82); and articles 1, 2, 12, of ECOWAS Protocol (A/SP.1215190). This was heard and dismissed by the Court.

It is obvious that the ECOWAS Court of Justice has not achieved much to impact the right to fair trial and the protection of human rights abuse in general through case laws. However, it has in one way or the other influenced the policies and statutes in Ghana through its Protocols of which Ghana has rectified. For instance, articles 34 and 35 of the Supplementary Protocol (A/SP.1/01/05) ensure practical modalities for the enforcement of rule of law and human rights in all Member States, which of cause is applicable in Ghana. Furthermore, article 45(1) of the ECOWAS Supplementary Protocol 2005 establishes that where there is a massive violation of human rights in a member state, ECOWAS may impose sanctions against the said state. This in no doubt has caused a positive policy change in Ghana.

The next discussion shall observe the impact of the European Court of Human Rights over the UK criminal law and procedure as a complement to the African regional instruments and the reflection of the case study of Ghana and the UK criminal law procedure since the UK is a party to the ECHR.

1.3.4 Impact of the European Convention on Human Rights over UK Criminal law and Procedure

This part of the dissertation focuses on the impact of the European Convention in brief excursus of Article 6 which deals with the Right to Fair Trial in criminal matters over the criminal law procedure of England and Wales, as enforced by the European Court of Human Rights through the English Courts. What makes this part relevant to the dissertation is that part of the project examines the UK criminal law and procedural rights as a case study in comparison to Ghana criminal law and procedure, as well as the distinguishing features between the two systems. Since the UK is a party to the ECHR, it has become imperative to consider how far it has been able to influence the UK.

The ECHR rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. Since 1998 it has sat as a full-time court and individuals can apply to it directly. In almost fifty-seven years now the Court has delivered more than 10,000 judgments. These are binding on the countries concerned and have led governments including the United Kingdom to alter their legislation and administrative practice in a wide range of areas. The Court's case-law makes the Convention a powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in England and Wales as well as Europe in general. The Court is based in Strasbourg. The European Convention on Human Rights is an international treaty under which the member States of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction.

The British courts have consistently held that ratified treaties, such as the European Convention on Human Rights, do not form part of the domestic law of the

UK[139]**.** Indeed, most references to the Universal Declaration in British judicial opinions simply cite-and then reject-arguments in pleadings that the Declaration is a source of law[140]. However, case laws from the Strasbourg Human Rights Court indicates that after the incorporation of the European Convention in the UK by the Human Rights Act 1998, the European Court has had a great impact over the protection and enjoyment of fundamental human rights, and where many citizens believe that their rights are not adequately protected by the domestic courts turned to seek redress from the ECHR. Where the domestic law is in conflict with the Convention, the European Convention prevails. This part of the dissertation shall be limited to examine the impact of Article 6 rights of the Convention in brief over the UK by looking at procedural rights and case laws.
An English judge at the domestic court dealing with criminal trial and offences would definitely have in mind article 6 ECHR:

[139] This is a fundamental principle of British law. *See, e.g.*, Chundawadra v. Immigration Appeal Tribunal, 1988 Imm. AR 121 (C.A. 1987), and citations therein; statement of the Under-Secretary of State for the Home Office, 42 PARL. DEB., H.C. (6th ser.) 297-8w (1983). A recent decision by the Court of Appeal does cite both the European Convention and the Covenant on Civil and Political Rights extensively in considering the scope of freedom of expression. Although noting that "Article **10** [of the European Convention] has not been incorporated into English domestic law," the court goes on to state that the article may be used "for the purpose of the resolution of an ambiguity in English primary or subordinate **legislation...** when considering the principles upon which the Court should act in exercising a discretion, e.g. whether or not to grant an interlocutory injunction ... [or] when the common law... is uncertain." Derbyshire County Council v. Times Newspapers Ltd., 1991 slip. Op. at 19-20. The opinion does not, however, mention the Universal Declaration of Human Rights.

[140] *See, e.g.*, Alexander v. Wallington Gen. Comm'rs, 1993 S.T.C. 588 (C.A. 1993) ("I need not take up time going through those grounds [alleging violations of the Universal Declaration of Human Rights] individually, since there is nothing in any of them."); R. v. London Borough of Barnet *ex parte* Islam and Quraishi, 1989 Q.B. 2181 (1991); R. v. Immigration Appeal Tribunal *exparte* Minta, 1990 Q.B. 1248 (1991); R. v. Secretary of State for the Home Dept. *exparte* Ruddock, [1987] All E.R. **518** (Q.B. 1986); Wheeler v. Leicester City Council, [1985] 1 App. Cas. 1054, (C.A. 1985).

• During the trial and its preparatory proceedings, whenever a procedural motion is made (to hear witnesses, to exclude evidence, for an adjournment, and so on) or, generally, whenever a procedural issue arises;
• On appeal when the appeal court is called on to rule on alleged procedural deficiencies at first instance.

It could be observed that the shield of procedural protection afforded by Article 6 comes into play as soon as a ***"criminal charge***" is brought against an individual; and it remains in place until the charge is "determined", that is until the sentence has been fixed or an appeal decided. But Article 6's requirements of judicial procedure do not cover the pre- "charge" phase of a prosecution, and in particular the process of criminal investigation prior to charging yet violation of pre-charging procedure would amount to an infringement of fair trial rights under Article 6 as established in the case of *Salduz v Turkey [2009]*[141] which was a police interrogation of a suspect without a lawyer's advice first to the defendant, was held to be in breach of Article 6.

Instances where it could be proved that the ECHR has had great impact over the criminal procedural law of UK are through case laws. For instance in *Campbell and Fell v. UK* (1984)[142], the European Court against the UK established that "*justice cannot stop at the prison gate".*
Article 6 (1) does not require the adoption of any particular rules of evidence, but left to the domestic law. Nevertheless it is not excluded that unlawfully obtained evidence may be treated as admissible without rendering the trial unfair; subject the recognized unacceptability of allowing reliance on evidence ob-

[141] 36391/02 (2009) 49 ECtHR 19
[142] [1984] 4 E.H.R.R. 293 at para. 69

tained by entrapment as established by the Strasbourg Court in the case of *Teixeira de Castro v. Portugal[1999]* [143].

In the case of *Khan v. United Kingdom [2001]*[144] the accused had been convicted of drug-dealing on the basis of **evidence** obtained by a secret listening device installed by the police. The recording of conversations had not been unlawful in the sense of being contrary to domestic criminal law, but had been contrary to Article 8 E.C.H.R. (right to respect for one's private life, home and correspondence). As at the time in the United Kingdom, there had existed no statutory system to regulate the use of covert listening devices by the police (the resultant interference with the Article 8 E.C.H.R. right had not been "in accordance with the law" as required by Article 8 (2) E.C.H.R.).

The **disclosure of evidence** to the accused by the prosecution was held by the Strasbourg Court against the UK in *Rowe and Davis v. United Kingdom [2000]*[145] and *Fitt v. United Kingdom [2000]*[146]. In the first case, in accordance with the law as it then stood, it was the prosecution, without the knowledge or approval of the trial judge, who decided that the evidence in question should not be disclosed. The Strasbourg Court held this not to be compatible with the right to a fair trial, despite the fact that the Court of Appeal had subsequently considered the withheld material and found the conviction to be safe. The international and national tests of fairness of the trial and soundness of the conviction thus led to different conclusions. In the second case the law had changed and the prosecution was required to make an application to the trial judge for authority not to disclose the evidence in question for the reason and grounds of public interest. The Strasbourg Court was satisfied that the defence had been kept in-

[143] [1999] 28 E.H.R.R. 101; 4 B.H.R.C. 533.
[144] [2001] 31 E.H.R.R. 45; (2000) 8 B.H.R.C. 310.
[145] [2000] 30 E.H.R.R. 1.
[146] [2000] 30 E.H.R.R. 480.

formed as far as was possible without revealing the material which the prosecution sought to keep and therefore no violation was found (by the narrow majority of 9 to 8). However, in another instance such as *Edwards v United Kingdom [2003]*[147], materials were produced to the trial judge in *ex parte* hearings. The defence was not aware of the material, and was unable to put forward an argument on it. The material included evidence that the accused had been involved in the supply of heroin before the start of the undercover operation. The Court held that the right of the accused to a fair trial under article 6(1) had been violated.

Moreover, **public hearing** in the case of children was held to be a violation against the UK in the light of Article 6(1) in the British cases of *T.* and *V. v. United Kingdom* [2000][148]. The applicants were two boys convicted of the abduction and horrific murder of another two-year old boy. They were aged ten at the time of the offence and eleven at the time of their trial, which, although attended by a number of special measures taken in view of their age, was essentially an adult trial: in public, with the public gallery full of journalists and onlookers and the two boys sitting in the dock, separated from their bewigged barristers. The Strasbourg Court (including the British *ad hoc* judge, Lord Reed of the Scottish Court of Session) took the view that the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven. It concluded that the two boys had been denied a fair hearing in breach of Article 6 (1).

[147] [2003] The Times, 29 July 2003
[148] [2000]30 E.H.R.R. 121; 7 B.H.R.C. 659

With regards to **appeal proceedings** *a*lthough Article 6 and Protocol 7[149] does not guarantee a right of appeal, appeal proceedings, if possible under domestic law, will be treated as an extension of the trial process and therefore subject to Article 6. But the requirements of fairness may not be the same on appeal as at first instance. This is particularly well illustrated by the cases concerning hearings. Leave-to-appeal proceedings before the English Court of Appeal are determined without the accused being present or represented by counsel; the prosecution is likewise unrepresented. In finding no violation of Article 6 (1) E.C.H.R. in this system, the Strasbourg Court took account of the proceedings in their entirety and of the role of the appellate court in the criminal process in *Monnell and Morris v. United Kingdom* [1988][150] . However, in *Ross v. the United Kingdom* [1986][151] it was held by the Strasbourg Court that although Article 6 does not guarantee an appeal in criminal proceedings, where the opportunity to lodge an appeal in regard to the determination of a criminal charge is provided under domestic law, Article 6 continue to apply to the appeal proceedings, since those proceedings form part of the whole proceedings which determine the criminal charge at issue. Again, in *Allen v United Kingdom [2011]*[152] the defendant was granted bail at the magistrates' court. The prosecution appealed while she remained in custody. The judge in the Crown Court refused to allow her to be present for the appeal. She applied to the European Court of

[149] Protocol No. 7 to the ECHR: The Seventh Protocol extends the list of rights protected under the Convention and its Protocols to include the following: the right of aliens to procedural guarantees in the event of expulsion from the territory of a State; the right of a person convicted of a criminal offence to have the conviction of sentence reviewed by a higher tribunal ; the right to compensation in the event of a miscarriage of justice ; the right not to be tried or punished in criminal proceedings for an offence for which one has already been acquitted or convicted (*ne bis in idem*) ; Equality of rights and responsibilities as between spouses.
[150] [1988]10 E.H.R.R. 205; [1987] E.H.R.C. 9562/81.
[151] [1986]11396/85, 11 December 1986, DR50, 179.
[152] [2011] Crim LR 147.

Human Rights, claiming that her rights under Article 5 (the right to liberty) had been breached because she had not been allowed to be present. The Court held that there had been a violation. The Court emphasised that the defendant should be present at any proceedings at which liberty might be taken away.

More so, the requirement of **independent and impartial tribunal** as specified under Article 6 was held to be violated under a trial proceeding in the UK. Article 6 E.C.H.R. embodies no guarantee either of trial by jury, or of fully professional courts. In other words, recourse to lay judges is compatible with Article 6 ECHR. To qualify as a "tribunal" within the meaning of Article 6 (1), the body concerned must have the power of decision. This was found not to be the case with courts martial in United Kingdom in the case of *Findlay v United Kingdom* [1997][153]. In the case of *Findlay*, it was held that a court-martial convened pursuant to the Army Act, 1955 did not meet requirements of independence and impartiality set by Article 6 (1) in view, in particular, of the central role played in the prosecution by the "convening officer": he was responsible for convening the court martial and for appointing its members and the prosecuting officer, but was closely linked to the prosecuting authorities (he had the final decision on the nature and detail of the charges to be brought) and was superior in rank to the members of the court martial.

In similar view regarding independent and impartial tribunal in *Gregory v. United Kingdom* [1997][154], a note was sent from jury to judge saying: "Jury showing racial overtones." As a result, a "firmly worded", clear, detailed warning was thereupon given by the judge to the jury, after submission from both counsels. The accused was convicted by 10:2 vote of the jury. The risk of prejudice, the Strasbourg Court was satisfied, had been neutralized by the judge's

[153] [1997] 24 E.H.R.R. 221.
[154] [1997] 25 EHRR 577.

warning and therefore no violation was found in this case to be impartial. On the contrary, in the case of *Sander v. United Kingdom* [2000][155] however, the Strasbourg Court's decision went the other way. The redirection of the jury by the judge in that case was not sufficient to have dispelled legitimate doubts as to the impartiality of the court.

Equally importantly, **trial within a reasonable time** as an essential element of fair trial was considered in *Attorney-General's Reference (No 2 of 2001) [2004]*[156]. In this case the House of Lords considered the principle that the right to fair trial under Article 6 of the ECHR includes the right to have a trial within a reasonable time. In cases where the reasonable time requirement in Article 6(1) had been breached, should the proceedings be stayed? Their Lordships held that they should only be stayed if a fair hearing was no longer possible, or if for any compelling reason it was unfair to try the defendant. The above case confirms that the House of Lords in the UK is always careful not to violate the rights safeguarded under Article 6 of ECHR when assessing the reasonableness of the length of the proceedings and Identifying the opening and closing dates of the period to be taken into consideration.

The **right to silence and not to incriminate one** has been held to be violated by the United Kingdom in the case of *Sander v. United Kingdom (supra) [2000]*. The right to silence is an inherent facet of the presumption of innocence and therefore the criminal law may not oblige an accused to answer questions (during the investigation) or to testify (in court). In Sanders' case incriminating evidence had been admitted at the applicant's trial of transcripts of his interviews with inspectors of the Department of Trade and Industry in order to show that he was contradicting himself. At the time of his interrogation by the inspec-

[155] [2000] Crim LR 767; E.C.H.R. 34129/96; 8 B.H.R.C. 279.
[156] [2004] 2 WLR 1.

tors he was under a duty under the Companies Act to reply to the inspectors' questions on pain of contempt proceedings. The Strasbourg Court considered that the notion of a fair procedure under Article 6 (1) presupposed that the prosecution must prove its case without resort to evidence obtained through methods of coercion in defiance of the will of the accused. A violation of Article 6 (1) was found.

Another instance where the right to silence was violated is in the case of *Condron v. United Kingdom (2000) [2001]*[157]. The accused were heroin addicts charged with supplying and possession, were silent during police interviews. They declared at their trial in 1995 that they had been acting on the advice of their solicitor that, because of heroin withdrawal symptoms, they were not in a fit state to reply. The Strasbourg Court, considering that the inadequate direction to jury by trial judge could not be remedied on appeal, held that there had been an unfair trial in violation of Article 6 (1). In the above case the European Court of Human Rights emphasised the need for the Court of Appeal to focus upon the fairness of the trial, rather that the safety of the conviction, in deciding whether to uphold an appeal from the Crown Court. In *Togher [2001]*[158], the Court of Appeal considered the relationship between the requirements for a fair trial and safety of any conviction which resulted. Lord Woolf CJ said that if the accused had been denied a fair trial, it was almost inevitable that his conviction would be regarded as unsafe, now that the European Convention had been incorporated into domestic law.

An equally very important landmark case which is not a British case, but very relevant to be cited is the decision in *Brusco v. France [2010]*[159], which illus-

[157] [2001] 31 E.H.R.R. 1; 8 B.H.R.C. 290; Crim LR 679 (ECtHR).
[158] [2001] 3 All ER 463.
[159] [2010] ECHR 1 621.

trates the adherence of the ECHR to stress that the importance of the right to remain silent and the right not to incriminate oneself, are generally accepted international legal principles at the heart of the notion of a fair trial which should not be violated. The ECHR found that the fact that the applicant was made to take an oath before answering the questions of the police amounted to a form of pressure, and that the threat of criminal proceedings (should he be found to have committed perjury) must have placed him under even greater pressure; this sort of pressures amount to a form of coercion which goes against article 6. The Court further underlines the fact that article 6 safeguards are meant to ensure that a lawyer can inform a suspect, before interrogations, of his right to silence and privilege against self-incrimination, and also provide assistance during the interrogations.

Free communication with defence lawyer is a right that was infringed in *Brennan v. United Kingdom* [2002][160]. The applicant was arrested in connection with murder. He saw his solicitor for the first time two days after his arrest, during which meeting a police officer was present. This is against the right to private consultation and communication with the solicitor under s. 58 of PACE 1984 and Code C, para. 6.1. By this time he had also made a number of admissions to the police. He was ultimately found guilty of murder. On the facts, the Strasbourg Court found no fault attributable to the national authorities as regards either the delay in the accused's access to his lawyer or the circumstances in which the confession evidence had been obtained during the police interviews. But it did find that the presence of the police officer within hearing during the applicant's first consultation with his solicitor had infringed his right to an effective exercise of his defence rights as well as Article 8 and legal privi-

[160] [2002] 34 EHRR 507.

leges in violation of Article 6 (3) (c) which read together with Article 6 (1) of ECHR. Another landmark non British case equally important to be considered is the case of *Salduz v Turkey [2009](supra)* which was an interrogation by the police in the absence of a lawyer where the accused brought before the public prosecutor and the investigating judge, claiming that his earlier statement had been made under duress, and with regard to the circumstance of the present case the Chamber arrived to a conclusion that a) the applicant's fair trial rights were undoubtedly prejudiced by the restrictions on his access to a lawyer during police custody, and b) that neither assistance provided subsequently by lawyer, nor the adversarial nature of the ensuing proceedings, in which the defence was able to challenge the prosecutor's statements, could cure these defects.

Also, the ***right to free legal assistance*** *under* Article 6 (3) (c) lays down two conditions for free legal assistance: (1) insufficient means and (2) the interests of justice. These criteria for establishing the interests of justice were spelt out in another non British landmark case such as *Quaranta v. Switzerland [1991]*[161] to be: (i) the seriousness of offence and the severity of the sentence risked; (ii) the complexity of the case; (iii) the personal situation of the accused.

The request for legal aid at first instance was refused in the *Quaranta's* case meanwhile his personal appearance at his trial was held insufficient by the Strasbourg Court. In similar instance, in *Benham v. United Kingdom [1996]*[162] the poll-tax case, the Strasbourg Court's judgment contains the dictum that where immediate deprivation of liberty is at stake, the interests of justice in principle call for legal representation.

[161] [1991] E.C.H.R. 12744/87.

[162] (1996) 22 E.H.R.R. 293.

More to the point of free legal assistant is the case of *Granger v. United Kingdom [1990]*[163] where the accused was denied any leave-to-appeal. Granger was refused legal aid for the hearing of his appeal against conviction because the appeal was judged by the legal aid authorities - and doubtless rightly so - to be "wholly without substance". Nonetheless, the applicant, presenting his own case, was unable fully to comprehend the arguments - whereas the other side, the Crown, was represented by counsel. The grounds of appeal were complex and he ran the risk of a heavy sentence. In these unequal circumstances, the Strasbourg Court found a violation because an unconditional right of appeal was removed from the defendant.

The importance of the right to legal assistance as a pre-requisite requirement to ensure fair trial was stressed by the UK Supreme Court. In addition to given regards to the decision of the *Salduz v Turkey [2009]* (supra) is the case of *Cadder v Her Majesty* [2010][164] which was decided by the UK Supreme Court. *Peter Cadder and other*, in this case were both detained under section 14 of the Criminal Procedure (Scotland) Act 1995, as amended ("the 1995 Act"). During which the police interviewed the defendant at the custody without given the accused a legal assistant. This resulted to the question whether the Crown's reliance on admissions made by a detainee during his detention while being interviewed by the police without access to legal advice before the interview begins is incompatible with his right to a fair trial. It was ruled by the UK Supreme Court that all suspects should be granted access to a solicitor before being questioned by police, when detained.

[163] [1990] 12 E.H.R.R. 469; [1990] E.C.H.R. 11932/86; Confirmed in *Maxwell v. U.K.* (1995).
[164] [2010] UKSC 43.

In the case of *Her Majesty Advocate v McLean* [2009][165] which was Scottish High Court decision, about having a solicitor to be present during an interview of an accuse, though the court departed from the rule of *Salduz v. Turkey* by affirming the decision of *Paton v Ritchie [2000]*[166] where the Court established that "neither Scots law nor the Convention require that in all cases the person who is detained should be afforded the opportunity to have his solicitor present", and therefore they are not persuaded that the absence of the solicitor had a decisive effect upon the preparation of the appellant's defence.

Apparently, in the United Kingdom, **the power to stop and search** a member of the public by the police is established under s.1 to 3 of PACE 1984, and also the power to stop and search vehicles and pedestrians for the prevention of acts of terrorism is under the Terrorism Act 2000, ss. 47A to 47C. However, the provisions of s. 44 of the 2000 Act were held to be unlawful, in the case of *Gillan v United Kingdom [2010]*[167].

There is moreover a great impact of the European Convention on the principles regarding the decision to **grant or refuse bail** to a defendant under the section 4 of the Bail Act 1976. Under s. 25 of the Criminal Justice and Public Order Act 1994 (CJPOA) which deals with the grant of bail to the defendant only if there are exceptional circumstances which justify it, the case of *R(O) v Harrow Crown Court (supra) [2007]* is worth to be mentioned. For instance the House of Lords considered that s.25 of CJPOA 1994 is compatible with Article 5 of the European Convention on Human Rights, which guarantees the right to liberty. That it did not cast a formal burden of proof upon a defendant to make out the exceptional circumstances allowing bail. In so far as s. 25 appeared to do so,

[165] [2009] ScotHC HCJAC_97/2010 SLT 73.
[166] [2000] JC 271.
[167] (4158/05) [2010] 50 EHRR 45 (ECHR).

it should be 'read down' in accordance with s.3 of the Human Rights Act 1998, so as to ensure that it was consistent with Article 5 (the right to liberty).

Finally regarding trial of juveniles on indictment at the Crown Court instead of the Youth Court, the decision of *V v United Kingdom [2000]*[168] was a hallmark case which is noted for its positive impact on the criminal law and procedure of England and Wales. For instance, in the wake of the European Court of Human Rights judgment in *V v UK*, the Lord Chief Justice issued a Practical Direction, (now para. III.30) of the *Consolidated Criminal Practice Direction* which emphasized that all possible steps should be taken to assist a young defendant to understand and participate in proceedings in the Crown Court[169].

1.4. Conclusion

Considering the constitutional history and background of Ghana, it could be deduced that all the military regimes that came unto power suspended and overthrown an elected government and a sovereign constitution. They all controlled and exercised the executive and the legislative powers of government but all the military regimes certainly maintained the judiciary and the courts after overthrown which notwithstanding did not respect the constitution as a source of law in Ghana during the post- independence constitutional period. The fundamental concepts and elements such as supremacy of the constitution, the independence of the judiciary, and the doctrine of separation of powers as guaranteed by the constitution of the fourth republic 1992 are established. Analytically, all the military regimes had a common characteristic which was autocracy.

[168] [2000] 30 EHRR 121 (ECtHR); [2000] Crim LR 187 (ECtHR)
[169] John Sprack: Criminal Procedure, Trial of Juveniles, Page 192.

Importantly, since independence in 1957, which is 59 years now in total, Ghana has experienced six (6) years of one-party system, twenty-one (21) years of Military dictatorship, and thirty-two (33) years of multiparty system of democracy between the first and fourth republic. The constitution 1992 guarantees that the three organs of government such as the *executive, legislative,* and the *judiciary* should not be fused in one person or institution, but also not to function in an isolation to enhance the smooth running of the administration of justice and fairness to avoid abuse. The impact of the African Charter/ ECOWAS Court of Justice over Ghana; and the impact of the European Court of Human Rights and the Convention rights over the UK criminal law procedure, is an indication of how the regional instruments have shaping the domestic legal culture and norms in protecting the right to fair trial.

To recapitulate what has been discussed so far in this chapter, there is the presumption that the purpose of the criminal justice system is for punitive and deterrent reasons only in Ghana. This should be eradicated and therefore errors and irregularities in criminal procedure which are sometimes overlooked must be seriously considered as breach and miscarriage of justice. Also, securing the procedural rights, justice and fairness of the criminal accused for the interest of justice is given the least pre-eminence and hence judicial interpretation and support for guaranteeing fair trial has been very weak in Ghana. There is a misconception that criminally charged by the police should be convicted at all cost and therefore, the rules and procedures that regulate the conduct of criminal trials are not enforceable to its fullness to serve it purpose of enactment. Moreover, right to fair trial in Ghana is compromised and exponentially abused to the detriment of the accused. Appeals against the decisions of the first instance

courts are very rare in spite of complaints of procedure irregularities, while there is lack of access to criminal justice and legal aid in Ghana.

Last but not the least, criminal accused persons are detained for too long without due process of the law and hence trial within a reasonable time is a mere declaration. Finally, the African Charter is not directly applicable in the domestic courts and criminal proceedings but to the discretion of the judges which in my opinion, is not the best way to uphold and guarantee the right here in question which is the right to fair trial because failure to incorporate the African Charter into the domestic laws in Ghana and Africa at large would mean that judges would lack the legitimacy to apply and rely on the Charter within their jurisdiction to secure people in our contemporary society.

Having observed the above factors and problems within the Ghana criminal procedure, I recommend that procedural rights should be secured for interest of justice; and above that rules and procedures that regulate the conduct of criminal trials must be enforced. There should be easy access to the criminal justice and legal aid availability; and finally, the African Charter should be directly applicable within the domestic criminal procedure to make the right to fair trial a reality, achieving and success. It could also be underscored that the impact of the ECHR over the UK criminal proceedings has been very positive and above all, reshaped and affirmed procedural rights of the criminal accused through substantive and case laws.

Chapter 2

ANALYSIS OF FAIR TRIAL IN THE CRIMINAL PROCEDURE OF GHANA

2.0. Introduction

This chapter focuses and analyses fair trial principles and standard of inefficiency in the Ghana criminal trial process. This objective is carried out by looking at the trial stages, police investigation, and the power to prosecute in Ghana, how bails and remand procedures work, and the funny legal aid scheme in Ghana. The chapter further examines how far fair trial rights have been given recognition and if the specific rights of the defence written in the constitution and the few that have found their way in the criminal code are upheld for the interest of justice in Ghana from the pre-trial stage to trial and the post-trial. It again considers measures of coercion – thus rules on imprisonment, role of the courts in enforcing human rights, what constitute trial within a reasonable time, and the paradigm of rule of law in Ghana. This would enable foreign readers of the dissertation to understand clearly the reality and state of the right to fair trial within the domestic procedural rights regime in Ghana; and the context in which the said right in question is countered with errors and irregularities. The idea of dealing with such rights in Ghana is beyond pointing out errors and irregularities and the abuse of the procedure that the criminal accused passes through before landing in jail but rather to improve the standards and the legal framework that safeguards and protects the fair trial regime and norms. The chapter discusses the application of the right to fair trial in Ghana, and the procedural rights that interrelate with the principle of equality of arms in the criminal proceedings. The rationale behind the chosen of these rights to be dealt with

is because such rights remain in a state of basic application in Ghana, dormant, and ineffectively enforced to the benefit of the accused to serve the interest of justice. The specific rights of the accused in Ghana are applied superficially and therefore severely constrained.

The Right to a **fair trial** means that people can be sure that processes will be fair and certain. It prevents governments from abusing their powers. A **fair trial** is the best means of separating the guilty from the innocent and protecting against injustice. Without this right, the rule of law and public faith in the justice system collapse. The right is one of the cornerstones of a just society. The international community proclaimed the right to a **fair trial** to be a "*foundation of freedom, justice and peace in the world***".** Therefore the right (fair trial) is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the ICCPR[170], which provides that *"everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."* The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated but, most recently, by a proposal to include it in the non-derogable rights provided for in Article 4(2) of the ICCPR[171]. The right to a **fair**

[170] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].
[171] *See* Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994 [hereinafter The Final Report], at 59-62.

trial is applicable to both the determination of an individual's rights and duties in a suit at law and with respect to the determination of any criminal charge against him or her. While the right to a **fair trial** exists to minimize mistakes; no justice system always produces the right outcome. The right on a criminal charge is considered to start running not "only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned."[172] This could obviously coincide with the moment of arrest, depending on the circumstances of the case. Fair trial guarantees must be observed from the moment the investigation against the accused commences until the criminal proceedings, including any appeal, have been completed. The distinction between pretrial procedures, the actual trial and post-trial procedures is sometimes blurred in fact, and the violation of rights during one stage may well have an effect on another stage. Different countries have developed different ways of doing this, but regardless of how a particular legal system operates the core principles to all fair justice systems form part of the Right to a Fair Trial to redress injustice and to uphold society's faith in the integrity of the justice system.

The right to fair trial is a specific right of the defence which has its source from the international human right laws and instruments that guarantees its functioning and adherence by the state's criminal justice system at the domestic level. The following international instruments proclaim and advocate against the violation of the said right. For instance, the *African Charter on Human and Peoples' Rights (ACHPR),* provides under the Civil and Political Rights, freedom

(http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?Opendocument).

[172] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington:1993) [hereinafter Nowak Commentary], at 244.

from cruel, inhuman or degrading treatment or punishment at (Article 5), rights to due process concerning arrest and detention (Article 6), and the right to a fair trial enshrined at (Articles 3, 7, 25, 26) of the ACHPR.

Also due to the delicacy of procedure fairness, various rights associated with a fair trial are again explicitly proclaimed in Article 10 of the *Universal Declaration of Human Rights (UDHR),* and Articles 5, 6 and 7 of the *European Charter on Human Rights (ECHR)* as well as Articles 2 to 4 of the *7th Protocol to the European Charter***.** The right to a fair trial is furthermore enshrined in Articles 3, 8, 9 and 10 of the *American Convention on Human Rights (ACHR),* as well as the *sixth Amendment to the United States Constitution* which contains the Bill of Rights that sets forth rights related to criminal prosecution.

Under the international human rights law, the right to fair trial is very helpful in numerous declarations which represent customary international law. Though the UDHR enshrines some fair trial rights, such as the presumption of innocence until the accused is proven guilty, in Articles 6, 7, 8 and 11, the key provision states that:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."* [173]

The right is also defined in more detail in the *International Covenant on Civil and Political Rights (ICCPR)***.** They are protected in Articles 14 and 16 of the ICCPR. Article 14(1) establishes the basic right to a fair trial, Article 14(2) provides for the presumption of innocence, and Article 14(3) sets out a list of min-

[173] Article 10 of the UDHR.

imum fair trial rights in criminal proceedings. Article 14(5) establishes the right of a convicted person to have a higher court reviews the conviction or sentence, and Article 14(7) prohibits double jeopardy. For instance it is stated in the IC-CPR that:

> *"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."*[174]

Fair trial right is the most litigated human right and substantial case law has been established on the interpretation of this human right. Despite variations in wording and placement of its definition, various international human rights instrument defines it in broadly the same terms. Meanwhile, the implicit constitutional remedies to fair trial in Ghana are inefficient.

Under the constitution of Ghana chapter five (5), Fundamental Human Rights and Freedoms are spelt out and therefore contain some implicit constitutional remedies established to protect and guarantee fair trial as a normative to enhance procedure justice. Article 33 prescribes and establishes the protection of (individual) rights by the courts. It is established in Article 33(1) and (2), that:

> "*Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prej-*

[174] Article 14(1) of the ICCPR.

> *udice to any other action that is lawfully available, that person may apply to the High Court for redress"*[175].
>
> Also the *"... High Court may... issue such directions or orders or writs including rites or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and quo warranto as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person concerned is entitled"*[176].

The same constitution of Ghana under the same chapter guarantees fair trial at Article 19 (1) that:

> "*A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court"*[177].

Though the constitution as a means of protecting and enforcing rights entails certain principles that when upheld, will meaningfully avoid contravention and violation of individual rights; yet there are several deficiencies and inefficiencies to that effect and the constitutional remedies to fair trial infringements and breaches in the criminal justice and procedure has been disfunctional. It is a fact that fair trial rights are central to equality; it is applied superficially in Ghana. It is therefore certain that only a reconceptualization and revitalization of the right

[175] Article 33(1) of the 1992 constitution of Ghana; Chapter 5: Protection of Rights by the Courts.
[176] Article 33(2) of the 1992 Constitution of Ghana; Chapter 5
[177] Article 19(1) of the 1992 Constitution, Ghana; chapter 5

to a fair trial by enforcing the existing laws can see a meaningful enjoyment of these rights by the criminally accused persons in Ghana. For instance, in all the three stages of the trial processes such as the *pre-trial stage, trial stage, and the post-trial stage*, for the interest of justice and fairness, the accused should not be made vulnerable in any of the processes.

2.1.0 Pre- Trial

The first stage where the state comes in touch with the suspect is the pre-trial stage, and surprisingly that is where the accused/suspect is made most vulnerable. Investigations at this stage are conducted by the police who legitimately possess powers of investigation. These powers are necessary for the detection and prevention of crime within and outside the state. However, if the rights of the individual are not protected at this stage, manifest unfairness and arbitrary use of powers are inevitable and can ultimately have a grave impact on trial fairness and hence to the detriment of the accused. In this regard, modern societies and legal systems including Ghana have developed protective barriers for the individual. These barriers exist in two forms which are: *the affective and effective stages* of the criminal process.

In the first stage which is the affective, there are some procedural formalities that the state has to follow as a condition for limiting the liberty and privacy of the suspect. As a result, the police are generally required to obtain warrants which empower them to arrest and search; inform suspects of their rights including the right to silence at the time of arrest, limit the accused right and put

them under detention. These procedural requirements serve to remedy the imbalances between the state and the suspect during the period of investigations. Also, exclusionary rules ensure that the courts exclude forced confessions; obtaining illegally evidence against the suspect, and prohibit any prejudicial effect which outweighs their probative value. However, these pre-trial protective measures such as norms that protect the accused during police interrogation, arrest with or without warrant, writing of the accused statement and charges, search and seizure, with or without defence legal counsel present, are inadequate in Ghana and most at times such rights that protect the accused are not enforced at all they are over looked by the police and judges do not take the adverse of the failure by the police to recognize the defence pre-trial rights serious.

In Ghana, the state prosecution service is the only institution that has the power to initiate a case or an investigation against an individual through the police Criminal Investigation Department (CID) or BNI. Under the constitution sections 88 (3) to (5), it is established that:

> *"(3) The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences.*
>
> *(4) All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or any other person authorised by him in accordance with any law.*
>
> *(5) The Attorney-General shall be responsible for the institution and conduct of all civil cases on behalf of the State; and all civil proceedings*

against the State shall be instituted against the Attorney-General as defendant."[178].

Therefore the fact that the state prosecution has certain advantages over the accused cannot be under estimated. These advantages of the prosecution include powers of investigation, a permanent team of prosecutors, and access to forensic evidence and budgetary allocation from the state coffers. Though it is understood that the state must possess these powers and resources if it is to maintain social order, yet the accused-based rights should be catered for in order to maintain some balance and equilibrium in the system. Sadly, these rights are perceived as a yardstick to undermine the powers of the state to counter crime domestically. But on the contrary, they are meant to provide equality, fairness and the protection of the accused in the interest of justice. Unfortunately, these rights remain in a state of basic application in Ghana. To some extent, they remain dormant and are not effectively upheld to the benefit of the accused though majority of the rights are written in the criminal procedure code and the constitution, they are not enforced to achieve its purpose.

At the trial stage, all criminal trials in the district court are summary trials in Ghana. A summary trial is a term often used in contradistinction to trials on indictment. The latter, which is adopted in the trial of more serious offences carrying sentences of death or imprisonment for life, is applied in the High Court where the judge sits with the aid of assessors or with jurors. The High Court also has power to try offences summarily during which the judge sits alone.

A summarily trial in the district court connotes a trial by a single magistrate sitting alone. A summary trial in the juvenile court is conducted by a single mag-

[178] Chapter eight of the 1992 Constitution of Ghana: Article 88(3) to (5).

istrate or chairman who sits with two panel members. In summary trials, all questions of law and of facts are determined directly and in open court by the magistrate sitting alone in the district court.

During trials, proceedings are done in an open court unless otherwise found necessary by the court in the interest of public morality, public safety or public order as established under 1992 Constitution, article 19(14) and 15 and Act 30, s. 165. But the court has the discretion *suo motu* or at the request of either party to exclude from the courtroom any witness as codified under s. 78 of the Evidence Decree, 1975 (NRCD 323). Also under s. 78 of NRCD 323 and the 1992 Constitution article 19(15), children and witnesses who are yet to testify may also be excluded from sitting in court during the hearing of a case.

Commencement of the trial of criminal proceedings at the district court starts by reading of the charges from the charge sheet- thus charges preferred against the accused person. The reading of the charges is normally done by the court clerk after the accused has entered the dock, and where the accused does not understand English Language, the court interpreter will translate the charges into the local language to the accused understanding, notwithstanding the fact that interpretations at the lower courts are done poorly.

The full trial of the case comprises the taking of evidence-in-chief of witnesses for the prosecution including exhibits as well as those of the accused himself and his witnesses. In all cases prosecution has the right to address court by way of reply after the close of the case for the defence; but this is normally not done, except where the prosecution is conducted by a police lawyer or a lawyer from the Attorney-General's Office. In Ghana, criminal procedure after the charges has been read to the accused understanding; his plea must always be taken, except in committal proceedings or proceedings for the remand of the accused to

be tried in another court. For instance whenever a charge is amended or substituted with a new charge, the accused should be invited to plead to the new charge. This is done whether the trial of the case is yet to start or is in progressive stage. Apparently, there are three main options when it comes to pleading and therefore the accused should either plead: ***plea of not guilty, plea of guilty, and refusal or failure to plead.*** By reason of section 113 of Act 30, the accused may refuse to plead by arguing on lack of jurisdiction by the court to trial him, or on the principles of *autrefois acquit* or *autrefois convict* as established in the cases of *Boni v The Republic [1971]*[179]*; and Republic v General Court Martial, Ex parte Mensah [1976]*[180].

In summary, police prosecutors most times mislead unrepresented accused to plead guilty to charges whereas such defendants are not. These instances are only unfolded when judges enter into plea enquiry. Hence, I recommend that police officers responsible for prosecutorial duties should be trained and be made aware of the consequences of such unprofessional conduct to avoid misleading judges and lawyers for interest of justice.

[179] [1971] 1 GLR 454, CA.
[180] [1976] 2 GLR 154, CA.

2.1.1 The Power to Prosecute in Ghana

The power to prosecute in Ghana has been established under the 1992 Constitution, article 88(3), which makes the Attorney –General "responsible for the initiation and conduct of all prosecutions of criminal offences". Nevertheless, under Act 30, the two main categories of persons who can initiate actual court-room criminal prosecutions in the district court are:

i. Public prosecutors;
ii. Magistrates.

For many years, magistrates are never known to have conducted prosecutions. Public prosecutors are always expressly appointed by statute and these include lawyers from the Attorney-General's office, police, labour, and health officers, and social security prosecutors, under Act 30, ss. 56-58. S. 56 (1) to (3) substituted by section 3 of the Act 633 (2002) establishes that:

> *56 (1) subject to article 88 of the constitution, the Attorney –General may, by executive instrument appoint generally, or for a specified class of criminal cause or, matter, or for a specified area, public officer to be public prosecutors, and may appoint a legal practitioner in writing to be a public prosecutor in a particular criminal cause or matter.*
> *(2) A public prosecutor appointed under subsection (1) may appear and plead before a Court or Tribunal designated by the Attorney-General in the Executive instrument or in writing.*

(3) The Attorney-General may give express directions in writing to the public prosecutor.

For instance in *Clerk of Axim Local Council v. Tandoh [1968]*[181], the appellant by their clerk of council instituted criminal proceedings against the respondent. When the case was called the appellants were not in court and the case was struck out for want of prosecution. They appealed alleging their clerk acted as a public prosecutor. At the appeal, it was held by the Appeal Court that a public officer who undertakes a criminal prosecution does not thereby become a public prosecutor unless he is appointed a public prosecutor by the Attorney-General under an Executive Instrument (EI) as provided by section 56 of Act 30 (Criminal Procedure Code 1960)[182].

Under s. 58 of Act 30, which clarifies prosecutions on indictment, it is stated that, proceedings shall not be instituted for the trial of an accused on indictment except by or on behalf of the Attorney-General. Meanwhile, lawyers from the Attorney General's office rarely conduct prosecutions in the district courts and such are done by the police who act as public prosecutors and also at the Circuit Courts on cases heard summarily under the Appointment of Public Prosecutors Instrument, 1976 (EI 4)[183]. For example in *Issah v The Republic [1999-2000]*[184] it was held by the Court of Appeal that:

"in the case of the power of the police to prosecute criminal cases, authority of the Attorney-General (AG) was given by the Appointment of Public Prosecutors Instrument, 1976 (EI 4) which

[181] [1968] GLR 774.
[182] See amendment by the Act 633 (2002).
[183] Amended by the Appointment of Public Prosecutors Instruments 1980 (EI 7), 1988 (EI 27), 1997 (EI 7), 1994 (EI 10), and 1999 (EI 9).
[184] [1999-2000] 2 GLR 45, CA.

> *was made by the AG in the exercise of his powers under s. 56 Act 30… which clearly provided*[185] *that any police officer not below the rank of sergeant could be a public prosecutor for all criminal cause or matters heard by a district court or heard summarily by a circuit court".*

Apparently, apart from the public prosecutors, prosecution cannot be initiated in Ghana by private persons. Until Act 633, s. 3 repealed Act 30, s.57 – the power of persons to conduct private prosecutions in Ghana was acceptable. However, the repealed by the Criminal Procedure Code (Amendment) Act, 2002 (Act 633), s. 9 has made s. 139 of Act 30 which made references to private prosecutors in Ghana abolish. For instance, the case of the *Republic v District Court Magistrate Grade I, Tema, Ex parte Akotiah [1979]*[186] held that the Act 30 which confers on the person the right to initiate criminal prosecution is no longer the case law in Ghana.

In exercise of the powers conferred on the Attorney-General by section 56 of the Criminal Procedure Code, 1960 (Act 30) as amended[187], section 1 which deals with the appointment of Public Officers to be Public Prosecutors establishes that:

> *"(1) lawyers employed in the Internal Revenue Service, the Customs, Exercise and Preventive Service and the Value Added Tax Service are by this Instrument appointed as prosecutors in respect of any action that arises under,*

[185] Paragraph 2 of column 1 of the Schedule to EI 4.
[186] [1979] GLR 341.
[187] This Instrument is made this 9th day of March, 2004.

(a) the Internal Revenue Act 2000 (Act 592);

(b) the Customs, Exercise and Preventive (Management) Law 1993 (P.N.D.C.L. 330); and

(c) the Value Added Tax Act 1998 (Act 546) respectively.

(2) The lawyers also have the right to prosecute any action that arises under any other enactment that relates to their respective Service".

Under section 2 which deals with the Right of Appearance in Court or Tribunal, it is established that:

"A public prosecutor appointed under paragraph 1 may appear and plead before any Court or Tribunal of competent jurisdiction"[188].

Under the Juveniles Justice Act, 2003 (Act 653), there is a section which deals with the right of juveniles arrest and caution. The cautioning of criminal suspects by the police instead of straight away prosecution is an option available for juveniles but not adults under the Act 653. Under s. 12 of Act 653, it is established that:

"(1) a police officer may give an informal caution instead of arresting a juvenile if it is in the best interest of the juvenile to do so;

(2) An informal caution is a verbal warning of which no record is required to be kept;

(3) A senior police officer may give a formal caution to a juvenile with or without conditions on the

[188] Attorney-General and Minister for Justice; Criminal Procedure Code, 1960 (Act 30) as amended: Date of Gazette Notification: 19th March, 2004.

recommendation of a probation officer, public prosecutor or magistrate;

(4) The formal caution shall be given in private in the presence of a parent, guardian or close relative or in the `presence of a probation officer (s.12 (5));

(8) The police shall cause a record to be kept of formal cautions in a register for the purpose at the police station;

(9) The register of formal cautions shall be made available to the Department of Social Welfare;

(10) The record of a formal caution shall be expunged after a period of five years from the date on which the caution was entered".

Having considered the powers to prosecute in Ghana as a sole responsibility of the state attorneys, and public officers appointed by same body, which means no availability of private prosecution in Ghana, I strongly argue that private prosecution should be instituted in Ghana alongside the state prosecution so that where state attorneys are not available to prosecute, equivalent lawyers acting as sworn private prosecutors could have the legitimacy to take such criminal matters up and proceed to prosecution, in circumstances where the state attorney enters a *nolle prosequi* concerning a particular case unreasonably in order to discontinue the case[189]. In such stances, private prosecution could save situations and hence, the Attorney General's disinterest in a case would not bar such

[189] This is a common situation in Ghana when such cases involve politicians and government officials who try to influence cases. There have been many instances where the state prosecutors fail to appear before a court without a reason. This has been a strategy to enable a judge throw the case out of court for lack of prosecution.

a case to be discontinued, which in the spirit of the law hinders justice, notwithstanding the fact that all prosecutions would need the consent of the director of public prosecutions of Ghana.

In recapitulating the issues, the prohibition of private prosecution in Ghana is a problem in the sense that state prosecutors are very few and therefore such causes delays and protraction of court proceedings in criminal trials, and abuses the process. Also, alternative means of dealing with cases rather than prosecution are very few in Ghana. As a result of these, I recommend that private prosecution should be instituted and introduced alongside the state prosecution service in Ghana to enhance speedy trials and avoid abuse of prosecution process by the Attorney-General Department which sole responsibility is to initiates and terminates prosecution of cases in Ghana. Again, Conditional Cautioning criteria for adults should be instituted as an alternative to prosecution in suitable cases in Ghana by the Ghana Prosecution Services and the police which would avoid unnecessary prosecution of minor cases and help to decongest the overcrowded prisons.

2.1.2 Trial of Juveniles in Ghana

When juvenile is in trouble with the law which amount to arrest and interviews at the police station, it is established that the juvenile shall not be questioned or interviewed by the police in relation to an alleged offence unless a parent, or guardian, a lawyer or close relative of the juvenile is present at the interview or in the absence of one of the stated persons above, a probation officer shall be arranged to be present[190]. Detention of juveniles at the police station should be specially designated place for the juvenile purpose, or in a part of a police station which is separate from the area where persons other than juveniles are detained. Also a juvenile shall not be allowed to associate with a person than a relative, a lawyer or a public officer whilst detained at a police station or being transported to a remand home or a place of custody. They are kept under the care of an adult of the same sex when detained in a police station or at the remand home, and are always separated by their sex. Juveniles under detention in Ghana has the right to adequate food, medical treatment if required, reasonable visits from parents, guardian, lawyer, or close relatives, and any reasonable conditions required for the welfare of the juvenile as established under article 15 of the Juvenile Justice Act 2003 (Act 653). The sitting of the Juvenile Court is different from the ordinary court sitting. A Juvenile Court shall sit either in a different building or room from that in which sittings of other Courts are held or on different days from those on which sittings of other Courts are held, and all those present should be permitted by the court. Proceedings at the Juvenile Courts in Ghana are informal and police officers in the court shall not be in uniform and restraint shall not be used on a juvenile unless there are exceptional

[190] See article 13 of the ACT 653, Juvenile Justice Act, 2003.

circumstances which warrant the restraint not foreseen for the safety of any person – article 16 of the Act 653.

A court of summary jurisdiction other than a Juvenile Court shall not hear a charge against or dispose of a matter which affects a juvenile if the court is satisfied that the charge or matter is one in which jurisdiction has been conferred on Juvenile Courts, and that a Juvenile Court has been constituted for the place, district or area concerned. Where the Court is satisfied, it shall make an order transferring the charge or matter to the Juvenile Court, but whereby Juvenile Courts have not been constituted for the area, a Court of summary jurisdiction may deal with the application for bail concerning the juvenile. Meanwhile a charge made jointly against a juvenile and adult (18 years and above) shall be heard by a Court of summary jurisdiction other than a Juvenile Court – article 17 of Act 653. Where a juvenile is tried jointly with an adult, and are both convicted, the juvenile should be remitted to the Juvenile Court for sentencing- s.18(1) of Act 653; but previous conviction of an accused before he is aged 18 cannot be taken into account when considering sentence under Act 30, s. 300. An example is in *Abbot v The Republic [1977]*[191].

Juvenile sentences, punishment and sanctions are different from adults when convicted of a crime. After convicting the juvenile, the juvenile can be punished and sentenced under the s. 29 of the Act 653 by any or a combination of factors such as: discharge- conditionally or unconditionally; enter into recognizance to be of good behavior- s.299 of Act 30; release under probation – s.31 (1) of Act 653; commit to the care of a relative or a fit person – Act 653, s. 29(1); detention in a senior correctional centre- (borstal institute or industrial school)- s. 39 Act 653; and payment of a fine, damages or costs by the offender or their par-

[191] [1977] 1 GLR 326

ents (where satisfied that the parent or guardian has contributed to the commission of the offence by neglecting to exercise due care of the juvenile) – an example is in *Donkor v The Republic [1977]*[192].

There are however, some limitations on sentencing a juvenile at the court and these are no death sentence on a juvenile offender can be pronounce- s. 32(2) of Act 653; a juvenile offender should not be sentenced to imprisonment by a Juvenile Court or a court of summary jurisdiction – s.32 (1) of Act 653.

Admittedly, many summary jurisdiction Courts in Ghana trial juvenile cases because there are few constituted Juvenile Courts in each area. The seriousness of the issue and concern is that there are instances where adult cases involving juveniles are tried and sentenced at the summary court when convicted. In such circumstance, if there is no appeal against the sentence at the High or Appeal Court, the juvenile faces the risk of higher sentencing. It is a norm in the sentencing guide and powers that juveniles sentencing are less grave as compared to adults. For instance, the maximum sentence for juvenile in crime like robbery/arm robbery is 3 years when sentenced at the Juvenile Court. But if sentenced at the summary jurisdiction Court for the same offence, the juvenile could be given a maximum sentence of 25 years.

To sum up, there are very few constituted Juvenile Courts in Ghana and therefore most of the cases involving juveniles are tried by summary courts where the juvenile stands the risk of higher sentence if not transferred for sentencing at the Juvenile Court. However, some judges fail to refer the convicted juveniles for sentencing at the Juvenile Court; therefore I recommend that there should be more constituted Juvenile Courts in each region, and where they are tried by a summary court for any reason, the juvenile should be transferred to the Juvenile

[192] [1977] 1 GLR 373

Court for sentencing regardless of the distance, for interest of justice and also for the juvenile's interest and reformation.

2.2 Bails and Remand in Ghana

The right to the granting of bail whiles under police custody or remand waiting for trial in Ghana is codified under s. 96 of the Criminal and Other Offences (Procedure) Act 1960 (Act 30), as amended by s. 7 of Act 633.

Under s. 96 (1) (a) and (b) of the Act 30, it is established that:

> *"(1) Subject to the provisions of this section, a court may grant bail to any person who appears or is brought before it on any process or after being arrested without warrant, and who-*
> *(a) is prepared at any time or at any stage of the proceedings or after conviction pending an appeal to give bail, and*
> *(b) enters into a bond in the manner hereinafter provided, with or without a surety or sureties, conditioned for his appearance before that court or some other court at the time and place mentioned in the bond".*

Also under Article 14(4) of the 1992 Constitution, it is established that where a person arrested, restricted or detained is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against the person, he shall be released whether unconditionally or upon reasonable condi-

tions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial. Moreover, the cumulative effect of article 14(1) and 14(3) of the Constitution 1992, work on the premise that every person is generally entitled to his liberty except in specified cases, and that even where his liberty is so restricted under one or more of those cases, he must be produced before a court within forty-eight hours, or regain his liberty which is through the granting of bail.

For instance, in *Fynn & Anor v The Republic [1971]*[193], the two applicants were convicted on various counts of stealing and sentenced to 12 months and 2 years imprisonment respectively. They appealed the following day and applied for bail pending hearing and determination of the appeal. They argued that they were to be granted bail since the judgment was wrong in law and the sentences were so short that they might have finished serving them before the determination of the appeal. In this case the court set down four circumstances in which bail after conviction could be appropriately granted as follows:

(i) If there are exceptional or unusual grounds for the application.

(ii) If there is a likelihood of the appeal succeeding.

(iii) If it is a case such a nature where it would be of assistance for the preparing of a real case for appeal that the appellant should be free to confer with his counsel and prepare his appeal.

(iv) If having regard to the sentence there is going to be a considerable delay either in preparing the record of appeal or because of the long vacation and in consequence the hearing of the appeal is likely to be unduly delayed resulting in the appellant serving the whole or substantial portion of his sentence.

[193] [1971] 2 GLR 433.

In my opinion, the Court was perfectly right in the decision to sentence the defendants even though the defendants claimed they intended to appeal against the decision and therefore considering the sentencing duration the appeal might not be heard speedily. I think the Courts approach was an effective way and right procedure to incarcerate convicted accused and a convict can only be granted bail or released once an appeal has been ruled on their favour. Obviously, the second standing of the Court which is the likelihood of the appeal succeeding could not be a yardstick to release them on bail and in fact, the defendants had no *locus standi* to claim such a bail pending their appeal.

Another case worthy of mentioning is *Baiden v The Republic [1972]*[194], where the applicants were convicted by a High Court for perjury and sentenced to a term of imprisonment. The trial judge indicated that he was minded to grant bail pending appeal if such an application were made. The applicants therefore filed an appeal against the decision and brought the instant application. The court held that it would be farcical for a court that had convicted a person to grant bail pending appeal against its own judgment. Therefore a convicted person ought not to apply for bail pending appeal to the same court which made the conviction. The granting of bail is an issue in Ghana and sometimes unpredictable in certain offences because most times it is either unreasonably refused or granted by the court.

In *Okoe v The Republic [1976]*[195] , the applicant was charged with forcibly entering onto land with violence. His application for bail before trial was refused by the trial judge. He therefore applied for bail at the High Court pending his trial at the Circuit Court. His application was opposed by the prosecution. The issue was whether or not the applicant could be released on bail pending trial. It

[194] [1972] 2 GLR 174.
[195] [1976] 1 GLR 80.

was held that the applicant could be granted bail upon such conditions as were reasonable to secure his attendance at the trial if there is an issue of delay. Under the laws of Ghana, s. 96 of Act 30 as amended by NRCD 309 is the governing law on the grant of bail when there is no question of delay, but where there are questions of unreasonable delay in prosecuting the case then the relevant law is article 15(3) (h) and (4) of the Constitution 1969 [now Article 14(3) (b) and (4) of the Constitution, 1992]. On these facts, the applicant was prima facie entitled to bail.

It is further stipulated under s. 96 (2) to (6) regarding where the court may refuse to grant bails and therefore establishes that:

"(2) Notwithstanding anything in subsection (1) of this section or in section 15, but subject to the following provisions of this section, the High Court or a Circuit Court may in any case direct that any person be admitted to bail or that the bail required by a District Court or police officer be reduced.

(3) The amount and conditions of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive or harsh.

(4) A court shall not withhold or withdraw bail merely as a punishment.

(5) A court shall refuse to grant bail if it is satisfied that the defendant-

(a) may not appear to stand trial; or

(b) may interfere with any witness or evidence, or in any way hamper police investigations; or

(c) may commit a further offence when on bail; or

(d) is charged with an offence punishable by imprisonment exceeding six months which is alleged to have been committed while he was on bail.

(6) In considering whether it is likely that the defendant may not appear to stand trial the court shall take into account the following considerations-

(a) the nature of the accusation;

(b) the nature of the evidence in support of the accusation;

(c) the severity of the punishment which conviction will entail;

(d) whether the defendant, having been released on bail on any previous occasion, has willfully failed to comply with the conditions of any recognizance entered into by him on that occasion;

(e) whether or not the defendant has a fixed place of abode in Ghana, and is gainfully employed;

(f) whether the sureties are independent, of good character and of sufficient means"[196].

For instance in *Gorman v Republic [2003-2004]* [197] the five appellants and another were arraigned before a regional tribunal on narcotics related charges. They applied for bail and were granted it. The Attorney –General appealed against the grant of the bail. The Court of Appeal upheld the appeal and rescinded the bail earlier granted by the trial tribunal claiming the offences were serious and grave. The accused appealed to the Supreme Court and the Court unanimously dismissed the appeal by affirming the rescinded bail, that the presumption of innocence in article 19(2) of 1992 constitution was a necessary but not a sufficient ground for the grant of bail. Where in a Statute, bail is specifically disallowed; article 19(2) is not a bar to the application of that Statute, and in any case the grant of a bail is subject to judicial discretion. The Supreme Court in this case refused the grant of bail.

[196] See the Annotated Criminal and Other Offences (Procedure) Act of Ghana (Act 30) by Henrietta J.A.N. Mensa-Bonsu, pages 47-50.

[197] [2003-2004] 2 SCGLR 784.

In the case, of *Brefor v The Republic [1980]*[198], the applicant for bail had been charged with murder for allegedly firing an arrow into one of the two persons who had apparently stolen his goat. The victim of the shooting later died from his wounds, and in April 1976 the applicant was taken into police custody, where he was held for over three years pending his trial. Taylor J in this specific case denied bail because he did not think the delay was unreasonable.

In Ghana certain offences were prescribed by law as non-bailable and in such offences it was highly impossible to be granted a bail and shall be kept in remand throughout the proceedings of the case. This law has just been struck out by the Supreme Court of Ghana ruling on the Thursday 5th of May, 2016 which was a case brought up by a legal practitioner *Martin Kpebu v. Attorney General [2015]*[199]. The Supreme Court by a 5-2 decision struck out Ghana's law on non-bailable offences. The court described Section 96 (7) of Act 30 which has been in existence for nearly three decades, as "unconstitutional, and has therefore established that a court that has jurisdiction to try murder, rape, treason, piracy, defilement, narcotic, among other crimes has jurisdiction to grant bail. This is why many accused are kept in remand for months and years even though quite a number of such cases lack the substantial evidence to convict the accused. Under s.96 (7) (a) and (b) of the Act 30, it is enacted that:

> *"(7) A court shall refuse to grant bail-*
> *(a) in a case of treason, subversion, murder, robbery, hijacking, piracy, rape and defilement or escape from lawful custody; or [As amended by the Criminal Procedure Code (Amendment) Act, 2002*

[198] [1980] GLR 679
[199] [2015] Ghana Supreme Court Ruling at Accra on the 5th of May 2016.

(Act 633), s. (7)].

(b) where a person is being held for extradition to a foreign country".

For example in *Abiam v The Republic [1976]*[200], the applicant had been charged with attempted murder, and applied for bail. The respondent objected on grounds of NRCD 309, s. 97(7). It was held that attempted murder was not included in the offence of murder and so prohibition did not cover it, and above all, applicant was in ill-health, bail was granted. But in *Boateng v Republic [1976]*[201], the applicant applied for bail whilst standing trial on a charge of stealing cocoa, but bail was prohibited.

Another case that confirms the charge of murder as non-bailable was in The *Republic v Arthur [1982-83]*[202], where the application was refused by the court. Meanwhile a bail was granted in a murder charge case under section 96(3), supported with an affidavit by which they denied ever committing the offence charged, where the prosecution did not file any affidavit in opposition in *Prah & Ors. v. The Republic [1976]*[203]. In this case it was held that under s. 96(7) (a), a person properly charged with the offence of murder could not be granted bail. However, the applicants denied ever committing the crime which the prosecution could not opposed, and evidence did not support the fact that they had committed any offence.

It is quite interesting to note that sometimes cases classified as non-bailable by statutes are influenced by the executive organ of government to grant bail by the courts, and whereby the judiciary/judge is not bold to turn such demands

[200] [1976] 1 GLR 270.
[201] [1976] 2 GLR 444.
[202] [1982-83] GLR 249.
[203] [1976] 2 GLR 278.

down, justice can never be said to have been served. *In Dogbe v The Republic [1976]*[204], the applicants who were on trial for murder, applied to a High Court for bail and had been refused twice. They therefore petitioned the Head of State and the Attorney-General (AG). They consequently recommended in a letter to the court that on account of the fact that four out of the seventeen accused persons were of old age and ill health, it should grant them bail despite the fact that the court had no discretion to do so under the provision of NRCD 309. The court held that no-one could exercise that influence on the court during the exercise of its discretionary power. That the AG could influence the trial process by *nolle prosequi* but not by writing his views to the court, and the Head of State through enacting a decree, but the court shall not shunt aside a statute and operate outside its framework and that the provisions of s. 96 of the Act 30 as amended by NRCD is imperative and mandatory.

Bails and remand for juveniles are dealt differently. Under s. 60 of Act 653, a juvenile is a child below 18 years, and a "younger offender or person" is one who is 18 or above 18 but is under 21 years. Under s.21 of the Act 653, a juvenile charged with an offence may be released on bail. Bail for a juvenile may be executed by the juvenile's parent or guardian. Where a juvenile is charged with an offence and he pleads not guilty to the charge but the court is of the view that the juvenile should be kept in custody, the proper order is to commit him under s.23 of the Act 653, to the care of the parents or guardian or to a remand home. A case in point is *Osei v The Republic [1971]*[205], where the High Court held that a remand order by a Juvenile Court against a juvenile school girl who pleaded not guilty to the offence of acts tending to disturb the peace, an offence not punishable by imprisonment, was "a most unfortunate exercise of discretion

[204] [1976] 2 GLR 82.
[205] [1971] 1 GLR 341.

and an abuse of discretion bordering on a reckless failure [of the courts] to do their duty…" the juvenile was accordingly admitted to bail and committed to the care of her mother. It suggests that since all offences are now bailable in Ghana, suspected offenders who have been kept under remand custody for more than 3 years should be granted bail, and those cases without substantial evidence for conviction of the accused should certainly be released and set free. Also, young offender's deserving of bail without parental care or guardian should be kept at special centres or homes.

2.2.1 Legal Aid in Ghana

In Ghana, the accused does not have a mandatory pre-trial right to legal representation. Legal representation is the single most important requirement for securing any meaningful balance between the state and the suspect at the pre-trial stage. For instance, according to James Krumrey-Quinn[206], fundamental to preventing the effects of resource differential between an indigent defendant and government-funded prosecution is the right to free legal representation as contained in the constitution of Ghana[207], however in practice not in an existence because it is not mandatory and judges have refused to enforce it. In practice the

[206] Law Graduate, University of Adelaide: on the Title: *Enhancing 'Access to Justice': Recognition of Informal Criminal Justice Mechanisms in International Human Rights Law;* on a paper submitted for assessment as part of the Human Rights Internship Programme undertaken over two months in 2010-11 at the Commonwealth Human Rights Initiative (CHRI) in Accra, Ghana, by the LAW FOUNDATION OF SOUTH AUSTRALIA LAW & JUSTICE ESSAY PRIZE FOR TERTIARY STUDENTS.

[207] Constitution of Ghana 1992 Article 294; and Legal Aid Scheme Act 1997 (Act 542) of Ghana.

impact of legal aid in Ghana is minimal[208] — a situation observed throughout African criminal justice systems[209] . According to the research, as of 2009, the State-funded legal aid provider, the Legal Aid Scheme ('LAS'), provided legal aid services to merely 737 suspects, constituting 11.15% of all cases (civil and criminal) dealt with by the LAS[210]. The review shows that a number of interrelated reasons explain this poor outreach of legal aid services in Ghana, chief amongst which is poor government funding. It revealed that in 2011 the LAS expected to have received GHS 716,000 or AU$ 471,000 in funding[211]. Within this sum was to be included not only staff salaries, but also building expenses and maintenance. Consequently, the Scheme employs only 16 lawyers full-time and a further 27 private lawyers on a part-time basis across a country of almost 24.8 million people[212] even as at 2015. In fact, these figures are on a steady decline owing to the low pecuniary incentives, especially for the expenses of private lawyers contracted by the LAS.

During my personal interview with the Ghana Legal Aid director in July 2015, it was discovered that the legal aid scheme provided legal assistance in 2013 to 6,750 cases which comprises of both criminal and civil; and in the year 2014, 8,321 cases (criminal and civil) were handled by the legal aid board under the Legal Aid Scheme Act, 1997 (Act 542). The scheme as at July 2015 had full time 19 advocates in the entire nation. Sometimes, cases are taken by other pri-

[208] In fact, in interviews undertaken by Stanford University PhD candidate from Ghana, Renee Aku Sitsofe Morhe, in her thesis on legal aid in Ghana (the only available academic literature on the topic) 74.2% of private lawyers acknowledged that legal aid in Ghana was ineffective: Renee Aku Sitsofe Morhe, Legal Aid in the Criminal Justice System, (unpublished JSM thesis, Stanford Law School, 2007).

[209] See, example, Baker, above n 10.

[210] Legal Aid Scheme Annual Report (2009).

[211] Interview with AY Seini, Director of Legal Aid Scheme, Ghana (Accra, 17 February 2011).

[212] Ibid. For statistics on Ghana, including population, see Central intelligence Agency, Ghana (16 March 2011) World Fact book <https://www.cia.gov/library/publications/the-worldfactbook/geos/gh.html>.

vate legal practitioners on pro bono as they are referred to them by judges at the court hearing in occasions, and are paid 20% of the bar professional legal fees for any case dealt after their claim has been submitted. There are other non-governmental organizations in Ghana which provide legal aid alongside the government funded scheme like the Legal Resources Centre (LRC) which provide legal aid to the indigents, and also through alternate dispute resolution. Help Law Ghana is another non-governmental organization providing legal aid to indigents in Ghana. Unfortunately, I could not obtain their statistical data to know the cases dealt with through their legal representation in Ghana.

The Ghana Legal Aid Scheme has a **Means Test** form to identify those that indeed requires legal representation for the interest of justice but cannot afford to pay for a service of an advocate. The Means Test form examines whether the accused or the person in need of funding is employed or unemployed, and the amount earned by the applicant. Under s.2 (1) and (2) to (3) of the Legal Aid Scheme Act, 1997 which deals with persons entitled to legal aid in Ghana, establishes that:

> *"(1) For the purposes of enforcing a provision of the Constitution, a person is entitled to legal aid in connection with the proceedings relating to the Constitution if that person has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings.*
> *(2) A person shall be entitled to legal aid-*
> *(a) if that person earns the Government minimum wage or less and desires legal representation in any-(i) criminal matter; or*

Obviously, the failure of the state to provide the accused with legal aid during their criminal pre and trial proceedings fails to provide the accused representation and hence, contribute to violation of fair trial, since what matters in the interest of justice in the stages of trial and proceedings is not the outcome of the judgment but the procedure fairness and justice.

A Comparative Analysis of the Legal Aid Schemes (LAS) in Tanzania and Ghana[213] expresses that the right of free access to courts should be enjoyed without any impediments, yet in Ghana and Tanzania the barriers impeding access to justice are high cost of court fees, expensive services from advocates and technicalities of court procedures, unfamiliarity with court language, unfriendly court environment and court being located far from the people. The Ghana Legal Aid Board (GLAB) is not able to provide assistance to the majority of the criminal accused, meanwhile, many facing criminal charges under the domestic law, do not know how, where and when to seek counsel due to illiteracy and above all economic constraints discourages the accused from requesting a legal counsel. Nevertheless, the police, the prosecutors and judges know that such a provision and a facility to the accused is a constitutional right of the accused which is a pre-emptive factor, and therefore when denied, hamper justice and violates the right in question. Many innocent people are found guilty due to the fact that they could not explain themselves at the court which is due to the mere fact that they lack legal representation. This albeit contributes to the self-incriminating of the accused and results to unfair trials.

[213] Charles Joseph Mmbando's LLM dissertation (Human Rights and Democratization in Africa), on the title: Towards the Realization of the Right of access to Justice.

The Article 14(3) (b) of the International Covenant on Civil and Political Rights of which Ghana is a signatory has not been given a practical recognition by the legal system of Ghana. Though the same wording has been reproduced in the constitution Article 19(2) (e)[214] which establishes that a person charged with a criminal offence shall be given adequate time and facilities for the preparation of their defence. This applies where the Means Test has been practically tested and the defendant qualified for a legal representation at the expense of the state; but its application in the judicial interpretation is very weak. When cases are being tried, judges do not insist on the need to provide the criminally accused person of any free legal representation whose duty is to be sure that the accused has been equipped with every necessary facility needed for his defence. For example, in the European Countries, where the international instrument has been properly interpreted in the judicial system, when someone is involved in a criminal case requiring numerous proceedings, the first question the court ask the individual involved in the case is do you have a lawyer? If the answer is no, then the court will show the individual the means to solicit for a state lawyer for free[215]. This means in certain courts, the individual will not be accepted to be standing to defend himself without a legal representation, for the interest of justice. This is not the case in Ghana, and it's relevant in case law has been naïve. A case in point is the African Commission on Human and Peoples' Rights (ACHPR) which frequently deals with instances where civilians are tried by military tribunals for serious crimes in Africa without legal representation. The ACHPR has held that on the face of it military courts do not satisfy civilians'

[214] Fourth Republican Constitution 1992 of Ghana

[215] Even in many countries such as the Netherlands, Germany, Spain, Italy, United Kingdom, depending on the gravity of the case, legal representatives and interpreters are provided automatically to the accused, for the interest of justice.

right to a fair trial (*see Constitutional Rights Project v. Nigeria (1993/1998[216])*). In this respect the ACHPR has reaffirmed the right to counsel as essential in guaranteeing a fair trial. The ACHPR held that individuals have the right to choose their own counsel and that giving the military tribunal the right to veto a counsel violates the right to a fair trial. This right as it is stated in the constitution of Ghana is an empty declaratory as it expresses the need for a legal representation of the accused by a counsel, but does not make sure the accused is given one. The system lacks the mechanisms to ensure its realization. The lack of legal representation and inadequate provision of legal aid represents grave inequality in the criminal system. Any legal system that fails to provide legal assistance, denies suspects access to efficient and effective legal process and procedures which is inconsistent with the rule of law and the values of democracy. Therefore the fourth republican 1992 constitution of Ghana to some extent runs counter to the principle of equality of arms between the prosecution and the accused. If the accused is unrepresented in the legal proceedings, then this gravely violate the principle of equality of the law. It has been established by Ramirez and Ronner that:

"The response in the Anglo-American jurisdictions to the indigent, and hence undefended accused, has been the provision of free legal assistance to certain classes of accused to ensure, by placing the accused on an equal footing with the prosecution, a fair trial."[217]

When it comes to the defending of the accused, the hand of a lawyer as a counsel services as a guide and therefore unrepresented accuse faces the risk of improper conviction.

[216] Comm. No. 102/93 (1998).

[217] See Ramirez & Ronner "Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment" 2004 California Western Law Review 103 142-144; and Steytler "The Undefended Accused 10-11".

Again, at the pre-trial stage, while confessions made to the police should be confirmed by a judicial officer, this is not really a foolproof system. The requirement for confirmation is meant to ensure that the confession is voluntary made and obtained without coercion or duress. It must be noted that it is the police who take the suspect to the judicial officer for confessions and this very suspect is handed back to the police after confession. So, it is not a surprise that most suspects give a false confession due to the threats of the police operating in the mind of the suspect. Even there are instances when suspects are severely beaten by the police, and for that matter, for fear of subsequent beating and harassment in the custody of the police, formulate stories and make false confessions which are sometimes full of inconsistencies and discrepancies in Ghana. Moreover, the investigation of crime is a sole-enterprise process that is monopolized by the state during which the defendants are kept under the custody of the police. As a common practice in Ghana and many African countries, investigations are conducted by the police with almost no judicial involvement. When the police investigate crime, their intention is to build up a case that will result in a conviction[218]. Such a mechanism is apparently convincing when it is clear that an offence has been committed and, perhaps, a suspect identified. Notwithstanding, the intention of the police is to get sufficient information to convict the suspect and not necessarily to find the truth, and as a result, miscarriages of justice and wrongful convictions are bound to occur[219]. This is not a

[218] Van Koppen & Penrod Adversarial or Inquisitorial: Comparing Systems in Van Koppen & Penrod (eds) Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems (2003) 1 2; McEwan Evidence and the Adversarial Process (1998) 2; Crombag Adversarial or Inquisitorial: Do We Have A Choice? in Van Koppen & Penrod (eds) Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems (2003) 21 22; Safferling towards an International Criminal Procedure (2001) 266.

[219] Rowland James Victor Cole: Equality of Arms and Aspects of the Right to A Fair Criminal Trial in Botswana, March 2010, Thesis at Stellenbosch University.

procedurally fair as the suspect nor does their legal counsel take part in the investigations process but the state prosecutor alone. The state may seize documents, interview witnesses and obtain incriminating evidence in the absence of and without the participation of the suspect, and the suspect may have little knowledge of the information collected during the investigation. However, the police may interrogate him and he is generally expected to answer questions put to him. This in the actual sense is unfair. The present investigative system in Ghana is police-dominated or the Bureau of National Investigations (BNI)[220] and limits the possibility of early judicial and prosecutorial control of the pre-trial process. In Ghana, suspects usually do not have the resources or the power to investigate crime. Even attempts by the accused to interview possible witnesses or obtain relevant document or other evidence might well be interpreted as interference with the investigation process which could be stopped by court injunction order, handled as contempt.

The fact remains that disclosure is made after the state has collected all its evidence and has proffered charges. Therefore, the accused is deprived of accessing the information at the earliest opportunity. The legislature and courts should now take the matter one step further by determining that suspects are able to access information, so that they are able to prepare for their case as the prosecution prepares for theirs. Whereas it might be argued that this will only allow the suspect to tailor and fabricate his evidence, this argument cannot really hold.

An equally important inefficiency worthy of mentioning in Ghana which subjects the criminally accused and suspects into discontent is arrest, detention, and trial procedure in all the stages of the trial. On Trial Procedures in Ghana ac-

[220] The BNI is the internal intelligence agency of Ghana, is legally a creature of The Security and Intelligence Agencies Act (Act 526) 1996 having been continued in existence by section 10 of that Act.

cording to Ghana Human Rights Report, 2010/2011[221], and also the 2014 report[222] the constitution provide for the right to a fair trial, and the judiciary generally enforces this right; however, the report confirms the judiciary to be "sometimes inefficient and subject to influence and corruption." Defendants on trials are to be represented by an attorney or the right to a lawyer at state expense if unemployed or indigent[223] as mentioned above but this is not the case in Ghana. Only those who can afford to hire a lawyer are represented because reliance on legal aid is a problem in Ghana. Under the Arrest Procedures and Treatment While in Detention, the constitution 1992 of Ghana and law provide for protection against arbitrary arrest and the law requires judicial warrants for arrest and provides for arraignment within 48 hours[224]; however, many people were frequently arrested without warrants, and detention without charge for periods longer than 48 hours occurred. For example, Officials detained some prisoners for indefinite periods by renewing warrants or by simply allowing them to lapse while an investigation was conducted. The law requires that a detainee who has not been tried within a "reasonable time" as determined by the court be released either unconditionally or subject to conditions necessary to ensure that the person will appear in court at a later date; however, in practice, this provision was rarely observed, the government frequently violated these prohibitions[225].

[221] The United States Department of State Diplomacy in Action: Bureau of Democracy, Human Rights and Labor Country Reports on Human Rights Practices for 2010/2011 of Ghana.
[222] Ghana -Country Reports on Human Rights Practices for 2014 United States Department of State • Bureau of Democracy, Human Rights and Labor.
[223] This is part of the Country Report on Human Rights Practices 2011 of Ghana.
[224] Constitution of Ghana 1992 art 14(3); Criminal and Other Offence (Procedure) Act 1960 s 15(1).
[225] For instance in September 2010 a man was granted bail after spending 10 years in detention in Ghana: Country Reports on Human Rights Practices for 2011 United States Department of State • Bureau of Democracy, Human Rights and Labor.

Also, in *Alhassan Abubakar v. Ghana {2000}*[226], which was decided by the African Commission in 1996, the commission held that the petitioner's detention for seven years without trial exceeded the reasonable time standard and was, therefore, a violation of Articles 6 and 7(1)(d) of the ACHPR.

Again, lengthy pretrial detention remained a serious problem in Ghana. According to the Prisons Service 2010 Annual Report, 25 percent of the prison population was in pretrial status. In 2015, 19%[227] of the prisons population is awaiting trial. Detainees sometimes served more time in detention awaiting trial than the maximum sentence for the crime required. During the year 2010[228] prison officials, courts, and police continued efforts to reconstruct the files of at least 300 pretrial inmates; the files had been missing since at least 2007, and even as at July –September 2015 dockets of some pretrial inmates are still missing and therefore cannot be tried until the police and the prosecution department are able to reconstruct the files/dockets[229].

Furthermore, while exclusionary (*a law that prohibits the use of illegally obtained evidence in a criminal trial)* rules serve to exclude evidence obtained by unfair means; the general rule in Ghana is that all relevant evidence, except confessions, is admissible no matter how it was obtained. It is vitally important that the accused be incorporated into the investigation process. Active participation of the suspect during investigations is required. For an example, searches and seizures should be made in his presence when possible, and not only when

[226] African Commission on Human and Peoples' Rights: Comm. No.103/93, (2000) AHRLR 124 (ACHPR 1994).

[227] My personal interview with Superintendent Charles Amenyaw at the Ghana Prisons Headquarters –Accra in July 2015.

[228] The available recent data: Prisons Service 2010 Annual Report of Ghana.

[229] This was confirmed by pre-trial inmates at the Sunyani prisons in July 2015 during a research stay in Ghana, and also from the legal and paralegal department of the Ghana Prisons Headquarters, Accra.

the police require him to point out incriminating evidence. Without any doubt, the activities of the prosecutors regarding investigations of suspects need the involvement of the judiciary to be more active to intervene during the pre-trial process. Suspects should be able to approach the courts when unfair processes are resorted to during investigation.

The summary of the main issues mentioned under the Ghana legal aid frame-work and recommendations for its improvement is that, there is poor outreach of legal aid services and poor funding from the government and therefore legal aid works very little. Again, I think that many innocent criminal suspects are found guilty at the courts in Ghana due to the fact that they could not explain and present their case for lack of legal representation, albeit contributing to self-incrimination and abuse of process. The police in Ghana at the pre-trial stage and investigation forcibly draw statement facts and confession from the criminal suspect under coercion, duress and harassment. I therefore recommend that the accused that fulfills the legal aid Means Test should be provided with the services of a counsel to guide and represent them to avoid them facing the risk of improper conviction. Moreover, the police should be made culpable if they fail to respect the rights of the accused such as to remain silence and protection against self-incrimination for the interest of justice and fairness.

Further, the police should be trained and equipped for proper way to investigate crime without resort to beating and coercion of the suspect. Finally, police investigations and interactions with the criminal suspects must be video recorded.

2.3.0. The Specific Rights of the Defence

This section of the dissertation is elected to deal with the trial stage and procedural rights of the defence to fair trial as it pertains in Ghana. It is not meant to discuss all procedural rights but the most pertinent which I see as a problem and violated right in Ghana criminal procedure. Such shall briefly include: right to disclosure of documents to the defence, right to legal representation, privilege against self-incrimination, right to presumption of innocence, the right to testify or to remain silent, right to be tried without undue delay, right to be tried in his presence, right to call witnesses and to cross-examine witnesses, right to have the free assistance of an interpreter if he cannot understand or speak the language used in court, and post- trial rights such as appeals and double jeopardy.

2.3.1 Right to Disclosure of Documents to the Defence

The inefficiency of the constitution and the criminal Procedure Code to protect the accused is also clear on the principles regulating the disclosure of documents to the defence. According to the review by Seth Awuku[230] on the issue of "disclosure in our criminal trial process", he raised up two important issues like: Does the Supreme law of the land, the 1992 Constitution of Ghana, prohibit the disclosure of information to the defence prior to the commencement of a criminal summary trial? Is the domestic criminal trial procedure abreast with the best international practices and standards?

In the Article he sadly expressed that, in the criminal justice system of Ghana, the Attorney General, per its representative, the police and prosecution, refuses

[230] Barrister & Solicitor in Ghana: Article written on the issue of "disclosure in our criminal trial process" published by the Daily Guide on the 24th September 2011.

to disclose information and documents to the defence for the preparation of defence prior to the commencement of a criminal trial. He therefore expressed that the *Ghana Bar Association (GBA),* in conjunction with the *Law Reform Commission (LRC),* must therefore take a critical look at Article 19(2) (e) of the 1992 Constitution and call for reform of the Criminal Procedure Code that would afford judicially enforceable rights to the accused person in a criminal trial. As established in indictable offences and under both sections 181 and 182 of the Criminal Procedure Code 1960 (Act 30), it establishes that:

> *"the prosecution shall furnish the Court and the accused with*
>
> *(a) a bill of indictment which shall state in writing the charge against the accused, and*
>
> *(b) a summary of the evidence against the accused which shall comprise a list of the witnesses who the prosecution proposes to call at the trial and a summary of the evidence to be given by each witness and a list of the documents and things it proposes to put in evidence at the trial*[231].

Unfortunately, this is not so in summary trials where such trials constitute the majority. Rather, the functions of cross-examination and examination in chief become the principal method to gather information, test the credibility and reliability of witnesses and the prosecution's exhibits. Clearly, this causes unnecessary delays, offends the constitutional principle of fair trial, trial within a reasonable time and equality before the court. This therefore is a weakness and a shortcoming which does not guarantee fair trial and more so provide not a rem-

[231] S. 182 of Act 30 (1960)

edy to its infringement. Disclosure is a means of promoting equality of arms between the prosecution and the accused and hence this should not be compromised. Though during the trial process, the defence may make an application for copies of all documents tendered at trial; regrettably, such application in the middle of trial does not allow the defence to adequately prepare their case against the state or the prosecution. Therefore the criminal trial in Ghana is not in conformity with international standards of fairness and efficiency in the administration of justice.

Comparatively, in jurisdictions like the United Kingdom, the Criminal Courts there apply a test whether disclosure is necessary in summary trials. In that jurisdiction, the test to disclose information to the defence prior to commencement of a summary trial is whether in the interests of justice it will be necessary to provide the defence with disclosure of documents in the hands of the prosecution. In that jurisdiction, the Supreme Court in the case of *Director of Public Prosecution v Gary Doyle {1994}*[232] identified four factors as possibly relevant to the court's decision in disclosing information to the defence prior to trial:

a) The seriousness of the charge.

b) The importance of the statements or documents.

c) The fact that the accused has already been adequately informed of the nature and substance of the accusation;

d) The likelihood that there is no risk of injustice in failing to furnish the statements or documents in issue to the accused. This is a good practice that would avoid preventable injustice and abuse regarding disclosure to the defence, and I think that it would improve the Ghana system in determining whether to dis-

[232] *{1994} 2IR 286.*

close or not by considering the above four factors mentioned, in order to avoid repeated risk of injustice.

In the Ghanaian jurisdiction, a person charged with the summary offence of robbery, for instance, can easily get the maximum of 25 years in jail sentence, if convicted. Yet in the interest of justice, the defendant in the criminal trial will not be given a pre-trial disclosure documents to prepare a defence which serves as a component of his right to life, liberty and to make full answer and defence to any charges leveled against him/her.

Apart from the prosecutions duty to disclose in an indictable offence as codified in Ghana, the defence also has a similar obligation to disclose to the court and the prosecution any material evidence or witnesses to testify during the trial. Against this general trend of authority, the Supreme Court in one case held to the contrary, namely that non-disclosure of a defence in certain circumstances can have a conclusive adverse effect on the veracity of the story of the accused. An example was in the case of *Atiemo v Commissioner of Police [1963]*[233] where the accused had three opportunities to raise his defence, namely:

(i) On the occasion of his arrest;

(ii) In two voluntary statements he made to the police; and

(iii) Through cross-examination at the trial.

The Supreme Court held that not having availed himself of any of those opportunities to disclose, who have a conclusive effect, and therefore faced with the two conflicting situations, the district court may opt for one or the other but reasons should be stated for the stand taken as directed in *Akpawey v The State [1965]*[234]. In this wise, prosecutors must observe that in dealing with the ac-

[233] [1963] 1 GLR 177, SC.
[234] [1965] GLR 661, SC.

cused during the pre-trial stage for interest of justice. It would be of great interest for the prosecutor with regards to disclosure and interest of justice in criminal proceedings to ensure:

a)That the accused has been given a copy of the charge sheet, police investigative report, witness statement and all other relevant document against him in the prosecution.

b) That the accused has been advised of his right to request for facilities for the preparation of his defence.

c) Upon request to the prosecutor, the accused is entitled to be provided with all relevant facilities before being called upon to plead to the charge of an indictable/summary offence.

d)That the accused has received upon payment of the required statutory fee, a copy of the charge sheet, police investigative report, his own statement and other relevant document, and

e) The term 'facilities' should in our Criminal Procedure Code be defined as all relevant documents in the possession of the prosecution and the police that may aid a person charged with an offence to prepare for his defence.

In the ICCPR Article 14(3) (b), it is stated that:

> *"A person charged with a criminal offence shall have the rights to adequate time and facilities for the preparation of his defence with counsel of his choosing"*.

This international legal instrument has found its way in Articles 19(2) (e) of the 1992 Constitution of Ghana which provides that:

"A person charged with a criminal offence by a court shall be given adequate time and facilities for the preparation of his defense".

Which means the following elements must be complied with prior to mounting a defence to a charge:

- The person must be charged by a court.
- The person charged must be given adequate time.
- The person charged must be given facilities.

The Problem is that an attentive reading of the 1992 constitution and the international legal instrument does not define the word ***'facilities'*** that should be provided to the person charged in order to prepare his defence as contained in the said provisions; neither has our Criminal Procedure Code been amended in accordance with the word ***'facilities'*** that should be provided to a person charged as contained in Article 19(2) (e) of the 1992 constitution of Ghana.

However, according to the ***Lawyers Committee for Human Rights***: A basic guide for legal standards and practice, 2000, the term ***'facilities',*** as contained in Article 14(3) (b) of the ICCPR and borrowed into Article 19(2)(e) of the 1992 Constitution, has been defined. It provides that the term ***'facilities'*** within Article 14(3) (b) of the ICCPR means that a defence counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defence and the defendant must be provided with facilities enabling communication, and confidentiality with defence counsel.

The above analysis vehemently shows that the functionality of these provisions is not real and available to those accused who cannot afford the cost of a private legal counsel since the state does not provide most a times with the excuse that

the state cannot afford due to lack of resources. And no doubt failure of the state and the legal system to provide the accused in criminal proceedings such ***"facilities"*** hampers and impedes fair trial.

More importantly, the work of Victor Cole[235] on a title: "*Equality of Arms and Aspects of the Right to A Fair Criminal Trial in Botswana"* reviews that equality of arms, a central feature of medieval trial by combat, seems to have disappeared from modern criminal procedural systems. He questioned whether criminal justice systems sufficiently cater for the fair trial of accused persons and argues that the present legal and institutional framework for the protection of fair trial rights in Botswana falls short of guaranteeing procedural equality[236].

This inconsistency of the institutional framework in Ghana and Africa as a whole spotted by Cole reflects to the work of Dr. Michael Wabwile's articles of ***"The Place of English Law in Kenya"***[237] which explains when and where the imported laws (English Law) becomes necessary in the judicial processes in Kenya and for that matter Ghana, and "***The Future of the Common Law in Kenya"***[238] which also emphasis on the **Anton Piller Orders** of the protection of the defendants and full disclosure which is a precondition to aid the administration of justice a real concern and significant to every legal scholar to expect the 'image' of the criminal procedure of the English system in Ghana and Africa as a whole, though the English system is not holistically free from criticisms, the positive aspects should of cause reflect each other.

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[235] Rowland James Victor Cole: March 2010, Thesis presented for the degree of Doctor of Law at Stellenbosch University.

[236] See reference at 143 on the work of Victor Cole: March 2010.

[237] DR. MICHAEL NYONGESA WABWILE: "The Place of English Law in Kenya" Oxford University Commonwealth Law Journal Vol. 3 Number 1 summer 2003, pg. 51-80.

[238] DR. MICHAEL NYONGESA WABWILE: 'The Future of the Common Law in Kenya", Eastern Africa law Review Vol. 20-27, May 2002 pg. 20-32; 'Anton Piller Orders Revisited' Journal of Business Law September 2000 pg. 387-404.

Meanwhile it is surprising to notice why few cases have been submitted to the *African Commission* or the *Human Rights Court* by Ghana though the abuse of the right to fair trial is of rampant. Another case worthy of mentioning is an individual complaint case decided by the African Commission in *Alhassan Abubakar v. Ghana* (supra) which was detention for seven years without trial exceeding the reasonable time standard in violation of Articles 6 and 7(1)(d) of the ACHPR. During the period of pre-trial stages where the accused is under detention, their right to presumption of innocence should be carefully upheld until a court of law legally finds the accused guilty, than the stigmatization of the accused defendant in order to avoid the pre-conception that the accused is undeserving of any right.

The failure of the Ghana criminal system and procedure to ensure the disclosure of documents by making it an obligation for interest of justice to the defence in summary trial is not fair and a good practice. The key summary of the issue regarding the accused right to disclosure of documents for their defence is that the Ghana domestic legal procedure is not abreast with the international standards of the right to disclosure of documents to the accused, and where applicable, disclosure to the defence is made discretional to the prosecutor/ judge. In view of this I recommend that disclosure of documents to the defence in Ghana in all trials should be enforced as a right and not a discretional issue, except for public interest.

2.3.2 Right to Legal Representation and Defence

Under article 19 (2) of the 1992 Constitution, it is established that:

> *"a person charged with a criminal offence shall be permitted to defend himself before the court in person or by a lawyer of his choice".*

It is the right procedure that after the court has recorded the prosecutor's facts and charges of the accused; the accused is also given the opportunity to explain what he known about the charge. This is the only way by which the magistrate will be able be determine whether or not the explanation of the accused warrants the entry of a plea of not guilty or guilty to the charge. For interest of justice, failure to hear the accused renders the trial irregular since it will be against the elementary principle of natural justice. Such a failure may result in a miscarriage of justice in that it will prevent the appellate or superior judicial officer from determining the circumstances which led to the conviction or acquittal of the accused[239]. In *Mensuo v the Republic [1971]* [240]the accused was charged and convicted without hearing him or his defence. He was sentenced to two years' imprisonment by a district court grade II. On appeal, Mensa Boison J said:

> *"What actually took place in the court has hardly been known in the annals of legal history, in that from the start to finish the accused was never heard in his defence or asked to show cause why".*

The clear illustration of the court convicting an accused without hearing the prosecutor's facts or the accused explanation and the effect of such conviction

[239] See B.A. Brobbey on Practice and Procedure in the Trial Courts and Tribunals in Ghana, page 83-85.
[240] [1971] 2 GLR 30 at 31.

has been established in *Atinga Frafra v The Republic [1968]*[241]. There is a procedure after hearing the accused's explanation and where the accused pleads guilty to the charge and therefore if the charge/s warrants conviction, then the court may proceed to conviction but where the accused pleads "not guilty", however the procedure to be adopted is laid under s. 172 of Act 30 which makes the taken of evidence and cross-examination mandatory as in *Forson v The Republic [1976]* [242]and further procedure explained in *Ewudzi v Dason [1957]*[243].

Actually a genuine plea of guilty to a charge is said to amount to a judicial confession to having committed the offence but such a plea obviates the necessity for a trial or proof of the charge by the prosecution.

Moreover, special attention should be paid to s.199 (4) of Act 30, which was explained in the *Republic v Bright [1974]*[244] to mean that whenever an accused person pleads guilty to a charge but adds words in explanation (this normally happens mostly when the accused are alone in court without a legal representation) indicating that he might have a defence to the offence charged, the trial court is under a legal obligation to enter a plea of not guilty on his behalf for the case to be contested on its merits. An example is the case of *Zabrama (Alpha) v The Republic [1976]*[245].

In instances where the accused person by his behaviour makes it impossible for the magistrate to determine meaningfully whether or not he is unequivocally guilty, a difficult situation arises and in such cases as indicated in the *Republic v Bright (supra)*, the magistrate should perform his duty by entering plea of not

[241] [1968] GLR 85.
[242] [1976] 1 GLR 138.
[243] [1957] 3 WALR 82.
[244] [1974] 2 GLR 12.
[245] [1976] 1 GLR 291.

guilty. An example is where an accused, which appears in court, fuming with anger, is asked why he pleads guilty and all he says is:

> *"Your Worship, I have no time. I say I am guilty, no more. Do what you like with me. I am fed up with you people"*

It is frustrating when an accused who cannot express himself properly in English language in court without a legal representation is compelled to defend himself without even understanding the whole trial proceeding. This is where the article 19(2) (f) in the 1992 Constitution should be given effect by providing a legal aid lawyer of the accused choice to defend him and where the accused has no means to pay for the cost, the legal aid should finance the accused for free for interest of justice but unfortunately, this is not the case in Ghana.

The recent case of *Charles Antwi v The Republic [2015]* (unreported) indicate that procedural right to legal representation is not even respected by some judges in Ghana. The accused (36 year old) was arrested on the 26th July 2015 for possession of a locally made pistol at the Ring way Assemblies of God Church where the President of Ghana worships. The accused in an interrogation and interview by the police confesses that he wanted to assassinate the President so that he could become the President. He was charged for an unlawful possession of firearm. The defendant was not given any legal counsel upon his arrest, and was sent to court on the 28th of July which was two days after his arrest. He confessed planning to kill the President of the state, and immediately, an Accra Circuit Court judge found him guilty of unlawful possession of firearm and sentenced him to 10 years imprisonment. In fact, it was the accused first appearance at the Court and the trial lasted minutes before he was jailed for 10 years without a representation. The fact of the case indicated that the accused was not

mentally sound. After the sentence, the case became a public interest issue and a human rights private lawyer appealed against the sentence praying the Human Rights High Court to set aside the sentencing of Charles who was given a 10-year jail term.

It is interesting that the State, however, appeared to be backtracking after it pushed for his sentencing following his confession. The Attorney -General also filed an application asking the High Court to overturn the ruling of the Circuit Court. According to the Director of Public Prosecution at the Attorney-General's office, the convict, Charles Antwi, was on the day of his conviction sent to court to be only remanded in lawful custody for further investigations. The Human Right Court on appeal quashed the decision of the Circuit Court on Monday, August 31, 2015, following a medical examination of the accused. According to (Chief Psychiatrist) report, an initial examination of the accused proved that he was mentally sick, and therefore the accused was released on the 7th September 2015[246], and has been committed to the Accra Psychiatric hospital for treatment.

Following Charles case, a lawyer and academic Professor Steven Kwaku Asare is pushing for the dismissal of the judge who sat on the case at the Circuit Court describing his sentence as "reckless".

It is of no doubt that if the accused had been given a legal representation, it would not have resulted to such a miscarriage of justice. The denial of the accused a representation, from the facts of the proceedings, also indicates a violation of his right of the privilege against self-incrimination. For the interest of justice, legal representation in the case was a desirable. There was a substantial question of law, and above all, the defendant was under a mental disability,

[246] General News of Monday 7th September 2015.

with inadequate knowledge to understand and follow proceedings or put his case forward without representation. The above unpardonable incidence demonstrates that some judges do not respect the procedural rights of the accused. The sad thing is that the judge who ruled on the case was a High Court judge sitting at the Circuit Court, so it was not a matter of inexperience but a disparaging intentional and abuse of process. In short, some judges, prosecutors and police in Ghana still think that the accused right to legal representation in criminal matters is to their discretion and not an obligation. With this I highly recommend that judges and all professionals responsible for prosecutorial duties must be educated on the consequences and failure to regard the accused right to legal representation.

2.3.3 Right of privilege against self-incrimination

The essence of the right against self-incrimination is that citizens should not be coerced into producing evidence against themselves (the Latin maxim is *nemo debet prodere se ipsum*). It has a connection with the right to presumed innocent which in principle put the proof of guilt on the prosecution. It is the right not to be compelled to testify against himself or to confess guilt.

Under s. 19(10) of the 1992 Constitution, it is established that:

"No person who is tried for a criminal offence shall be compelled to give evidence at the trial".

The aim of this is to avoid self-incrimination of the accused.

The issue of incriminating evidence arose in *Nyarko v The State [1963]*[247] that if no case is made for the accused to answer at the end of the case for the prosecution and yet a submission of no case is wrongly overruled, an appellate court is not entitled to take into consideration subsequent incriminating evidence adduced against the accused. That decision was given in a trial on indictment under s. 271 of Act 30, and the same principle was applied in a summary trial by the Supreme Court in *Logan v The Republic [2007-2008]*[248]. The court held in (holding 3) that the trial court wrongly took into account evidence adduced by the accused in his defence which filled in omissions in the case for the prosecution.

All the rights discussed so far are rights that must be protected at the trial stage to ensure fair trial. However, because of the non-application of the principle of equality of arms, these rights do not receive immediate application. They rather receive contingent application. Therefore, failure to apply them does not attract immediate sanction[249]. In Ghana, for instance, sanction will depend on whether the accused was prejudiced as a result of their non-application.

The acceptable norm is that failure to advise an accused of his right to legal representation shall amount to an irregularity if the accused was prejudiced. But in the normal circumstance, where there is an overwhelming evidence of prejudice, an attorney could succeed in arguing based on the evidence, which the accused could not do if he/she is acting on his/her own. Recalling witnesses for cross-examination, is a duty which can only be done by a legal expert and when properly done by attorney, mostly lead to acquittals where convictions seemed

[247] [1963] 2 GLR 59, SC.
[248] [2007-2008] 1 SCGLR 76.
[249] Rowland James Victor Cole, Equality of Arms and Aspects of the Right to A Fair Criminal Trial in Botswana, Thesis presented for the degree of Doctor of Law at Stellenbosch University, March 2010, pages 365-367.

probable or certain, had a lawyer not appeared for the accused. Hence if the accused is informed of such right, he would never wave his right to secure the services of counsel and the results of the trial would have been different.

The situation in Ghana when these above trial stage rights are examined critically shows much disparity in resources between the prosecution and the accused. The complexity is that as mentioned above, the legal system in Ghana does not mandatorily provide state attorneys for those who cannot afford the cost of a private attorney to defend them though this is a right of the citizenry. The disparities in resources are underlined in the wording of the constitution 1992 and the functioning of the criminal procedure code 1960 of Ghana. As established under the constitution article 19(2) (e):

> *"A person charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence".*

Adequate facility comprises the right to a lawyer for once defence which ensures equality of arms. The question is what about if the person charged is an illiterate or not a legal expert, and is indigent? Can he have a lawyer of his choice? More than 75% of the population of Ghana is indigent and also the percentage of people charge with criminal offences; about more than 90% of them have no means to hire a lawyer of their choice to represent them. Why is it not stated in the constitution that the judiciary should provide legal aid for free to all those who have no means to hire a lawyer of their choice to defend them? After all that is what the international instrument -ICCPR article 14 (3) which Ghana is a party, obliges Ghana to do and therefore entreats Ghana to produce and respect same wording of the said article 14(3) of ICCPR. What would be the standard of a frightened, and sometimes threatened, tortured, and beaten ac-

cused by the police (sometimes with the evidence of a swollen face, a fractured arm) for the purpose of cruelly extracting information from the accused without a lawyer? This violates other rights of the accused such as respect to human dignity and not to be tortured or treated inhumanly; and how could a defendant be able to defend himself in the face of the prosecutor who is a legal expert and in an unfriendly environment like the courtroom? This is certainly not possible. The ICCPR which Ghana has ratified[250] states at article 14(3) (d) that:

> *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".*

As at now, a closer examination of the article 19 (2) (f) of the Ghana's constitution does not cover the part of the wording of the ICCPR article 14 (3) (d) which is:

> *"...to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of*

[250] International Covenant on Civil and Political Rights – ICCPR, Ghana Ratified: 7 September 2000.
Optional Protocol to the ICCPR- Ratified: 7 Sep 2000.

justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

The article 19 (2) (f) of the Ghana constitution 1992 only establishes that *"a person charged with a criminal offence shall be permitted to defend himself before the court in person or by a lawyer of his choice".*

This unfortunately is a great deficiency in the laws of Ghana which fails to remedy the situation in the interest of justice when the accused have to be equipped with legal assistant in the proceedings. But in the actual sense, a through image of the international law should reflect in the Ghana's constitution 1992 which should also be enshrined in the Criminal procedure and Juvenile Act (Act 30), but it is not and that is why for the interest of justice, fairness in the criminal trial proceedings in Ghana have been immensely compromised.

This can only be balanced and countered by empowering the accused with constitutional and procedural rights that specifically protect the accused in the face of the might of the state prosecutors to enhance substantive and procedural due process of the law.

The difference between substantive and procedural due process is that the Constitution prohibit the government from depriving a person of *"life, liberty or property without due process of law."* The concept of due process has its roots in the constitution 1992 under article 14(1). It establishes that:

"Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in… cases and in accordance with procedure permitted by law…"

Substantive due process protects substantive rights of individual – which are fundamental human rights and freedoms established in the constitution[251] of Ghana by requiring the government to afford an individual due process before depriving a person of fundamental rights which includes protection of personal liberty. Substantive due process requires the courts to determine if a law is unreasonable when it affects a fundamental right such as fair trial. However, procedural due process ensures fundamental fairness in all legal and administrative proceedings. It protects the individual's rights by placing restrictions and requirements on how a government may proceed in an action to deprive one of any right. A person is entitled to notice, and an opportunity to present his case, before the government may take any action that adversely affects his rights.

But on the contrary, the reality in Ghana is that if an accused is charged, he would most likely be convicted than acquitted whether or not he is factually culpable. The police easily make arrest on a mere suspicion that the person has committed a crime. Usually, the police shall caution the person that he has the right to remain silent because anything he may say may be used against him in court[252]. The caution of the police during arrest[253] in Ghana is a bit funny as they establishes that failure to state facts that are later relied upon in court can have adverse inferences because the police shall subsequently beat up the suspect to "speak the truth." This is described as "talk true slap"[254]. So, after cautioning you that you may remain silent, the police would beat you up to extract

[251] Constitution of Ghana 1992, Articles 12, 13, and 14.
[252] Ghana Police Handbook: May 2010; and Criminal Procedure Code 1960 of Ghana.
[253] Section 3-15 of the criminal procedure code (Amendment) Act 2002; act 633. S (2) and b).
[254] My personal interview with a greater number of inmates in Ghana confirmed seriously that about 95% of suspected criminally accused persons in the hands of the police are severely beaten and maltreated for extraction of information. Again, see HelpLaw Ghana; private organization that provides legal help and assistance to the poor who cannot afford to hire a service of a lawyer to defend them in Ghana: helpdesk@help-law.org.

a statement from you. Then as a common practice, the police shall normally write the statement for the accused with another police officer watching as an "independent witness." They will then read the statement to the accused and ask him to sign or tomb print. When these statements are read later in court, then the suspect would realize that the police have added that during interrogation, he had confessed to the crime charged. This system no doubt is abusive, and runs counter to the principles of the rule of law and international laws regarding fair trial. The summary of key issues mentioned is that the failure of the criminal justice system to provide the accused with legal representation is a compelling pressure and factor that force the accused to testify against him. Again, criminal suspects are coerced into producing evidence against themselves by the police in Ghana, and I recommend that there should be video recording of all police interactions with the criminal accused from the period of arrest, charging and first court appearance.

2.3.4 Right to Presumption of Innocence

At the trial stage, a significant right such as the right to be presumed innocent is unfortunately, what is overlooked and not respected the most in Ghana. Though this important right is recognized by the Constitution and case law, it functionality and application in Ghana is constrained and its realization is not supported. The presumption of innocence has constitutional endorsement in Ghana and therefore the accused should be perceived innocent of all charges until proven guilty by the court of law.

In criminal practice, the fundamental rule in all criminal prosecutions has been stated in the 1992 Constitution, article 19(2) (c) that:

> *"(2) a person charged with a criminal offence shall…(c) be presumed innocent until proved or has pleaded guilty".*

This is on the contrary in Ghana. The presumption of innocence should ensure that the burden lies with the prosecution to prove every element of an offence beyond reasonable doubt. In the criminal trials, the burden of proof is used in two senses. It may mean:

(i) The burden of adducing evidence at the trial;

(ii) The burden of adducing such quality of evidence that will convince the court of the existence or non-existence of a fact.

The NRCD 323 s. 11(1) avoids the use of the expression "*burden of proof"* and uses "*burden of producing evidence*" and the "*burden of persuasion*".

The failure to discharge that burden should lead to the acquittal of the accused as in *Donkor v The State [1964]*[255]. In practical courtroom situation, the import of the burden of proof on the prosecution was in *Yeboah v The Republic (Consolidated) [1972]*[256]. It was held in the case that the guilty of the accused must be proved with that degree of certainty required by law. In the *Republic v Adamu [1960]*[257] when the prosecution evidence was considered to contain conflicts and discrepancies as to mar the degree of certainty, the accused could not be found guilty.

[255] [1964] GLR 598, SC.
[256] [1972] 2 GLR 281.
[257] [1960] GLR 91.

As commented categorically by Ollennu JSC, reading the judgement of the Supreme Court in *Oteng v The State [1966]*[258], the learned Supreme Court judge established that a criminal case cannot be proved on a balance of probability as is done in civil cases.

The state has all the resources to prove offences. The state has sufficient time and forensic experts to analyse the evidence and must be understood that when charges are instituted, the state is satisfied that it has sufficient evidence to secure a conviction. Unfortunately the courts have acquiesced to the legislation of reverse onus clauses which declare the accused guilty; calling upon him to prove to the contrary. The accused should be able to challenge the existence of a presumed fact with ease and therefore be able to defeat a presumption unfavourable to him/her in proceedings[259]. This is the situation in the case of *Paul Rodney Hansen v The Queen {2007}*[260] where Anderson J expressed his concerned by saying:

> *"Because of prosecutorial difficulty in proving a positive, an accused that does not have equality of arms in terms of resources, and may lack articulateness, is forced to carry the even heavier burden of proving a negative. That such negative is subjective and intangible only exacerbates the difficulty for an accused."*[261]

The legislature should refrain from casting the burden of proof on the accused. Otherwise, the accused is significantly disadvantaged in the articulation and re-

[258] [1966] GLR 352 at 354, SC.
[259] Christie & Pye "Presumptions and Assumptions in Criminal Law: Another View" 1970 Duke Law Journal 919.
[260] [2007] NZSC 7.
[261] Anderson J in the case of Paul Rodney Hansen v The Queen (2007) NZSC 7.

alisation of his right to be presumed innocent. The right to be presumed innocent is normally constrained by the fact that it is quite often taken away by legislation creating reverse onuses, a situation that is tolerated by a lack of judicial intervention.

Since the accused is not under any obligation to prove his innocence, there is no duty on him to help the police in their inquiries as decided in *Tetteh v The State [1965]*[262]. In that case, the trial court in its judgement expresses the view that the accused should have mentioned the name of the person who accompanied him to the first prosecution witness's house because that would have enabled the police to find him and cause him to make a statement for or against the accused's contention. The court added that failure by the accused to produce or lead the police to the witness was detrimental to the accused and confirmed the court's belief that he had something to hide. On appeal, the

Supreme Court stated at 675 that:

> *"The magistrate clearly misdirected himself on the burden of proof. There is no duty on a person accused of a crime to help the police in their inquiries, because an accused person is not under any obligation to prove his innocence. The onus is on the prosecution to prove the guilt of the accused. If a certain fact beneficial to an accused person is peculiarly within his knowledge then commonsense requires that in his own interest and for his own safety the accused should let the police know of such a fact".*

[262] [1965] GLR 670, SC.

Equally an instance where the Supreme Court emphatically stressed on the presumption of innocence was in *The Republic v Court of Appeal: Ex parte The Attorney General v [1998-1999]*[263], - better known as the Benneh case which was pre-trial detention and grant of bail. Wiredu JSC delivering the judgment for the majority in that respect sought to draw a relationship between the constitutional presumption of innocence and the right to bail, but was also quick to mention the relevance of the particular circumstances of each case, and therefore wrote:

> *"The accused is presumed to be innocent until it is otherwise established. It would therefore be unjust to deprive him of his right to enjoy his freedom in the absence of any law prohibiting the grant of bail to him under the circumstances as established by the facts of this case".*

So the presumption of innocence points out to two different directions thus it refers to the treatment of the suspects and defendants before and during the trial, insisting that such treatment must be consistent with respect for their innocence. In short, the presumption of innocence is overlooked in Ghana and its functionality and application is constrained whiles its realization is not supported. I recommend that the right to the presumption of innocence must be respected, enforced, and consistent in Ghana and its application must be same for all defendants.

[263] [1998-1999] SC GLR 559.

2.3.5 Right to Remain Silent

The right of the accused to be silent during an investigation by the police is also crucial when it comes to a defendant who does not know what to say in a perplex situation like an interrogation period. The rule is that it is improper for a court to infer the guilty of an accused merely from his failure to speak or give a statement to the police when charged with an offence. In *Okyere v The Republic [1972]*[264] Hayfron- Benjamin J, dealing with the right of an accused person not to give evidence even in court, stated:

> *"This right encompassing as it does the right against self-incrimination is like all other fundamental rights important and far-reaching…it is no mere rule of evidence or procedure, it is a fundamental principle of liberty and justice".*

This right is hardly respected by the police and also at the lower courts in that to some extent the accused are severely beaten by the police to talk the truth at the custody thereby violating other rights of the accused like respect to human dignity and not to be tortured; and the accused forcefully tell stories which are classified as confession, which judges are able to detect only if they pay attention to the accuse during plead enquiry by the judge. For example in *Teye alias Bardjo v The Republic [1974]*[265], the accused upon being charged with murder wrote simpliciter, "*I have nothing to say"* and the trial court regarded that statement as importing a guilty mind. The Court of Appeal said at 444 that:

> *"We think that while a judge is entitled to comment upon the refusal of an accused person to*

[264] [1972] 1 GLR 99
[265] [1974] 2 GLR 438, CA

make a statement, great care must be taken not to invite the jury to regard the silence of the accused as a fact inconsistent with his innocence".

It is very serious that silent before the police or in court is taken to be accepting to be guilty by the lower courts and the police. In *Commissioner of Police v Donkor [1961]*[266], the accused when charged with stealing the property of his host, denied the theft before the host. When arrested by the police, the accused refused to say anything either then or the next morning when he was formally charged. At trial, he explained that he was too annoyed and surprise to say anything to the police when arrested. On appeal against his conviction by a district court which was confirmed by a Circuit Court, the Supreme Court held that the district court came to the wrong conclusion when it formed the view, on which the conviction was based, that an early explanation was necessary to dispel doubt of an accused's guilt.

Concluding the issue of right to silent in Ghana would be very dicey to future protection of the right to fair trial if the police are not called to order to understand its essence in the criminal law and procedure to avoid misconstruing that remaining silent during police interrogation only means refusing to disclose information to the police, but rather it is a right. If judges would be very critical and therefore caution the police once its violation is detected, it would uphold fairness and justice in the Ghana criminal system. Honestly, right to silence is regarded as a fact inconsistent with accuse innocence in Ghana. Hence, the manifest significant of the right to silence in criminal interrogation, investigation and trial must be understood by all law enforcement agents, prosecutors and judges for interest of justice; and must not be prejudiced when exercised;

[266] [1961] GLR (Pt II) 694, SC.

notwithstanding the adverse inference that could be drawn against the silence at the court.

2.3.6 Right to be tried without delay

Under the criminal law procedure of Ghana the law constituting the right to be brought to the court and tried without delay has been established under articles 14(4) and 19(1) of the Constitution 1992; and also safeguarded under s. 77 of the Criminal and Other Offences (Procedure) Act of Ghana (Act 30) that:

> *"Subject to section 74, the police officer or person executing a warrant of arrest shall without unnecessary delay bring the person arrested before the Court which he is required by the warrant requirements of section 81 to produce such person, and shall return the warrant to the Court with an endorsement thereon showing the time and the place of its execution"*

But this said right is one of the most seriously abused rights in Ghana where the suspects are easily picked and detained on mere charges when evidence are yet to be put together, whiles the suspect is kept in the police custody for days, weeks and sometimes and places months according to many inmates both convicted and those waiting for trial during my interview with them on my research stay in Ghana between June to September 2015. After been sent to remand, most of the suspects/accused are kept in remand from between 6 months to 11 years even without a representation. These vulnerable humans remain in the di-

lapidated prisons forgotten. At the later part of this same chapter 2 of the dissertation, what constitute trial within a reasonable time in Ghana has been observed and much could be adduced from the fact that trial within a reasonable time or without delay is compromised exponentially to the detriment of the accused. In sum, criminal trial proceedings in Ghana take too long to come to an end and most of the cases are unduly delayed. Therefore, I recommend that good mechanism such as institution of more criminal courts, computerisation of the courts, electronically recorded version of the accused dockets/ files containing charges and evidence at the custody of the police and prosecutions department at the Attorney General office should be kept to avoid being lost, and to enhance speedy trial.

2.3.7 Right to be tried in one's Presence

As a general rule all criminal prosecutions must take place in the presence of the accused. Under s. 19(3) (a) and (b) of the 1992 Constitution:

> *"(3) The trial of a person charged with a criminal offence shall take place in his presence unless;-*
> *(a) he refuses to appear before the court for the trial to be conducted in his presence after he has been duly notified of the trial; or*
> *(b) he conducts himself in such a manner as to render the continuation of the proceedings in his presence impracticable and the court orders him to be removed for the trial to proceed in his absence.*

Where the accused who has not been charged with a felony fails to reappear after an adjournment, such a situation is dealt with in accordance with s. 170 (1) to (6) of the Act 30, as amended by s. 18 of Act 633. Likewise if the accused non-appearance is as established under s. 167 of Act 30, which is not appearing in person, and does not plead guilty in writing or by counsel under s. 70, the court shall issue a warrant to arrest the accused and have him brought before the court as provided under s. 72 of Act, 30. For example it has been held that such a plea of guilty by letter which is plea in *absentia* should be absolute and unconditional, without any reservations. According to s.171 (2) of Act 30, and *State v Sabbart [1967],* the High Court emphasized that the magistrate is duty bound to enter a plea of not guilty for the accused person and proceed to hear the case since the accused in a letter pleaded "guilty of exceeding the speed limit but definitely not to the extent of 40 mph as alleged by the prosecution". This is because that letter raises a defence to the charge and put the burden of proof on the prosecution.

If there is non-appearance of the defence counsel, but parties and witnesses are present in court and without any excuse acceptable for the absence of the defence counsel, the case may proceed in his absence. In such an event, the accused may be called upon to conduct his defence but it should not be in a way as to willfully exclude the accused counsel from the hearing as in *Adu v the Republic [1976]*[267] where the accused had changed his counsel in the course of the trial. Also non –appearance of witnesses during the hearing of a trial is an issue and therefore if a witness for the accused or the prosecution is absent without any lawful excuse at a time of the hearing, the court may issue a warrant, either *suo motu* or on the application of either party, to compel the attendance in court

[267] [1976] 1 GLR 55.

of such a witness under sections 174(2) of Act 30; 68 of NRCD 323; and 59 of Act 459 respectively. However no such bench warrant can be issued to compel attendance in court of a witness unless there is evidence on oath to the effect that the witness can give material evidence but will not attend if not compelled to do so, and the calling of the witness is a responsibility of the parties- the prosecution and defence. The Court may also invite a witness by its own discretion to witness at the court for clarity, affirmation and consistency for interest of justice.

2.3.8 Right to call Witnesses for Examination

Under article 19(2) of the 1992 Constitution, it is established that a person charged with a criminal offence shall:

> *"(g) be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution"*

Also examination of witnesses under s. 119 of Act 30 has been repealed by s. 5 of N.R.C.D. 324, and also contains directives under s. 68 (1) and 69 of NRCD 323. For instance in *Nyameneba & ORS v The State [1965]*[268]it was held on appeal that by s. 121 (1) of Act 30, a scientific report is prima facie evidence of the matters contained therein and not conclusive evidence. The chemist should have been cross-examined since the appellants disputed the accuracy of the re-

[268] [1965] GLR 723, SC.

port. A similar case in point regarding examination of witnesses was emphasized in *Commodore alias Kayaa v The Republic [1976]*[269]. Again, in *Avegavi & ORG v The Republic [1971]*[270], at their trial of robbery, the third appellant made statements to the effect that the prosecutor has lied to the court concerning him. Counsel for the prosecution then applied for leave and in the presence of the jury cross-examined the first and third appellants to prove their previous convictions, but it was held that according to s. 129 of Act 30, an accused person cannot be cross-examined as to his previous convictions and bad character.
Notwithstanding the above clause in the constitution which is article 19(2) (g), the accused without legal representation would find it if not difficult, totally impossible to cross examined the prosecution or the prosecution witness in court for lack of expertise and language difficulty at the court where medium of expression is in English whereas the majority of the accused charged cannot express themselves in English, whiles facts (expressions from advocates) indicate that interpretation at lower courts are poorly done at most of the magistrates courts[271] . Meanwhile, under the 1992 constitution s. 19 (2) (i) and (h), it is stated that a person charged with criminal offence shall:

> *"(i) be informed immediately in a language that he understands, and in detail; of the nature of the offence charged;*
>
> *(h) be permitted to have, without payment by him, the assistance of an interpreter where he cannot understand the language used at the trial"*

[269] [1976] 2 GLR 471.
[270] [1971] 1 GLR 428, CA.
[271] Personal founding during my research in Ghana as expressed by professional lawyers.

Article 14(2) of the 1992 constitution says "…*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".* This article provides for the right to information and interpretation which if properly adhered to would facilitate proper understanding of the proceedings to the accused. However, in Ghana, the right to interpretation to understand court proceedings is minimal and in most instances, poorly done but would be functional and beneficial to the accused if properly done especially at the lower courts where this has become an issue. On the whole, criminal accused who are not legal experts cannot examine witnesses called by the prosecution lawyer for lack of expertise without legal representation.

Also, interpretation of court proceedings at the lower courts is poorly done, and as a result, recommend that interpreters at the lower courts should be adequately trained to enable them perform their duties without any difficulty. Moreover, legal counsels should be provided to represent the unrepresented accused for interest of justice in Ghana.

2.3.9 Post-Trial Rights

In the Anglo-American legal tradition which Ghana follows suit, as well as its customary traditional courts, a trial whether civil or criminal, ends with a conviction or acquittal. Therefore the post-trial stage looks into what is next after conviction. Sentence –setting is a problem for the post-conviction stage, as it is an appeal or review of the procedure. As a legal norm, judgement of the court in the first instance is far from the end of the procedure. Criminal procedure ter-

minates when the final appeal court declares its verdict or when the time limit within which one must appeal expires. Only then is the judgement legally valid.

2.3.10 Right to Appeal

The right to appeal is a norm to prevent abuse and detention of the criminal convict indiscriminately. On the other hand, it becomes relevant when the prosecution observe that the accused has been unreasonably acquitted instead of conviction. Generally the right to appeal serves two purposes which are firstly, to function as a mechanism whereby parties can obtain a more favourable outcome to the proceedings, and second, appeals promote ideals such as constituency and fairness and regulate uniform interpretation of the law. Within the framework of human rights, only the first of these aspects can be of relevance for the individual-international human-rights law is not concerned with the uniform and correct application of national law, it will only react if domestic law has been applied in an entirely arbitrary way[272]. It should be noted that an appeal will not necessarily render a more advantageous results than the original judgement; nevertheless, it must be exercised as a right.

Apparently, it is of great importance to know as to who has the power to approach the court of higher instance for a review. In Ghana the right to appeal is guaranteed and protected under the constitution 1992; the criminal procedure code (1960); and the Courts Act 1993 (Act 459). As an international norm explicitly stated under the ICCPR instrument, the right to appeal should not be a

[272] See Stefan Trechsel: Human Rights in Criminal Proceedings, pages 360-363.

problem in Ghana and also the awareness, access and procedure should not be a far reaching on the part of the criminal accused person. On the contrary, the said right though established in black letter words, is dysfunctional. The question is how many convicted persons in Ghana are able to appeal against court decision over their cases where even evidence of procedure fairness and exhibit is so rare? How many have access to legal experts to view their cases for them and advise on the point of law? Apparently it is very few, because overwhelming majority of defendants hires their own legal representatives and defence and therefore whereby an accused is financially incapable, they are left vulnerable at the mercies of the judge in front of the state prosecution team. Imagine where there is no equality of arms between the prosecutor and the accused, if the defendant is convicted whether on a fair or unfair grounds, the defendant would have by then be tired of long proceedings and therefore be unwittingly ready for the prison as a resting place, left alone to think of an appeal. In most instances, the accused has no legal representation throughout the process and stages of the trial due to the failure on the part of the government and the criminal justice system to provide adequate legal aid and facility to the defendant for the interest of justice. Article 14 (7) ICCPR clearly gives the right to appeal to the defendant. From a human rights perspective this seems clear as a classical means to control state authority, but the question is can the prosecutor also approach the higher court with the notion to claim a violation of procedural law? For example, the false weighing of evidence in favour of the accused which led to an acquittal or too weak a sentence? This is possible since article 14(5) ICCPR leaves this question open. It is established that:

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".[273]

Actually the international instrument leaves this on a two –level basis if the state allows for the prosecutor to make an appeal against the defendant as it stands in the case of Ghana. However, these systems have to allow for appeals against a conviction or an aggravated sentence that only comes about at the appeal level[274]. In Ghana under the court Act 1993 (Art 459), the right of appeal to the Supreme Court is safeguarded at section 4(1)[275].

Under Section 4(2) of the Court Act 1993, it is stated that the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter (including interlocutory matter) civil or criminal, and may grant leave accordingly. Regarding appeals proceedings from Traditional Courts in Ghana, the same section 4 subsections (4) states that:

"An appeal from a decision of the Judicial Committee of the National House of Chiefs shall lie to

[273] No. 14668: MULTILATERAL International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966, Optional Protocol to the above-mentioned Covenant. Adopted by the General Assembly of the United Nations on 19 December 1966.

[274] Nowak, Article 14, No. 68.

[275] "An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court:
(a) as of right, in any civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a Judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction; (b) with the leave of the Court of Appeal, in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest; (c) as of right, in any cause or matter relating to the issue or refusal of writ or order of habeas corpus, certiorari, mandamus, prohibition or quo warranto".

the Supreme Court with the leave of that Judicial Committee or the Supreme Court"[276].

Under the Court Act 1993, cases dealt by traditional chiefs at the customary native courts in Ghana also follow a procedure where hearings are done and judgements made at the lower courts. Appeals at the chiefs courts ranges from the local councils of chiefs to the regional councils of chiefs and to the Judicial Committee of National House of Chiefs where judgements from the national house of chiefs cannot be appealed at any other law court except at the Supreme Court which has the ultimate power and jurisdiction to decide appeals from the National House of Chiefs. Similarly, under article 273 (6) of the Constitution 1992, it is established that:

"An appeal shall lie as of right in respect of any cause or matter dealt with by a Judicial Committee of the National House of Chiefs under clause (5) of this article to the Supreme Court[277]*"*

Again, the Court Act 1993 affirms appeals from the lower courts in both criminal and civil cases as of a "right" when it is based on a substantial question of law or in the interest of justice or public but this section of the Act did not specified which of the parties as to whether the convict or the prosecution may exercise such a right. But section 21 of the Act 459 makes it clearer on the appeals to the High Court as to whether the prosecution or the accused can proceed to appeal after a conviction or acquittal. It establishes that:

(1) The prosecution or a person convicted of an offence in a criminal case, tried by a Circuit

[276] Section 4—Appellate Jurisdiction of Supreme Court, and Section 4(4), appeal from the customary and traditional courts from the national house of chiefs lies to the Supreme Court only.
[277] Jurisdiction of the National House of Chiefs, article 273 (6) of 1992 Constitution.

Court or tried by a District or Juvenile Court may appeal against the judgment to the High Court.

(2) A person aggrieved by any judgment of a District Court in a civil matter may appeal against the judgment to the High Court.

(3) A person aggrieved by an interlocutory order or decision made or given by a District Court may appeal against the decision or order to the High Court with the leave of the District Court or of the High Court and the High Court shall have jurisdiction to hear and determine the appeal[278].

Under the section 11(4) (5) and (6) of the Court Act 1993, Where a party desires to appeal to the Court of Appeal in a criminal case, he shall give notice of appeal or notice of application for leave to appeal within one month of the decision appealed against; and therefore the Court of Appeal shall have jurisdiction to hear and determined any such appeal.

Under the Constitution 1992, appeals are again spelt out under article 33 (3) in a simple language which stipulates that:

A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court[279].

The criminal procedure code 1960 (Act 30) also confirms and directs how petition of appeal are solicited under section 326 (1) and (2) once trial proceedings comes to an end and sentence pronounced. It is established that:

[278] Section 21—Rights of Appeal to the High Court, the Court Act 1993 (Act 459) of Ghana**.**
[279] See the protection of rights under article 33 (3) of the constitution of Ghana.

> *"(1) every appeal shall be made in the form of a petition in writing presented by the appellant or his counsel, every such petition shall (unless the High Court otherwise directs) be accompanied by a copy of the order appealed against.*
> *(2) Where the appellant is represented by counsel the petition shall contain particulars of any alleged or of fact on which the appellant relies".*

There is further direction that Where the appellant is committed to prison custody, Section 327 of the Criminal Code 1960 emphasises that, the appellant may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison, who shall thereupon forward such petition and copies to the Registrar of the Court.

In *Oyo v The Republic [1999-2000]*[280], the appellants were convicted on narcotic charges and sentenced to the mandatory 10 years. They appealed on grounds that since they had been in custody without bail for 2 years before the sentence, the court should have considered those years to impose a retroactive sentence on the appellants. It was therefore held on the appeal per Benin J.A. by the provision in s.315 (2) of Act 30 that a sentence of imprisonment should start from the date it was pronounced and a court was thus not entitled to back date a sentence. More to the point on appeals, a conviction or sentence imposed by a juvenile court on a juvenile is appealable to the High Court under s. 21 (1) of Act 459, as amended by Act 620. Further, a sentence imposed by a juvenile court on a juvenile who has been committed for sentence by a district court forms part of

[280] [1999-2000] GLR.

the district court proceedings by which the juvenile was committed and is also appealable to the High Court under s. 18(5) of Act 653.

The question is how many individuals are able to appeal against a court decision at the domestic level; and to the regional/international court for the interest of justice? There are notable facts that majority of the convicts in Ghana are not able to appeal for review of their sentences which is not because they believe justice has been done but the actual fact is that the financial means to fight for justice is not available whiles legal aid lawyers are not available to take such numerous cases up for appeal and review. In such circumstances, it only takes a private lawyer at compassionate grounds to submit an appeal for free for such convicted citizens. But the issue in question is that, a right to lawyer should not be obtained on compassionate grounds nor should it be obtained by merit or discretion as it is in Ghana. Appeal rights are of great importance to the right to fair trail and above all, the principle *ne bis in idem (*double jeopardy*)* only comes into play after the trial has gone through all these instances, which this part of the investigation shall consider.

Having discussed the right to appeal in Ghana which is very imperative and a component to the right to fair trial at the post- trial stage, the summary of the main points is that exercise of the right to appeal is minimal because majority of the convicted persons in Ghana are unable to appeal against the court of the first instance decision in instances where even evidence of procedure fairness and exhibits are so rare, without a legal aid lawyer. Again, there is public loss of confidence in the criminal justice system in Ghana. Therefore to improve the situation, I recommend that the department of public prosecution service in Ghana should be able to appeal on behalf of the accused especially in the instances where the accused is unrepresented and for interest of justice, where

procedure unfairness and abuse of process are detected after the conviction of the accused. This would build public confidence in the criminal justice system.

2.3.11 Double Jeopardy (*NE BIS IN IDEM*)

The prohibition of double jeopardy (*ne bis in idem*) guarantees that no one can be tried twice for the same crime. Simply put, if a person has been previously acquitted or convicted of an offence by a court of competent jurisdiction and is later charged with the same offence, the rule against double jeopardy will apply to bar the prosecution. In the case of *Boni v The Republic [1971] (supra)*, it was held that autrefois can be pleaded in bar to criminal prosecution only by the accused who can show that he was in jeopardy at his first trial. The Court of Appeal held further in that case that autrefois prevents the prosecution from impugning the validity of a verdict but does not apply where (as in that case) the accused was neither acquitted nor convicted. Also in the *Republic v General Court Martial; Ex parte Mensah [1976] (supra)* it was held that to establish a plea of autrefois convict it must be shown that the accused is being charged with an offence which he has been convicted or could have been convicted at the earlier trial. It is not enough to show that the evidence to be adduced to prove the offence at the second trial is the same as that offered to prove the offence at the first trial. The same principle is applicable to pleas of autrefois acquit. The principles expatiated herein have been codified under the 1992 constitution, article 19(7).

The rule is grounded on the notion that a person who has undergone the ordeal of a criminal trial should be left undisturbed following the final verdict, either

to go on to lead a normal life if acquitted or to face the appropriate punishment if convicted.

The rule against double jeopardy provides certainty and a conclusion for the individual who has been tried[281]. It is therefore necessary to establish a distinction that the principal justifications for the rule against double jeopardy as **established** according to the findings made by the executive committee of experts of Hong Kong are as follows:[282]

(i). ***Avoids the repeated distress of the trial process*** - The rule avoids the repeated distress of the trial process, which affects not only the accused, but also his family, witnesses on both sides and the victim.

(ii). ***Reduces the risk of a wrongful conviction*** - The chances of a wrongful conviction must increase if an individual is tried more than once for the same offence. The likelihood of conviction, whether the defendant was guilty or not, might be greater at a second trial as the prosecution may have acquired, because of the first trial, a tactical advantage. Furthermore, an innocent person may not have the stamina or resources to fight a second prosecution.

(iii). ***Promotes finality in the criminal justice system*** - It is clearly desirable from the point of view of all parties (whether victims, witnesses or the accused) that there is a point at which the circumstances of the offence can be put behind them, so that life can move on. The rule against double jeopardy promotes confidence in court proceedings and the finality of verdicts.

(iv). ***Encourages the efficient investigation of crime*** - It could be argued that if the prosecution were able to prosecute once again a defendant who had been acquitted there would be a risk that the initial investigation might not be carried

[281] Law reform Commission of Hong Kong on double jeopardy; sub-committee consultation paper: LC Paper No. CB(2)1093/09-10(01)

[282] See the Law Commission of Hong Kong report, Paper No. CB(2)1093/09-10(01)

out as diligently as it should have been. The fact that there is but one chance to convict a defendant operates as a powerful incentive to efficient and exhaustive investigation.

As a matter of fact, there seems to be some confusion about the actual meaning of the prohibition of double jeopardy. The reason for this assertion is that some states have statutory procedures which allow a retrial if there is a genuine believes that new evidence is found. This is the situation in Ghana. Other states questioned whether their appeals and review proceedings would fall within the ambit of this prohibition [283]. Admittedly, if the ICCPR itself provides for a right to appeal, it is clear that appeals proceedings cannot fall within the prohibition of double jeopardy. Similarly resumption of a trial can remain outside its scope, as the ICCPR justifies domestic proceedings. Nevertheless, it remains unclear where the principle *ne bis in idem* is actually applicable. I think that one need to digest the arguable nature of the *limb* surrounding the principle *idem* by firstly trying to find justifiable answers to the following socio-legal questions:

Can the trial be repeated if facts were left undiscussed, or the consequences of the punished act misjudged, and can it be repeated if a lesser or enhanced degree of intent is later discovered? It is understood that the prohibition of double jeopardy is a well acceptable principle of English law.[284] Despite the resentments and reservations of some legal experts with regards to the principle, it is an international instrument which all jurisdictions must comply for the interest of justice. Certainly where applicable, all jurisdictions apply the principle of *ne bis in idem* from the moment it is believed that the trial is concluded, that is, as soon as the matter is considered *res judicata* not disparaging the fact that differ-

[283] See Christoph J.M. Safferling: Towards an International Criminal Procedure, page 319-338; and also Harris, 16 ICLQ (1967), 352 at 376 describes these difficulties can be studied in the drafting history of the ICCPR.

[284] Lidstone in Andrews (1985), 85.

ent systems give different answers to this question. For instance, while the common law tradition generally sees the trial terminated when the accused is convicted or acquitted, the civil law jurisdiction understands the matter settled only when the last appeal decision is reached. The principle of double jeopardy as pertained as international norm though triggers a sharp debate that would create a loophole for criminals to get away without conviction, which would make individual citizens disbelieve in the criminal system, it can also avoid unjust and unfair repeated trials where the prosecutor tries every possible means to cause proceedings reach a verdict of conviction in states such as Ghana where fairness in the criminal justice system is so rare. From the community's point of view the question arises as to whether a person should be allowed to escape justice when new and compelling evidence has emerged subsequent to his acquittal which points to his guilt. Rapid developments in recent years in forensic science and DNA testing have highlighted these concerns. Anomalies arising from strict adherence to the rule has sparked public outcry in some jurisdictions, and changes to the law have therefore been proposed or adopted in a number of jurisdictions. An example of this instance in Ghana is the case of *Alfred Woyome v Attorney General [2012]* which was a criminal trial at the Accra Fast Track High Court, on charges of defrauding by false pretences, corrupting a public officer, conspiracy and abetment, a case of public interest where the prosecution filed a *nolle prosequi* (be unwilling to pursue) to discharge *Woyome* and three other accused persons of various counts.

The rule of double jeopardy may be regarded as having two limbs. The first involves the plea of *autrefois acquit* or *autrefois convict*. A person cannot be prosecuted for the same offence for which he has previously been acquitted (*autrefois acquit*) or convicted (*autrefois convict*).

Also the second limb of the rule empowers the court to order a stay of proceedings for abuse of process. In contrast with the *autrefois* doctrine, the power to stay proceedings provides a wider discretionary power for the court, and is wider in scope. Because of this, a defendant may fail in an *autrefois* plea but may succeed in an application to stay the court proceedings on the basis of an abuse of process[285].

Apparently, this principle of double jeopardy is an international norm enshrined in the major human rights treaties and established in article 14 (7) of ICCPR.

The principle of *ne bis in idem* safeguarded under the constitution of Ghana reflects the wording of the international instrument ensuring that individuals would not be punished twice for a particular offence committed. Meanwhile the prosecution in Ghana most often than not try to overlook this important principle and thereby violates it. It is stated under article 19 (7) that:

> *"No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for the offence, except on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal*"[286].

There is a notwithstanding clause under the law of Ghana which categorically affirms the possibility for a person to be tried again after an acquittal. Under article 19 (8) of the 1992 constitution an emphasis is made that:

[285] Hong Kong Sub-committee consultation paper: LC Paper No. CB (2)1093/09-10(01).
[286] 1992 constitution of Ghana.

> *"Notwithstanding clause (7) of this article, an acquittal of a person on a trial for high treason or treason shall not be a bar to the institution of proceedings for any other offence against that person".*

An example of the situation where the Attorney General prosecuted an acquitted individual was in the case of *Wereko- Brobby & Kwame Mpiani vs. Attorney General {2010}*[287]. The judge properly and emphatically noted and therefore stated that the Attorney-General could not "*prosecute the accused on the [mere] basis of adverse findings by a commission of inquiry".* It was ruled by the judge that the decision or attempt by the Attorney-General to trial the accused for a second time on the same charges of which the latter have already been tried and acquitted by a legitimately constituted court of law is unlawful.

Considerably, there is a sharp argument for and against the principle herein question if there is the need for the rule of double jeopardy to be reformed in Ghana as it has been proposed under many different jurisdictions. In Ghana the issue of double jeopardy is also covered by Act 29, s. 9(1) which provides that:

> *"Where an act constitutes an offence under two or more enactments the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."*

In *Essien v The State [1965]*[288], it was held that it is not the law that a person shall not be punished twice for the same act. In that case, the accused was

[287] See the statement of the Accra High Court judge, Justice Samuel Marfo-Sau on Tuesday, August 10, 2010 when he acquitted the two gentlemen.
[288] [1965] GLR 44.

charged and convicted in the district court with dangerous driving, contrary to section 18(1) of the Road Traffic Ordinance 1965[289] and negligently causing harm, contrary to Act 29, s 72. After appealing on the ground that his conviction infringed Art 29, s. 9(1), it was held that as the same act constituted separate offences under separate enactments, the counts were not bad in law. Admittedly, it has also been established that where one act creates a civil liability and at the same time a criminal liability, the fact that a person has suffered civilly for that act cannot be a bar to a criminal prosecution for the same act. This principle is also rationalised under the same Act 29, s. 9(1). A case in point is *Ababio v The Republic (supra) [1972]*. In that case, a chief who was convicted in the circuit court for the offence of failing to attend a traditional council meeting preferred against him under the Chieftaincy (Amendment) Decree, 1966[290], appealed to the High Court on the ground that he had already suffered the customary sanction of destoolment for the same non-attendance of that meeting. It was held that it is not the law that a person cannot be punished twice for the same act; destoolment in breach of customary obligation is a sanction irrelevant to a criminal charge. I perceive that double jeopardy rule to some extent has become a loop hole for criminals, to avoid a second trial and vehemently recommend that there should be an exceptionally rule to the principle of *ne bis in idem* in Ghana, whereby an acquitted and convicted accused could be retried when substantial and compelling evidence is discovered.

[289] (No 55 of the 1952).
[290] See (NLCD 112), para 5A as inserted by the Chieftaincy (Amendment) (No 3) Decree, 1967 (NLCD 203).

2.4 Measures of Coercion

Deprivation of individual's liberty follows after the conviction of the accused which is part of the criminal procedure and still subject to human rights law. Human rights serve to limit the rights of the state to interfere with fundamental values of the individual. The intervention of human rights instruments is designed to restrain the prosecution authorities, to ensure that measures such as detention, wire-tapping, and search and seizure are based on appropriate legal regulations. This part of the investigation is not a criminological analysis of the most appropriate treatment prisoners should go through in Ghana during the period of their incarcerations but merely intends to revel how human rights are applied in dealing with the accused under detention awaiting for trial, and the convicted criminal in the prisons. One simple fact is that human right cease not to protect the defendant after conviction.

There are many human right provisions that govern the condition of imprisonment at the domestic level but in Ghana, the criminally accused are detained under very harsh conditions which are honestly detrimental to their lives and health safety. The first to be considered is the right to liberty and security of person which is enshrined in article 9 of the ICCPR. Similarly, the wording of the article 6 of the African Charter provides for the protection of the right to liberty and security.

Certainly, human right laws in Ghana should be adequately enforced in the prisons and one needs to understand that it is inevitable rights that cannot and should not be derogated. The right to personal liberty is codified in article 14(1) of the 1992 constitution of Ghana which also establishes that: "*Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except with a procedure permitted by law- in execution of a*

sentence or order of a court in respect of a criminal offence of which he has been convicted".

Deprivation of liberty could be said to be a measure taken by a public authority by which a person is kept against his/her will for a certain amount of time within a limited space[291]. Punishment overwhelms the life of the incarcerated and therefore the criminal convict's life is degraded whiles in prison as the case has been in Ghana which has been causing the death of many inmates. The statement in article 13(1) of 1992 constitution of Ghana expressing *"except in the exercise of the execution of a sentence of a court"* regarding deprivation of life strongly indicate that once a criminal is sentenced, he /she loses the right to be treated with dignity. Meanwhile article 10(1) of the ICCPR states that*:*

> *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".*

It has been noted that the highest number of inmates that are able to serve their prison sentences in the prisons of Ghana, upon release come home with no prospect of life but dies shortly after their release from the prisons which is due to torture, cruel, inhuman or degrading punishment and bad treatment melted on them whiles in prison which is also prohibited by article 7 ICCPR and article 5 of the African Charter. The Charter prohibits such treatment and violations; and therefore urges that every individual shall have the right to respect of the dignity inherent in a human being. The fact that prisoner's right to liberty is restricted does not mean that they are inanimate objects as the case and situation in Ghana reveals.

[291] See Stefan Trechsel: Human Rights in Criminal Proceedings page 412; and Frowein and Peukert (1996) Article 5 N 9.

Under article 15 of the 1992 constitution of Ghana establishes the right to respect for human dignity by emphasising that:

> *(1) The dignity of all persons shall be inviolable.*
>
> *(2) No person shall, whether or not he is arrested, restricted or retained, be subjected to -*
>
> *(a) Torture or other cruel, inhuman or degrading treatment or punishment;*
>
> *(b) Any other condition that detracts or is likely to detract from his dignity and worth as a human being.*
>
> *(3) A person who has not been convicted of a criminal offence shall not be treated as a convicted person and shall be kept separately from convicted persons.*
>
> *(4) A juvenile offender who is kept in lawful custody or detention shall be kept separately from an adult offender".*

Apparently the above article 15 intended to protect the dignity of the individual once convicted or awaiting for trial, though stated in the black letter words under the constitution and the spirit of the law, in most at times the law is not adhered to by the law enforcement agents in Ghana as shown by a survey through this research. According to media and expert reports[292], prison conditions generally were harsh and sometimes life threatening due to physical abuse, food shortages, overcrowding, and inadequate sanitary conditions and medical care.

[292] Country Reports on Human Rights Practices for 2014 United States Department of State • Bureau of Democracy, Human Rights and Labour.

The 2011 convict population indicates that the average daily lock-up population for the reporting year was **10,355**. Average daily remand population was **3,042**. Out of the average daily inmate population of **13,396**; one hundred and nineteen (**119**) were juveniles, and a total of **318** foreigners were admitted during the reporting year 2011[293]

Prisons Service statistics available in August 2014 indicated **13,479** prisoners **(13,235** men and **244** women) were held in prisons designed to hold approximately one-third that number. Of this total, **3,027** were remand prisoners. Authorities neither housed juvenile detainees separately from adults nor pretrial detainees separately from convicted prisoners, but women were held separately. No staff specifically focused on mental health, and inmates with mental disabilities were not routinely identified, separated, or transferred to general or psychiatric hospitals.

With few exceptions, prison overcrowding was "alarming," according to the UN special rapporteur in 2014. At the time of his 2013 visit, the male section of Nsawam Prison[294], designed to hold **717** inmates, held **3,773**. Kumasi Prison, with a capacity of 800, held **1,981** inmates. Cellblocks there contained 115 convicted prisoners sharing a space of approximately 415 square feet. The remand sections were often worse, with cells so overcrowded (40 in a cell designed for four) that inmates were laying head to toe in a fetal position. Inmates in Sekondi Prison slept in shifts, sitting up, due to lack of space. Many prisoners slept on the floor without a mattress, mat, or blanket.

In 2012, the most recent year for which statistics were available, the government reported 94 deaths in custody, all from natural causes such as malaria, tuberculosis, or HIV.

[293] See Ghana Prisons Service Annual Report Magazine 2011.
[294] Nsawam prisons are the biggest and the most dangerous of all the prisons in Ghana.

Both guards and other prisoners physically abused prisoners. During his November 2013 visit, the special rapporteur examined several detainees in Kumasi and Sekondi prisons and found three cases with clear physical evidence of recent and severe caning. Detainees' testimony indicated that prison guards sometimes used caning as punishment.

The current statistics available in July 2015 indicate that convicted prisoners are **11,478** which comprises of male **11,318** and female **160**. Unconvicted prisoners are **2,410** with the breakdown of male **2,368** and female **42**. The total number of prisoners is **13,888**. Other relevant data is juvenile prisoners at the Senior Correctional Centre (SCC) **125**; and foreigners **676**. The total number of prisons in Ghana is **43**[295].

The photos showing the situation in Ghana prisons that confirms how they sleep are available at appendix 5. Prisoners sleep in turns in most of the prisons meanwhile, most of the inmates have been sentenced with hard labour and would do hard labour without having the opportunity to sleep at night. This is degrading to human health and dignity.

Under s. 315 (1) (2) and (3) of Act 30,where a person is sentenced to a term of imprisonment, the court which sentenced that person shall issue a warrant of commitment ordering the carrying out of the sentence in a prison in the Republic. The warrant is the authority to the police and prison officer to convey and keep the person, and a sentence of imprisonment commences on and includes the day on which it is pronounced.

In Ghana a greater proportion of the convicted individuals have imprisonment with hard labour imposed on them for their crimes by the court and this is where the convicted individual are committed to suffer and have their right to

[295] http://www.ghanaprisons.gov.gh/statistics.html

life and respect of human dignity taken. Prisoners are even forced to work[296] when they are sick. Whenever there is inhumane treatment of the convict, there should be proper effective remedy at the domestic level to protect the individual. Normally, to claim a human rights violation during the time behind bars is not an unusual procedure in most countries, indeed it is enshrined in all of the human rights treaties so far looked at. For example article 2 ICCPR provides for an effective remedy against any human rights abuse before a national authority, and article 26 of the AfCHPR affirms it.

Also once violation occurred, there should be the possibilities for the individuals to be pardon, and given parole. It is believed that many if not all national jurisdictions recognise some possibility of gaining a 'pardon'. In such instance, the criminal is pardoned because there has been a blatant miscarriage of justice (pardon) or further punishment seems to be superfluous (remission), when the goals of the sentence appear to have been achieved without insisting on the full punishment. In jurisdictions where there are no appeal proceedings in the sense of hearing the evidence anew, this institution seems to be even more important. In Ghana for instance, there are instances whereby some prisoners are pardon. In accordance with Article 72 of the 1992 Constitution, the President granted Presidential Amnesty to Nine Hundred (900) prisoners drawn from prisons across the country based on ill-health, advanced age and satisfactory conduct of the prisoners during the period of incarceration[297]. I contend that convicted prisoners, pre-trial detainees, and juveniles should not be kept together at the prisons facilities; and to that extent recommend that there should be alternative

[296] Article 8 (3) (a) (b) and (c) (i), of ICCPR.

[297] See 1st Republic 2015 Presidential Amnesty, reported by public relations unit of the ministry of interior.

sentencing methods in Ghana such as community service, tagging, and conditional cautioning instead of direct charging and prosecution.

Having briefly examined how the rights of convicted and remanded prisoners are curtailed, the right to fair hearing within a reasonable time by the court shall be dealt with in the next section. It is not clear what is meant by *"reasonable time"* and what time frame is reasonable in Ghana to give hearing to a suspected criminally not convicted accused. Therefore the next discussion and investigation shall look into what constitutes trial within a reasonable time in Ghana by observing some case laws.

2.5 What Time Frame Constitute Fair Trial in Reasonable Time?

The constitution of Ghana 1992 article 14(2) establishes that the person 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. Meanwhile article 14 (3) (a) and (b) emphasis that for the purpose of bringing someone before a court in execution of an order of a court; upon a reasonable suspicion of committing a crime or having committed the crime, such a person shall be brought before a court within forty-eight hours after the arrest, restriction or detention. Under article 14 commented above, the apprehended suspect when brought before a court within the forty-eight hour duration should certainly be allowed to enjoy all the procedure and constitutional rights mentioned above expressly and impliedly stated in the criminal code 1960. But as a common practice (whether legal or illegal) in Ghana such

criminally accused after appearing before a judge within the 48 hour duration if they are lucky, mostly ends up in either prison or police custody. Some remains there for days, months and even years waiting for trial. Meanwhile, the same article 14 (4) of the constitution, has a wording that:

> *"Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."*

Similarly, under article 19(1) which deals with fair trial ensures that "*a person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court".*

Nevertheless, the issue of fair hearing or trial within a reasonable time by a court is what one needs to understanding because what constitute a reasonable time in Ghana is questionable in the sense that many criminally accused spend years under detention which sometimes supersedes the duration of the prison sentence when the person is convicted. So does the reasonable time mean three (3), five (5) or ten (10) years in prison or police custody?

In the time past, the High Court in Ghana, made a decision in the case of *Owusu v The* Republic{1980}[298] and ruled on the effect of article 21(3)(b) and (4) of

[298] [1980] GLR 460.

the Constitution, 1979 which had the same wording as the article 14 (3) (b) and (4)[299] of the present Constitution,1992.

The applicants had been in custody for more than three years, awaiting trial for abetment of murder. They brought an application for bail pending trial. The prosecution objected to the grant of bail on the grounds that section 96(7) (a) of the Criminal Procedure Code, 1960 (Act 30), as amended, prohibited the grant of bail in a case of murder. The application for bail was granted by the High Court. The court upheld that Parliament could not by virtue of section 96(7) (a) of Act 30 as amended, purport to take away or restrict the power conferred on the courts by the Constitution, 1979 to grant bail when a person has not been tried within a reasonable time as provided by article 21(3) (b) and (4) of the Constitution. The High Court established that three years incarceration without trial was an unreasonable time.

Moreover, in the case of *The Republic v Kevin Dinsdale Gorman and Others{2004}*[300] which was forwarded to the African Human Rights Commission, a decision from the Supreme Court of Ghana[301], and an appeal against the decision of the Court of Appeal rescinding bail, granted to the appellants by the trial court regarded the issue of trial within reasonable time.

This was an appeal against the refusal of the Court of Appeal to grant an application for bail to the appellants. The six accused persons were arraigned before the Greater Accra Regional Tribunal on 28 January 2004 on narcotics-related charges based on sections 56(c), 1(1) and 2 of the Narcotic Drugs (Control, Enforcement and Sanctions) Law 1990 (PNDC 236). The Tribunal as trial court granted bail on 3 February 2004 to all the accused on specified conditions. The

[299] It expresses on arranging suspects before a court within forty-eight hours after the arrest.
[300] (2004) AHRLR 141 (GhSC 2004).
[301] 7 July 2004, Criminal appeal J/3/3/2004.

Attorney-General's office appealed against the grant of bail to the Court of Appeal, which delivered a ruling on 3 March 2004 upholding the appeal and thereby rescinding the grant of bail in respect of all the accused.

Factors that prompted the grounds of the appeal as argued by the appellants was that the Court of Appeal erred in law in rescinding the bail granted to the accused/applicants/respondents/appellants when it failed to consider adequately the import of the provisions of article 19(2)(c) of the 1992 Constitution in relation to s 96(1)(2)(3)(4) and (5) and section 96(6) of the Criminal Procedure Code 1960 Act 30, as amended, with respect to the grant of bail and thereby occasioned a substantial miscarriage of justice.

Again, it was contended that the Court of Appeal erred in its interpretation of the applicable provisions of the Criminal Code 1960 (Act 30) as against the relevant provisions of the Constitution 1992 of the Republic of Ghana on the grant of bail to accused persons, the reasons being that it downplayed the constitutional provisions providing for the pre-trial release of an accused person on bail in favour of the guiding (not mandatory) principles governing the grant of bail as contained in section 96 of Act 30. Above all the court contended that the accused have no place of abode under their jurisdiction and therefore a grant of bail shall be inappropriate as they will not reappear to stand trial.

It is of great importance to observe that what constitutes a reasonable time in Ghana is not well defined and this makes the state of criminally suspect unpredictable and to some extent, violates their rights. After all for the interest of justice, even convicted criminals should be treated with dignity and therefore the right procedure should be used in convicting them. My interview with Accra Fast Truck Criminal High Court 3, 4, 5 and 6 and a Justice of the Supreme

Court[302] revealed that trial within a reasonable time in Ghana to them could be 6 months to 1 year if on indictment, or 2 years before trial or even more. The judges including other Justices of the High Courts and Appeal Courts interviewed explained that most trials unreasonably delayed are sometimes due to the court waiting for the Attorney General to prove prosecution charges and availability of witnesses and evidence. This is also due to the work load of the public prosecutors and therefore charges, investigations, and prosecution take too long whiles the accused is kept in custody. Delays are also due to the transfer of the prosecutor dealing with the case or either transfer or death of a judge hearing the case. In such circumstances, it takes longer unreasonably to appoint another judges to continue with the hearing. For instance, during my research stay in Ghana, the state attorney general department declared an indefinite strike action from 6th July 2015 for more than a month without going to court whiles judges and courts in the nation kept adjourning cases at their courts because all prosecutors were not attending to court meanwhile private prosecution is not available in Ghana and hence prosecution is a sole responsibility of the state prosecutors. One High Court Judge explained to me as he lament over the fact that he had 17 cases pending and 1 case was involving 23 defendants in custody, and 2 murder cases. All in custody meanwhile the Attorney General was on strike. So he questioned whether he should discharge them, or keeps them in prison? The High Court judge explained that some of the cases are ready for sentencing, meanwhile the State Attorneys' are not working, but de-

[302] His Lordship Justice J.B. Akamba, a Justice of the Supreme Court of Ghana was appointed by the Honourable Lady Chief Justice to assist me in the research during the period of the research stay in Ghana. Justice J.B. Akamba is a former Director of Public Prosecution of The Gambia from 1994-1999; Court of Appeal Judge in The Gambia from 1999-2001; former Director of Ghana Judicial Training from 2008-2011; Court of Appeal Judge in Ghana from 2002-2011; and a Supreme Court Judge of Ghana 2012 till date.

fence lawyers are ready to address the jury before sentencing. Should he go ahead or proceed to sentencing whiles the prosecutors are not present at the court? What shall be the outcome?

During my research investigation, I visited Sunyani Prisons in Ghana and with the permission of the Regional Prisons commander, with the help of the Public Relations Officer, I interviewed some inmates. Both inmates who have been convicted and sentenced and those on remand waiting for trial. It was very sad to hear from the inmates that majority of them throughout their court proceeding in indictment and summary trials had no representation. Remand cases (unreported cases) are very grave. The prison officers brought to me remand prisoners that have been there for longer. There were 3 (Kwabena Fasegme, Kwasi Dere, and Afo Kosase) people who have been on remand for 10 years on murder suspect. These guys have been taken to court 92 times when I requested for the number of times their warrants have been renewed, and therefore court attendance. The last time they appeared before a judge was on the 5th of May 2014. They have never had any legal counsel or representation at the court throughout these years. According to them they spent almost a year at the police custody in 2006, and were continuously beaten by the police. The case is at the High Court in Sunyani, and one of the mere reasons for the delay is that the prosecutor of the case died. The question is why after 92 times in court there has not been a sentence over these cases if there is enough evidence and if not why do they have to be kept in the prison? In another case also on suspect murder, the person has been on remand for 9 years. The last time he appeared before a judge was 2 years 3 months ago, and also has no representation. Another remanded prisoner (Godwin Frimpong) 4 years on remand, and has not seen a judge for the past 1 and half year. Another inmate on remand (Kwasi

Bredi) for 4 years no one explains to him why he is not been taken to court. Other murder suspect (Mr. Kwasi Owusu) on remand for 11 years, claim he was given a representation in middle of the trial but the counsel who should be paid by legal aid, keep asking for money from him and because he cannot pay, counsel does not show up in court when the case is called. There are many who have been on remand from between 4-10 years without representation and majority of them have been forgotten. Having examined such cases in the course of the investigation including convicted prisoners serving their sentences, I foresaw many convicts have good grounds to have their sentences quashed or reduced for interest of justice if they could appeal and therefore I recommended all such cases to a lawyer[303].

According to a Superintendent of Ghana Prison Service headquarters also in charge of paralegal, and a member of the National Prisons Council during my interview with him, some 300 cases were sent to the 'Justice for all' body for consideration 2 years ago to release such inmates for the interest of justice but nothing has been done till now.

In the case of the *Republic v Arthur [1982-83] (supra)*, the applicants who had been committed to stand trial for murder filed for bail pending trial, arguing that there was no likelihood of their case been heard within a reasonable time as prescribed by article 21(4) of the 1979 Constitution (now article 14(4) of the 1992 Constitution since there were older cases still awaiting trial. The court held that since certain crimes took longer to investigate than others what constituted "unreasonable period" had to be determined within the particular context.

[303] A legal practitioner in charge of reviewing cases and sentences appointed by the High Court; and honestly he is seriously working on all such cases and has promised to involve other lawyers to help for interest of justice.

The application was therefore dismissed and failed to show that there had been unreasonable delay in bringing them to trial.

Precisely, the purpose of the right to be tried within a reasonable time in criminal matters is to ensure that the accused persons do not have to lie under a charge for too long and that the charge is determined[304]. Prolonged proceedings can put a considerable strain on accused persons and have the potential to exacerbate existing concerns such as uncertainty as to the future, fear of conviction, and the threat of a sanction of an unknown severity. It is only if a decision is reached by the court within a reasonable time, if not the alternative would be postponement *ad calendas graecas*- a denial of justice.[305]

Basically, there are three questions, which arise in the context of the right to be tried within a reasonable time: when does the period begin, when does it end, and what are the criteria used to distinguish proceedings of reasonable length from those involving undue delay? The three periods could be said to start from where the person is charged with a criminal offence in the domestic criminal procedure law which may or may not consist of an official opening of a criminal investigation without the term 'charge' being used. Furthermore, the period to be considered ends when the proceedings end- i.e. hearing within a reasonable time until there has been an acquittal or conviction, even if this is on appeal as the ECtHR made clear in the case *Wemhoff v. Germany[1979-80]*[306]. The assessment of the period to determine whether proceedings have been concluded within a reasonable time would be to fix a specific time limit. In certain circumstances, the time allowed would be too short or too long. It is therefore essential

[304] Wemhoff v. Germany, The Law, s 18.
[305] Gollwitzer (1992) Art. 6 N 76.
[306] [1979-80] 1 EHRR 55.

that each case be assessed on its own merit.[307] Trial periods in Ghana are unduly and unjustifiably delayed the possibility of the domestic authorities compensating the accused for the excessive length of the proceedings is unreasonably a problem and not straightforward.

A conclusion could be drawn from the fact that because trial within a reasonable time is not absolutely defined, the criminal system fails to respect such right of the accused thereby violating other several rights of the accused. A legal system that could have remanded suspects brought to court for 92 times within 10 years without a sentence put the competence of the court and judges into question and on the other hand multifaceted factors such as lack of evidence and availability of witnesses could be the reason for that challenge which makes it difficult and to some extent, extremely impossible for the court to deliver judgement in a reasonable time. In such cases the court should free the detained suspect from prison custody to avoid breaching other rights of the accused. It is clear that the criminal system in Ghana fails to adhere to the general rule to trial suspects within a reasonable time. Speedy trials and guarantee of procedural rights of the accused is to be upheld to for the interest of justice.

To sum up, what constitutes reasonable time in Ghana for criminal trial has not been properly defined or specified and therefore has no time limit, and therefore recommend that there should be time limit duration on all criminal trial proceedings from start to the end to avoid unreasonable delay and denial of justice in Ghana.

[307] See Villiger (1999) N 448.

2.6. How the Courts Enforces Human Rights in Ghana

Fundamental human rights has been enshrined in the constitution 1992 of Ghana due to its importance in protecting human dignity and liberty which ensures that every right entitled to humans are protected by law and for that matter the court from infringement and abuse. In most democratic states, these rights of the citizen are spelt out and impliedly expressed by the constitution which cannot be taken by the executive, legislature, nor the judiciary without due process of the law. Human right laws which most often than not originates from international soft law or hybrid of laws and finds their ways into national and domestic laws by incorporation and ratification in order to protect human rights as international norm; often faces danger such as abuse, violations and infringement by authorities if not well protected by the domestic courts and international courts where necessary. Under this chapter, specific rights such as protection of fundamental human rights and freedoms (article 12); right to life (article 13); personal liberty (article 14); respect for human dignity (article 15); equality and freedom from discrimination (17); fair trial (article 19); the right of persons detained under emergency law (article 32); and the right to be protected by the court (article 33) shall be examined briefly due to their relevance to the thesis.

Human rights enforcement in Ghana could certainly be viewed from the period after the independence of Ghana under the 1960 First Republican Constitution up to the present fourth republican constitution of 1992. Historical background of the article 13 (1) of the 1960 constitution though made a provision for the protection of certain rights by the executive –headed by the president, yet, when cross section of the citizens relied on the provision, the Supreme Court failed to

upheld to the spirit of the law and on the contrary classified the said provision to be a moral obligation of the president which is not enforceable by the court.

For instance in the case of In *re Akoto* 1961[308], an attempt was made by a group of citizens to insist on their right not to be detained without the due process of law. The appellant and seven others in the case were detained under[309] the Preventive Detention Act, 1958[310]. The application for the writ of *habeas corpus,* challenging their detention was dismissed by the High Court. The applicants further appealed to the Supreme Court against the dismissal on the grounds, inter alia, that the Preventive Detention Act, 1958 was unconstitutional and hence in contravention of the declaration of fundamental principles made by the President on assumption of office and as contained in article 13(1) of the Constitution, 1960. The said article 13 (1) stipulated that:

> "*immediately after his assumption of office the President shall make the following solemn declaration before the people - On accepting the call of the people to the high office of President of Ghana I ... solemnly declare my adherence to the following fundamental principles -That the powers of Government spring from the will of the people and should be exercised in accordance therewith. That freedom and justice should be honoured and maintained ...That no person should suffer discrimination on ground of sex, race, tribe, religion*

[308] [1961] 2 GLR 523, SC
[309] This was an order made by the Governor- General and signed on his behalf by the Minister of the Interior.
[310] No 17 of 1958.

> *or political belief... That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law. That no person should be deprived of his property save where the public interest so requires, and the law so provides*"[311]

In dismissing the appeal, the Supreme Court claimed that a declaration did not constitute a bill of rights, creating legal obligations enforceable in a court of law. The Supreme Court delivered itself of an opinion which very much influenced the interpretation placed on article 13(1). The court said, (per Sir Arku Korsah CJ):

> "*The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The People's remedy for any departure from the principles of the declaration is through the use of the ballot box, and not through the courts.*"[312]

The Supreme Court in the above case failed to interpret the constitution to defend the detained citizens by holding that article 13(1) of the 1960's constitution merely created a moral right, and not legally enforceable right at the court.

[311] "Declaration of fundamental principles": as part of the oath of the President, under article 13(1) of the 1960 Constitution.
[312] [1961] 2 GLR 523 at 535.

The court's interpretation identifies it as coward and impotent to interfere or examine the legality of the state's action. Because if the declaration is just a mere moral obligation, then the framers of the constitution; would not have described it as "fundamental principles". If fundamental principles are violated, then it takes the court to enforce it not for the citizen to wait until election time to take an action "*through the use of the ballot box*" as the court put it. In that sense how does the court explain the wording of the article 13(1) of the constitution 1960 which states "…*no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law"?*

The decision of the Supreme Court was widely criticized by academics, jurist, some justices, and writers for undermining the spirit of the law and very fabric of the 1960 constitution.

In the decision in support of the unanimous decision of the Supreme Court case *New Patriotic Party v Inspector General of Police 1993*[313] (supra), Charles Hayfron-Benjamin JSC criticised the Supreme Court judgement[314] by saying *"In 1961 in the Akoto case, our Supreme Court missed the opportunity to designate article 13 of the 1960 Constitution as a Bill of Rights."*[315]

Likewise, in the view of Kpegah JSC in the case of *Amidu* v *President Kufuor {2001/2002}*[316] the judge expressed that:

> *"Every student of the Constitutional Law of Ghana might have felt, after reading the celebrated case of In re Akoto, that if the decision had gone the other way, the political and constitutional de-*

[313] [1993-1994] 2 GLR 459, SC.
[314] Thus the judgment of the case of Akoto [1961] 2 GLR 523, SC referred above.
[315] Ibid at 505
[316] [2001-2002] SCGLR 86

> *velopment of Ghana would have been different. 'Different' in the sense that respect for individual rights and the rule of law might well have been entrenched in our land."*

Another criticism of the right infringement case (*Akoto*) 1961 came from the late Professor Adu Boahen[317], that:

> *"One of the reasons why democracy has not done too well in this country and why human rights have often been trampled upon has been the rather timid and conservative role played by the Judiciary. According to many informed legal opinions, had the Supreme Court ruled otherwise in the case of Re Akoto ... the course of history would have been different."*

It is therefore essential to note that, fundamental human rights were not respected before the coming into force of the current constitution 1992 of Ghana. It was not properly enforced by the courts in Ghana though Ghana was a signatory to a lot of international conventions[318] that protects human rights. There was only the right of habeas Corpus under legislations which was partially enforceable under Act, 1964 (Act 244); article 28 of the 1969 constitution; article 35 of

[317] *Human Rights and the Democratic Process*, Accra, 1993 at page 33, Ghana Academy of Arts and Sciences; in a contribution to a symposium on the Concept and Practice of Human Rights in Ghana; on the 18th November 1980.

[318] Convention on the Prevention and Punishment of the Crime of Genocide (1966); Convention on the Political Rights of Women (1952); International Convention on the Elimination of all Forms of Racial Discrimination (1965); Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child (1989); African Charter on Human and Peoples' Rights (1981) and the Charter of the United Nations and the Universal Declaration of Human Rights 1948.

the 1979 constitution; and the article 13 of the 1960 constitution which was declared unenforceable by the Supreme Court in the case of *Akoto 1961*.

It is obvious that most national courts appear to be reluctant to utilize international norms as rules of decision when those norms are inconsistent with national executive or legislative action, like in the case of Akoto 1961 (*supra*) in Ghana, even though the 1960 constitution article 13(1) made a provision for the protection of human rights, the court was reluctant to interpret it as such. Certainly, national jurisdictions will protect human rights much better if Universal Declaration is perceived as a "Rule of Decision" but not just mere imposed international laws. Surprisingly, very few national courts are willing to overturn inconsistent domestic law based on rights found in an international source such as the Universal Declaration of Human Rights. The Declaration is nonetheless frequently cited in support of judicial decisions which uphold a particular right guaranteed under domestic constitutions or statutes. Thus, even in jurisdictions in which domestic law is subordinate to customary international law, instances in which the latter is utilized explicitly to overrule the former are rare. It is as a result of the effects of international laws that made the judgment of the Supreme Court in the case of Akoto 1961 more ridiculous and questionable. It was therefore an ideal privilege when the current constitution 1992 of Ghana, established sections to protect the fundamental human rights and freedoms. The Constitution of Ghana 1992 guarantees the protection of human rights under article 12(1). It is established that:

> *"The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agen-*

cies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in this Constitution"[319].

It is of great importance to ensure that human rights protection been explicitly stated in the constitution and therefore declared as enforceable by the court, be observed and upheld by the executive, legislative and the judiciary which should avoid violating the said rights provided for in this constitution. It further expresses at Article 12(2) that:

"Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest".

Under the constitution the High Court has a jurisdiction to enforce human rights and freedoms specified. It is spelt out under articles 33(1), 130(1), and 140(2) of the constitution that rights and freedoms when violated can be brought before the Higher Court. For instance article 33(1) establishes that:

"Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully availa-

[319] Article 12(1) Chapter 5, 1992 Constitution: Fundamental Human Rights and Freedoms.

ble, that person may apply to the High Court for redress.

For the protection of the rights and freedoms by the courts, the section 33(3) further expresses that *"A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court.* The wording of the constitution regards and considers rights and freedoms as inherent in a democracy and therefore intends to protect, safeguard, and secured the freedom and dignity of man as a norm in civil society, by ensuring that individual can challenge and defend their rights up to the Supreme Court when infringed. Apart from the above, constitutional provisions, section 15(1) (d) of the Courts Act, 1993 amended by the Act 2002 (Act 620), also vests the jurisdiction of enforcing the Fundamental Human Rights and Freedoms guaranteed by the constitution in the High Court.

In the case of *Ocansey and Others v The Electoral Commission and Another (2010)*[320] which was decided by the Supreme of Court, these two consolidated cases raise important constitutional questions pertaining to the right of prisoners to vote in public elections and referenda, pursuant to article 42 of the 1992 Constitution, as do other citizens of the Republic. The court in dismissing the case therefore made a reference to *Tehn-Addy v Electoral Commission [1997-1998]*[321]. Another important case regarding human rights in Ghana is that of *Gorman & Ors v The Republic [2003-2004]*[322] which identifies circumstance under which the liberty of persons awaiting trial could be curtailed. In this case the court made the observation by saying that:

[320] WRIT NO. JI/4/2008, and WRIT NO. JI/5/2008
[321] [1997-8]1 GLR at p. 595; see also foreign jurisdiction in the case of *Bennet Coleman and Co. Ltd. & Ors. vs. Union of India & Ors [1973]* AIR 1973 SC 106 at 118.
[322] [2003-4] SCGLR 784

> *"...we must always guard against a sweeping invocation of fundamental human rights as a catch-all defence of the rights of defendants. People tend to overlook the fact that the Constitution adopts the view of the human rights that seek to balance the rights of the individual as against the legitimate interests of the community. While the balance is decidedly tilted in favour of the individual, the public interest and the protection of the general public are very much part of the discourse on human rights in our Constitution. Thus article 14(1) (d) makes it clear that the liberty of certain individuals, including drug addicts may be curtailed not only for the purpose of their own care and treatment, but also "for the protection of the community."*

Moreover, similar instances which buttresses the fact that the statutes and its interpretation by the court protects human rights is in the case of *Tsatu-Tsikata v Attorney General{2001}*[323](supra), which regards the right of the individual and the constitutionality of the criminal summons of the accused. The majority of the court held that a criminal summons issued in the Fast Track High Court in the name of the President of Ghana rather than the name of the Republic contravened this provision and was therefore a nullity. This decision was reversed

[323] (No. 1) (2001 – 2002) SCGLR 189

on review by the majority of the court in the case of *Attorney-General (No. 2) v Tsatsu Tsikata [2001-2002]*[324] where at 647 Acquah JSC held poignantly that:

> The applicant also *complains about the majority's holding that the criminal summons served on the respondent was unconstitutional*. Now *it is true that the criminal summons was inadvertently issued in the name of the President*, but *what harm or threatened harm did that error cause the plaintiff*? Did he as a *result of that error go to the castle to answer the call of the President*, or when he came to the court, *did he find the President of the nation presiding*? The plaintiff came to court *because he knew it was the court that summoned him*, and that *whoever issued the criminal summons, obviously made a mistake*. The plaintiff *suffered absolutely no harm by the error*, neither has he demonstrated any. *That error was one obviously amendable* without prejudice to the rights of the plaintiff-respondent. And *the majority's declaration on this error was nothing but an exercise in futility."*[325]

It is of no doubt that some justices sometimes try to narrow the constitutional rights of the individual when it comes to practical analysis of their rights infringement. For instance the court further established that, where a constitution-

[324] *(No. 2)* (2001-2002) SCGLR 620.
[325] With the concurrence of Wiredu C.J, Sophia Akuffo and Afreh JJSC in the case of Attorney-General (No. 2) v Tsatsu Tsikata

al infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect.

It is certainly clear that Article 14(1) (g) of the 1992 constitution of Ghana, sanctions the deprivation of an individual's liberty upon reasonable suspicion of the commission of an offence or about to commit an offence under the laws of Ghana, ostensibly for the protection of the community and the body politic.

Nevertheless, the court argued that the detention of persons awaiting trial in prison custody, in the absence of clear legislation to the contrary, will continue to be an essential feature of our criminal jurisprudence. Ordinarily, persons charged with criminal offences are, by virtue of the rule that presumes them innocent, until they are proven guilty, are entitled to be admitted to bail. But bail is not automatic, it is sometimes withheld; with the order that the accused person be detained in legal, i. e. prison custody.

Also, under the criminal laws of Ghana, there are a number of offences on the statute books, in respect of which courts are constitutionally or statutorily mandated to refuse bail, and order the detention of accused persons in legal, i.e. prison custody. The overriding consideration for curtailing accused persons right to liberty in such matters is that they are not likely to appear to stand trial if granted bail, having regard to the nature of the offences and the "severity of the punishment which conviction entails."[326]

[326] That was the view and argument of the court in the case Gorman & ors v The Republic. It could be observed from the 1992 constitution article 14 (4) which establishes that Where a person is arrested, restricted or detained under this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released wither unconditionally or upon reasonable conditions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial. This means the person would be legally denied bail if there is a presumption that the person might to appear for the trial in the future. (Emphasis is mine).

It is of no doubt that human rights and freedoms are well spelt out in the constitution 1992 of Ghana which notably guarantees their protection. For example, for the protection of personal liberty, article 14 (1) states that every person shall be entitled to his personal liberty and no person shall be deprived of it except in the procedure permitted by law. That is except by enforcing the law, after a court has ordered the police to do so. If not, depriving someone his personal liberty is against the person's constitutional right. The respect for human dignity is also established under article 15(1) (2) (a) and (b). It states that the dignity of all persons shall be inviolable, and therefore no person shall be arrested, restricted or detained, or be subjected to torture, cruel treatment and inhuman punishment; and above all a person who has not been convicted of a criminal offence shall not be treated as a convicted person and shall be kept separately from convicted person –article 15(3). On the issue of equality and freedom from discrimination, article 17(1) and (2) emphasises on equality of all persons before the law and prohibit discrimination on any grounds.

Also where one is detained by virtue of emergency law, as established under article 32 (1), the person shall in not later than twenty-four hours be furnished with a statement in writing specifying in details the grounds upon which he is restricted or detained to his or her understanding in a language the person understands, and his next of kin or spouse shall be informed likewise; and in not more than ten days after the commencement of the restriction, his detention shall be published in the Gazette and in the media stating the cause and why- article 32 (a) (b) (c)[327].

In the conclusion however, the enforcement of human rights by the courts in Ghana as at now is very poor, inconsistent and without any certainty. Before the

[327] Article 32 of the 1992 Constitution of Ghana: Rights of Persons detained under Emergency Law.

coming into force of the 1992 constitution, human rights was considered to be predominantly foreign and international ideology trying to finds its way in counter with the domestic statutes codified to deal with the suspected criminals which by presumption was to serve two main purposes such as punitive and deterrent. Though the 1992 constitution contain articles projected to protect human rights, enforceability by the courts remains terrible. The criminal system fails to provide legal representation to the criminally accused through its established legal aid scheme without which defendants vulnerably passes through criminal proceedings undefended from the pre-trial to the trial stage to conviction. About 95% of initiated criminal cases, results to conviction whether it lacks substantial evidence or not because judges at the Circuit and Magistrate Courts undermine the fact that the accused in criminal trial in many instances have not been informed of their rights by the police, and despite numerous coercion and violations of the criminal suspects rights by the police with evidence of damage faces resulting from severe beating, judges fail to question the police and admit any evidence against the unrepresented defendant who are normally prosecuted by the police at these levels of court. Though Article 33 establishes that any person aggrieved by the violations of his right may apply to the High Court up to the Supreme Court for redress; this remains a mere declaration if legal aid lawyers are not provided for free for the indigents who are poor and low income earners. Such category of persons constitutes the major percentage of the criminal defendants in the Ghana criminal justice system.

Having observed the enforcement of the right to fair trial in Ghana, the next discussion shall examine the paradigm of rule of law in Ghana with particular reflection of the Supreme Court judgment of the case between the *New Patriotic Party v. National Democratic Congress* which was an election dispute in the

year 2012. This would enable us to test how procedural fairness work when dealing with irregularities between the executives and the ordinary citizen.

To reflect on the main ideas been discussed under this particular part of the dissertation, I have argued that right to fair trial and other human right instruments are poorly enforced, inconsistent and without certainty in Ghana and therefore recommend that judges, courts and court officials as well as law enforcement institutions must uphold and apply human right norms in Ghana.

2.7 The Paradigm of Rule of Law in Ghana: NPP v NDC 2012

The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions. Generally, however, it can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power. More simply, the rule of law is a norm that regulates between the government power and its institutions and the ordinary citizens. It spells out the rule which governs ones behavior for which there may be consequences if the violation of a particular rule occurs.

This part of the thesis deals with the typical example and pattern as well as the model of the "rule of law" in Ghana by reflecting on the judgment of the Supreme Court case *New Patriotic Party v. National Democratic Congress{2012}*[328] on the 29th August, 2013. It was a presidential election petition challenging the validity of the election of John Dramani Mahama (The current

[328] WRIT No. J1/6/2013.

President) as president of the Republic of Ghana pursuant to the presidential election held on the 7th and 8th December, 2012. The challenge was brought under Article 64 of the Constitution, 1992; Section 5 of the Presidential Election Act, 1992 (PNDCL 285); and Rule 68 and 68A of the Supreme Court (Amendment) Rules 2012, C.I. 74. The said Article 64 s. (1) states that:

> *"(1) The validity of the election of the President may be challenged only by a citizen of Ghana who may present a petition for the purpose to the Supreme Court within twenty-one days after the declaration of the result of the election in respect of which the petition is presented,*
>
> *(2) A declaration by the Supreme Court that the election of the President is not valid shall be without prejudice to anything done by the President before the declaration"*[329].

The petitioners[330] of the case and the respondents[331] had their judgment[332] from the Supreme Court of Ghana. By their second amended petition dated the 8th day of February 2013 the petitioners claimed, as stated at p.9 of the Written Address of their counsel;

[329] Article 64 of the Constitution, 1992

[330] NANA ADDO DANKWA AKUFO-ADDO 1st Petitioner , DR. MAHAMUDU BAWUMIA 2nd Petitioner, JAKE OTANKA OBETSEBI-LAMPTEY 3rd Petitioner.

[331] JOHN DRAMANI MAHAMA 1ST RESPONDENT; THE ELECTORAL COMMISSION, 2ND RESPONDENT; and NATIONAL DEMOCRATIC CONGRESS (NDC)] 3RD RESPONDENT.

[332] IN THE SUPERIOR COURT OF JUDICATURE IN THE SUPREME COURT ACCRA – A. D. 2013. The nine Justices: Justices William Atuguba, Julius Ansah, Sophia Adinyira, Rose Constance Owusu, Jones Victor Dotse, Anin Yeboah, Paul Baffoe-Bonnie, N. S. Gbadegbe and Vida Akoto-Bamfo.

"(1) that John Dramani Mahama, the 1st respondent herein, was not validly elected President of the Republic of Ghana;
(2) That Nana Addo Dankwa Akufo-Addo, the 1st petitioner herein, rather was validly elected President of the Republic of Ghana;
(3) Consequential orders as to this Court may seem meet."

The facts of the case as asserted by the court is that, although the petitioners complained about the transparency of the voters' register and its non or belated availability before the elections, this line of their case does not seem to have been strongly pressed. According to the presiding judge of the court Justice W.A. Atuguba, the evidence clearly shows that the petitioners raised no such complaint prior to the elections nor has any prejudice been shown therefrom. Indeed even in this petition the petitioners claim that the 1st petitioner was the candidate rather elected, obviously upon the same register. So also their allegations that there were irregularities and electoral malpractices which *"were nothing but a deliberate, well-calculated and executed ploy or a contrivance on the part of the 1st and 2nd Respondents with the ultimate object of unlawfully assisting the 1st Respondent to win the 2012 December Presidential Elections."* Indeed the 2nd petitioner for and on behalf of all the petitioners, testified that the first respondent did no wrong with regard to the conduct of the elections but was merely the beneficiary of the alleged malpractices, irregularities and violations.

Eventually the core grounds of their case are as summarized at p.125 of their counsel's Written Address as follows:

"I. over-voting
II. Voting without biometric verification
III. Absence of the signature of a presiding officer

IV. Duplicate serial numbers i.e. occurrence of the same serial number on pink sheets for two different polling stations

I. duplicate polling station codes, i.e. occurrence of different results/pink sheets for polling stations with the same polling station codes

II. Unknown polling stations i.e. results recorded for polling stations which are not part of the list of 26,002 polling stations provided by the 2nd respondent for the election."

The judges objecting to the allegation IV commented that:

> "*We unanimously saw no merit in ground IV relating to duplicate serial numbers i.e. occurrence of the same serial number on pink sheets for two different polling stations."*

The court ascertained that they were at a loss as to how the embossment of the same number on more than one pink sheet whether serial or otherwise in respect of two different polling stations has impacted adversely on the 2012 electoral process. Those numbers have no statutory base. However the decisive fact is that their incidence has not been shown to have any detrimental effect on the electoral process. Therefore they felt that grounds V and VI did not relate to matters that could have any substantial effect on the declared results. Hence the court decided to deal mainly with the first three grounds of the petition.

On the other hand, the facts of justice Ansah's judgment establish two grounds of the petitioners. The grounds for these reliefs were inextricably linked to various alleged deviations from the prescribed procedures for the conduct of presidential elections which said deviations, according to the petitioners, incurably vitiated the election and swearing in of the 1st respondent as president of Ghana.

The petitioners stated the said grounds in their second amended petition in these terms:

"Ground 1: There were diverse and flagrant violations of the statutory provisions and regulations governing the conduct of the December 2012 Presidential elections which substantially and materially affected the result of the elections as declared by the 2nd Respondent on 9th December, 2012.

Ground 2: Establishes that the election in 11,916 polling stations was also vitiated by gross and widespread irregularities and/or malpractices which fundamentally impugned the validity of the results in those polling stations as declared by 2nd Respondent."[333]

On the allegation of the absence of the presiding Officers signature, Justice William Atuguba of the Supreme Court established that "by far the irregularity which has engaged and sharply divided this court as to its consequence is "absence of the signature of a presiding officer." This irregularity is anchored in article 49 of the 1992 constitution.

As established by the court, it is undoubtable that in some instances the declared results were not signed by the presiding officer though the petitioner's polling agents did sign. The crucial question that has devastated this court is whether those results should be annulled.

The Supreme Court however directed that:

> *"To arrive at an answer to this question a number of considerations are relevant. To some minds the sacred nature of the constitution and the clarity of article 49 so far as the requirement of the presiding officer's signature is concerned warrant the*

[333] The final Judgment of Justice Ansah on the 2012 NPP v NDC election dispute.

> *unmitigated annulment of the votes involved. Quite clearly however this has not been the approach of this court and its predecessors to constitutional construction or application".*

With regard to the absences of the signature of the presiding officer, the court asserted that *"In this case it would be unfair and fraudulent for the petitioners to authenticate the results through their polling agents' signatures and turn round to seek to invalidate on the purely technical ground of absence of the presiding officer's signature".* The court further explained that the failure of the presiding officer's signature could be due to an administrative error with reference to re *N (A Minor 1972* [334] at 597 by Sir, George Baker P.

The presiding judge on the issue of the absence of the presiding officer's signature concluded that:

> *"I have endeavoured to demonstrate* ***ut supra****, absent the presiding officer's signature there is copious evidence* ***intra*** *the relevant pink sheets by way of the eternal signatures of the polling agents and also* ***aliunde*** *to sustain the authenticity of those results. Consequently I would adopt the attitude of the Court of Appeal in* ***Clerk v Clerk (1976) 1 GLR 123 C.A*** *in dealing with the absence of the presiding officer's signature in this case"*[335].

[334] (1972) I WLR 596

[335] William A. Atuguba, Presiding Judge: Justice of the Supreme Court in the case Writ No. J1/6/2013.

On the issue of Over Voting, the court questioned what constitutes over-voting and it was established to be whereby the number of those who voted at a polling station exceeds the number of voters contained in the relevant polling station register. And the situation where the number of ballots in the ballot book exceeds the number of ballot papers issued to the relevant polling station. The petitioners contends that where the votes in the ballot box are exceeded by even one vote the integrity of that vote is said to be compromised and must be annulled and depending on the impact of that vote on the overall results, the election in that polling station must be rerun.

As put across by Justice Ansah on the issues for the determination by the court, it considered the following:

"1. Whether or not there are statutory violations in the nature of omissions, irregularities and malpractices in the conduct of the Presidential Elections held on the 7th and 8th December 2012.

2. Whether or not the said statutory violations, if any, affected the results of the elections. "

The judge on this case substantiated the burden of proof and applicable standards governed by statutes provided in the Section 10 of the Evidence Act, 1975, (NRCD323).

Analysing the judge's categories of irregularities over the election dispute, on the issue of unknown polling stations, Justice Julius Ansah refused to accept that for lack of evidence. Again, on the issue of the Pink sheets not signed by presiding officers or their assistants, the judge established that:

"The failure to sign the pink sheet was a monumental irregularity unmitigated by any circumstances. ...Article 49 (3) of the Constitution does not merely constitute a mandatory constitutional duty on presiding officers to do so prior to

announcing the election results, but it is also one of the entrenched provisions of the Constitution.

I am of the candid opinion that the failure by the presiding officer to sign the pink sheet before announcing the results constituted an omission to perform and a breach of his constitutional duty. It vitiated the votes cast at the polling station, a more monstrous irregularity no one can imagine.

It was as unpardonable as it was inexcusable that presiding officers should fail to sign declaration portion of pink sheets they worked with…Based on the foregoing discussion under this head of irregularities, I find that all votes cast and declared during the 2012 presidential elections which involved pink sheets not signed by presiding officers or their assistants are to be nullified and I so declare".

On the issue of duplicate serial numbers and polling station codes, justice Ansah refusing the allegation of the petitioner's established that: *such could not be used to annul the votes in the polling stations specified and therefore rather dismiss the claim based on that ground.*

Again on the allegation of over voting at the polling stations, the learned judge referred to article 42 of the constitution 1992 and Regulation 24 (1) of CI 75 as the constitutional and statutory violations which had a close link with over voting. Quoting them in extenso hereunder for their full import and effect, the above article states that:

> *"Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."*[336]

[336] Article 42 The Right to Vote, 1992 constitution of Ghana.

Also Regulation 24 (1) establishes as follows:

> *"The poll: Number of votes and place of voting*
> *24 (1) A voter shall not cast more than one vote when a poll is taken."*

On the premise of over voting the judge affirms that anything done by any person or authority to fetter the right to vote is inconsistent with the constitution which will attract the sanction of being declared unconstitutional, null and void.[337]

Commenting on voting without prior biometric verification, the judge referred to Regulation 30 of the Public Elections Regulations, 2012, C.I, 75, and when Justice Ansah annulling the election results based on irregularities expressed that:

Firstly, it is clear that the irregularities associated with the 2012 presidential elections were substantial. Substantial is not used here as a term of art and it can be understood in its natural sense as meaning either materially or essentially[338].

Secondly, it is equally clear that the non-compliance in this case affected the results of the 2012 presidential election. Once account is taken of the irregularities, the first respondent no longer has the required fifty percent plus one of the valid votes cast which produces the remarkable effect that he was not entitled to be declared president-elect of the Republic of Ghana. Put differently, the irregularities produced the significant consequence that the first petitioner was deemed to have lost any chance of continuing the race for the presidency of Ghana, whereas a proper reckoning of the election outcome, that is, minus the

[337] See Article 2 (1) of the constitution 1992. In election matters, it is to be annulled.
[338] Justice of the Supreme Court of Ghana giving his opinion before the annulment of the presidential election results 2012.

nullified votes, would have shown that he was entitled to a final shot at that high office through a run-off poll[339].

Considering the impact of nullified votes on the 2012 presidential election results over the three allegations by the petitioner's which are: *Voting without prior biometric verification, Pink sheets not signed by presiding officers or their assistants, and Over voting,* the judge emphatically expressed that the evaluation of the impact of the nullified votes shows that they resulted in neither the first petitioner nor the first respondent obtaining the critical fifty percent plus one valid vote threshold. Therefore neither the first petitioner nor the first respondent had the required number of votes by the constitution to be declared the President of the Republic of Ghana,

In the judgment of the heated election dispute which was ruled by the nine (9) judges as 5 against 4 in the favour of the respondent, Justice Ansah, one of the four (4) judges who annulled the results of the election based on irregularities concluded that:

> *"I make the following conclusions and directions:*
> *1. That the relief that an declaration be made that Mr. John Dramani Mahama was not validly elected the President of Ghana, is hereby granted;*
> *2. That a declaration be made that Nana Akufo-Addo be declared the candidate who was validly elected the President of Ghana, is also refused.*
> *3. The consequential order I make is that the E.C. conducts a re-run of the Presidential elections for the two leading candidates, Mr. John Dramani*

[339] Justice Ansah in the judgment of the 2012 election petition; Commenting on the effects of the irregularities by the Electoral Commission of Ghana over the election.

Mahama and Nana Akufo-Addo, in all the polling stations affected and indicated in the petition and its supporting documents, forthwith.''[340]

Having considered the facts surrounding this suit, it is therefore necessary to scrutinized and reflect the paradigm of rule of law in Ghana by examining the very fabric of the constitution and statutes which is used when disputes arises over the law whereby judges, jurist, and legal academics are sharply divided. This part of the research is not to reflect on the rule of law as a legal framework of criminal justice in Ghana but to test and examine procedure fairness when the court is adjudicating between the executives of the government and the ordinary citizen in the spirit and letter of the law.

The question I have been lamenting on over the recent Ghana Supreme Court judgment of the election petition is: Can there be a fair trial if the swore in President (executive) of the republic of Ghana is a party (the first respondent) to a pending case at the Supreme Court over presidential election dispute involving the president? This would be a paradigmatic investigation and analysis regarding the rule of law in Ghana when the above ***ipso facto*** of the case is considered**.** The simplest test to prove if there is a substantiate applicable norm and principles of rule of law in the jurisprudence of Ghana, is by considering how case law unveils the approach of the court when it comes to the law and its application and enforcement whether irregularity in the legal statutes could be classified as an administrative error .

To find an answer to the above question, a comparative analysis of the constitution 1992 of Ghana and the principles of rule of law shall enhance ones understanding over the perception and model of rule of law in Ghana.

[340] J. ANSAH JUSTICE OF THE SUPREME COURT; in the WRIT No. J1/6/2013 29TH AUGUST, 2013

Under article 57 ss. (1), (2), (4) and (5) of the 1992 constitution, chapter eight which deals with the executive powers, it is establishes that:

> *(1) There shall be a President of the Republic of Ghana who shall be the Head of State and Head of Government and Commander-in Chief of the Armed Forces of Ghana.*
>
> *(2) The President shall take precedence over all other persons in Ghana;*
>
> *(5) The President shall not, while in office as President, be personally liable to any civil or criminal proceedings in court.*

The concern of the 2012 election dispute is that the political tension which divided and nearly caused civil war in the country, could have been avoided if the rules governing elections and the powers ascribed to a swore in president by the constitution were understood and perceived by the Electoral Commission of Ghana and the Supreme Court.

The Constitution establishes that once a person is sworn in as the President of the republic, that person is the head of state and government and not only that, but he commands the armed forces. Which means the fear that if challenged by any ordinary person, can be crushed by orders is of no doubt even though the principles of democracy should govern every democratic institution and nation. Also under article 57 of the same constitution 1992 s. (2) the President takes precedence over all other persons in the country, and above all such a person once sworn in shall not while in office as President be personally liable to any civil or criminal proceedings in court. It is therefore imperative to establish a fact that this created an ***inequality*** in the case of the election dispute between

the petitioners and the respondents. This action places one man above the law when the principle of rule of law by Professor A.V. Dicey is considered. The second point of Dicey states that: *"No man is above the law; every man and woman, whatever be his or her rank or condition, is subject to the ordinary law of the real and amendable to the jurisdiction of the ordinary tribunal".*

The second question to be asked now is since the Electoral Commission (EC) of Ghana and the Supreme Court new that the 2012 presidential election results was been challenged by the opposition party for irregularities and malpractices:

(1) Why did the EC pronounce and confirm the respondent as a winner without first conducting an investigation into the matter?
(2) Why did the Supreme Court of the Land fail to investigate the irregularities before the sworn in of the president?

For example, in the case of *Bush v. Albert Gore 531 U.S. 98 (2000)*, On December 8, 2000, the Florida Supreme Court ordered, inter alia, that manual recounts of ballots for the recent Presidential election were required in all Florida counties where so-called "under votes" had not been subject to manual tabulation and that the manual recounts should begin at once. Noting the closeness of the election, the court explained that, on the record before it, there could be no question that there were uncounted "legal votes"-i. e., those in which there was a clear indication of the voter's intent-sufficient to place the results of the election in doubt. Petitioners, the Republican candidates for President and Vice President who had been certified as the winners in Florida, filed an emergency application for a stay of this mandate. On December 9, this Court granted the stay application, treated it as a petition for a writ of certiorari, and granted certiorari. Upon several deliberations by the court, on Novem-

ber 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's 25 electoral votes.

The interesting issue in this case is that the Supreme Court took time to resolve the disputes before confirming the winner and before inauguration ceremony, to ensure that there is confidence in the government and also that the right of voters recognized.

Unlike the United States, the Ghana's scenario was vice versa. The Supreme Court failed to investigate the case first but right away the chief justice swore the challenged incumbent in. Meanwhile under article 63 s. (3) and (4) of the constitution 1992, it is established that:

> *"(3) A person shall not be elected as President of Ghana unless at the presidential election the number of votes cast in his favour is more than fifty per cent of the total number of valid votes cast at the election.*
>
> *(4) Where at a presidential election there are more than two candidates and no candidate obtains the number or percentage of votes specified in clause (3) of this article a second election shall be held within twenty-one days after the previous election."*

Notwithstanding the judgment of the justices which was 5-4, the rest of the 4 made a declaration for example as quoted above from Justice Julius Ansah that considering the irregularities of the results, no one was validly elected the pres-

ident of Ghana; and that consequential order directs the EC to conduct a re-run of the presidential election for the two leading candidates in all the polling stations affected and indicated. The evaluation of the impact of the nullified votes shows that neither the petitioner none the respondent won the election by fifty percent plus one valid vote threshold. Nevertheless, the majority decision of the 5 Justices upheld the sworn President. The question that every legal scholar needs to think about is:

(1). what precedent has been established by the Supreme Court in this case with regards to fairness of the trial?

(2). Can an irregularity in the law which itself is a breach of the constitution be classified as an administrative error, upheld and therefore pardoned for interest of justice?

To sum up what has rightly been said, there was an inequality of arms in the election dispute 2012 which runs counter to the principle of rule of law.

Secondly, there can be no fair trial in a proceeding whereby the sitting president is a party to a pending court case which ruling shall determine his fate in an election dispute. The constitution 1992 article 57 emphatically establishes that the president while in office is personally not liable to any civil or criminal proceedings in court. Since a sworn in president in Ghana takes precedence over all other persons; is the head of government and commander in chief as established by article 57, his affiliation as a defendant to domestic court litigation and influence on judicial decision may constrain fairness in the trial proceedings.

Hence, I recommend that whenever Presidential election results is in dispute or been challenged at the law court and a suit is pending in Ghana, the Supreme Court should endeavour to sit on the case, hear and rule over it before the declared winner be sworn into office by the Chief Justice for interest of justice.

2.8 Conclusion

The state as a sole entity with legitimacy and power established in the constitution serves as a means of protecting the citizens and the state institutions by its enacted laws at the domestic levels, sometimes runs counter to the principles of the rule of law when carrying out its duties to curb crimes through its legal and criminal procedure system.

During proceedings, the power of the prosecutor is disproportionate to that of the individually criminal accused. The functionality of the constitutional and procedural rights which should be instrumental to enhance procedure fairness and therefore avoid violations, illegal detention and abuse of rights within the domestic laws of Ghana, is deficient when the three stages of criminal trial and procedure is examined in the light of international legal framework and norms regarding fair trial. The constitutional laws protecting procedural rights are an important instrument in protecting the accused and they are fundamental to guaranteeing the right to a fair trial as a concept of human rights firmly protected by international customary law. International human rights laws and constitutional proceduralism ensures and urges the state systems to ensure that the rights of the individual are protected, and lays down the criteria for protecting the individuals criminally accused in all the stages of the trial. The constitutional entrenchment of criminal procedures not only complements procedural rules but sustains their application which if upheld properly, would certainly be meaningful to ensure real justice and fairness in the Ghana's legal system.

It could be deduced under this chapter that the state at which prosecution under the Attorney –General is the only mandated institution to initiate and terminate prosecution under Article 88 of the Constitution 1992, and section 54 of Act 30 *(Nolle prosequi)* processes in Ghana as it pertains. This has adversely caused

overwhelming delays and frustrations within the criminal proceedings in Ghana, due to lack of private prosecution, and alternative prosecution such as conditional cautioning to help alleviate the tension and coercion inmates are subjected unto. Also, it could be recapitulated that the use of police officers for prosecutorial purposes at the lower courts such as the magistrate and Circuit Courts complement the state prosecutor s roles and duties. Notwithstanding, failure to train such police prosecutors to be abreast with procedure rules causes menaces, violations, and procedural rights of the accused which guarantees the right to fair trial. More so, it is imperative to ensure that Juvenile Courts in Ghana are empowered and not constrained considering the distinction between adults' courts and Juvenile Courts, to serve the interest of justice, purpose, and the integrity of the juvenile offender.

Legal aid poor funding in Ghana has had a negative impact and contributed to enormous cases whereby criminal accused persons in serious crimes are left to go through horrific and terrible difficult criminal proceedings without legal representation which results to high risk of conviction and imprisonments whereas others are kept on remand custody for years without bail. On top of that, convicted criminally accused with prospect of succeeding at an appeal are not able to pursue without state funded representation in situations where the defendant is unable to hire the services of a private advocate.

The principle of double jeopardy in Ghana which provides certainty and a conclusion for individuals who have been tried, should not be used as a yardstick to let loose criminals.

The role of the courts is an important component in the rule-of-law and therefore the existence of a judiciary and its proper functionality is a fundamental aspect of the rule of law which ensures that criminally accused suspects are

brought before a judge for hearing within the stipulated time prescribed by the constitution and the statutory code through legal procedure, to ensure that they are tried within a reasonable time. Such reasonable time should not be long to avoid infringement of rights. It is understood that more complex structural reforms strengthen court capacity (i.e., training judges), independence of the judiciary, and transparency within the judiciary to ensure procedural safeguards, and the establishment of a higher-level appellate court.

As said by Lon Fuller "laws must exist" and this is to enhance a ruling standard. The term "rule of law" suggests that the law itself is the sovereign, and hence stands for the proposition that no person or particular branch of government may rise above rules made by elected political officials. Everyone is subject to their dictates in the same way and the rule of law, therefore, is supposed to promote equality under the law. Meanwhile, critics of the rule of law, however, have noted that this system creates a ruling elite that has the power to manipulate through the law. As Harvard law professor and leader of the critical legal studies movement, suggested, *"By promoting procedural justice [the rule of law] enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage."*[341] In the actual sense the law is seen as "indeterminate," meaning that the law has no clear or objective meaning. Consequently, the law cannot possibly serve as an effective barrier to the government's abuse of power because power structures in society, not the law itself, determine the outcome of legal issues and problems. This is because judicial interpretation and enforcement of the law is influenced by the ruling elite, and the rule of law does nothing more than legitimize already existing legal relationships and power structures. Nevertheless, as a complicated theory, the rule of

[341] Morton J. Horwitz

law should be viewed as a matter of institutional development, international politics and above all policymaking. Concerning the last two questions I raised at the later part of this chapter, it is clear that constitutional law students in this generation most especially in Ghana, would have much to deliberate upon. However, the Supreme Court of Ghana is not bound by its judgment and therefore such a precedent should be revisited in future to ensure that a constitutional breach which is an irregularity cannot and should not be classified as an administrative error. Prima facie, a breach of the constitution cannot be pardonable under the spirit of the law. The next chapter which is 3 examines the customary law arbitration of criminal cases by traditional chiefs in Ghana- Legal pluralism, and how the customary law functions alongside the official court legal system.

Chapter 3

LEGAL PLURALISM: CUSTOMARY LAW IN CRIMINAL TRIAL PROCEEDINGS IN GHANA

3.0. Introduction

Until 1957, Ghana was called the Gold Coast, the colony of the Dutch, German, French and lastly Britain which influenced the country and other neighbouring countries with its colonial powers. When the British came to Africa, the people were living communal lives. They had their own laws- "customary laws", traditions, and regulations for controlling their societies. At the head of each community was the Chief or the paramount Chief who is the local and traditional ruler. The expression "traditional" meant a lot to the local citizenry. "Tradition" connoted the rules, habits and norms of a group of people within a particular area. In Ghana as well as in other African countries before the colonial powers, the Chiefs through the indigenous customary laws had the powers to settle disputes including civil and criminal at the traditional council of Chiefs and elders at the palace, where traditional procedure fairness was always paramount. Chiefs dealt with cases including murder, theft, rape, robbery, and all sort of crimes and punishment of the culprits included fines, payment of damages, beating, death penalty, banishment, restitution, and others. It could be underlined that there was no defense counsel or representation by then to ensure proper defense of the accused, no presumption of innocence, each case was judged base on its merits, and the traditional judges believed much in confession, but witnessing, evidence and cross-examinations were done by the traditional rulers to guarantee fairness. However, the chiefs who were judges did not have a formal and legal education but informal training, yet the colonialist did

not do away with the African laws and traditions they met on the ground but also introduced their own concept of laws and justice into the colonies. With specific reference to Ghana and the British colonies- it was the Common Law. The Common Law operated side by side with the traditional laws, and therefore legal pluralism connoted the structures for dispute resolution. The imported[342] laws implanted the courts as the structure for settling disputes. This imported English system of law has become a legacy to Ghana and all the countries colonialized by the British which is distinguished from the Roman Dutch or Continental laws. The traditional system had what is called customary arbitration by which chiefs and opinion leaders settled disputes among the Africans, and the two methods have subsisted up till today in all the African countries colonized by foreign powers. A distinguishing feature of legal pluralism is that the laws apply to different people at the same time although they all lived in the same community. The traditional laws applied to indigenous Africans of the colonies. Such was the state of the affairs until the influx of other nationals into Ghana and the other countries. The colonialist did not place the quality of the local laws on the same level as that of the imported laws. They considered the imported laws superior to the traditional laws. In Ghana it has been established and ruled that for traditional laws to be valid and enforceable it should not be against equity, common sense and good conscience[343]. These were described as the repugnancy rule. If a case went to court and the judge decided the traditional rule was against equity, common sense and good conscience, the rule will not be applied. The British imposed upon Ghana's traditional society's criminal laws and penal systems designed to "keep the multitude in order" rather than to

[342] The imported laws mean the English laws or the Western system of justice.
[343] See S.A Brobbey: Justice of the Supreme Court explaining legal pluralism in African Countries: Ghana as a case study. Also, Chapter four article 11 (6) of the laws of Ghana, Constitution 1992.

preserve the equilibrium between man and traditional ***gods***[344]. The development of penal law, however, was uneven. After creating the Colony of the Gold Coast in 1874, the British gradually reformed and improved the legal and the penal systems. After more than a century of legal evolution, the application of traditional law to criminal acts to a greater extent has been reduced. Yet to a lesser extent, traditional laws are still applicable when chiefs are adjudicating over criminal cases. Ghanaian customary law is, however, the basis of most personal, domestic and contractual relationships. So the Criminal Law of Ghana is based on the Criminal Procedure Code, 1960, derived from English Criminal Law. The Chieftaincy Act, 2008 (Act 759)[345]; and the constitution 1992 article 270 gives village and other traditional chiefs the power to mediate local matters and to enforce customary tribal laws dealing with such matters as divorce, child custody, and property disputes. However, the authority of traditional rulers has steadily eroded because of a commensurate increase in the power of civil institutions, such as courts and district assemblies.

Currently in Ghana, the laws of the country have been structured to the extent that chiefs wield a large measure of independence of the Central Government, especially in the determination of disputes involving chiefs. In the terms of the Constitution, (Art. 270) and the Chieftaincy Act, 2008 (Act. 759), disputes involving chiefs can only be determined by the chiefs themselves. The institutions

[344] "gods": they are African deities/spirits. Followers of "traditional or indigenous" African religion pray to various spirits as well as their ancestors through practices and rituals. These gods (spirits) serve as intermediaries between humans and God (the Supreme being- creator of heaven and earth). In Africa, the Supreme God is worshiped through the consultation or communion with lesser deities (gods) and ancestral spirits. Gods are honoured through libation and sacrifice. In these practices, the will of God is sought by the believer also through consultation of oracular deities or divination.

[345] CHIEFTAINCY ACT, 2008**:** An ACT to revise and consolidate the Chieftaincy Act, 1971 (Act 370) to bring its provisions in conformity with the Constitution and to provide for related matters. Date of assent: 16th June, 2008.

that deal with issues involving chiefs are the judicial committees of divisional councils, judicial committees of traditional councils, judicial committees of regional houses of chiefs and judicial committees of the National House of Chiefs. No court in Ghana has jurisdiction to handle any dispute involving chiefs, except the Supreme Court which sit on appeals over cases decided by the National House of Chiefs.[346]

In Ghana the law is established to be the *Constitution*, enactment made by or under the authority of the Parliament established by the constitution; any orders, rules and regulations made by any person or authority under a power conferred by the constitution; *the existing law; and the common law*. The common law of Ghana comprise the *rules of law, doctrines of equity, and the rules of customary law* including those determined by the Superior Court of Judicature[347]. It is also establish that the "Customary law" means the rules of law which by custom are applicable to particular communities in Ghana. The section 6 states that the existing law shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of this constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by the constitution. It is no wonder that the legal system has been evolving and much more needs to be modified, adapted and qualified to bring the legal system and trial procedures in Ghana to the international standard to make the conventions ratified or acceded by Ghana meaningful.

For example, it has been commented by Dr. Michael Nyongesa[348] that in Kenya, the law of England was first applied through systematic legislation by the

[346] Courts Amendment Act, 2002 (Act 620).
[347] The Fourth Republic Constitution 1992 of Ghana, Chapter four sections 1 and 2, 3, and 6.
[348] Dr. Michael Nyongesa Wabwile: the Place of English Law in Kenya, summer 2003, Oxford University Commonwealth Law Journal.

British administration at the onset of and during colonial rule[349]. Afterwards at the independence, Kenya inherited the entire colonial material by re-enacting and adopting colonial legislation[350]. Now the imported English law continues to be applied as the residual law of the East African Republic and has firmly entrenched in its legal system. Quit apart from the fact that the entire legal order of Kenya rests on the values and principles based on the common law as agreed in the independence constitutional settlement of 1963, the legal system of all the colonialized countries is heavily dependent on the applied English Law. The sections that prescribe the hierarchy of the formal sources of law enforceable by Kenyan Courts in order of binding force are the Constitution of Kenya 1992, all other local legislation, the imported English law, and the African Customary law[351]. It is worth noted that the imported English law is incorporated, and is a subsidiary source of law which supplement the local written laws in all the colonialized countries and therefore its significant cannot be understated in ensuring fair trial procedure and proceedings in Ghana, and all the countries that were under the British colonial rule.

In Ghana the need for a unified and codified customary law: incorporation of customary law by common law has been established under Articles, 272, and 274(3) (f) of the Constitution[352] and Sections 3(1), 9(3), 49-55 of the Chieftaincy Act, 2008(Act 759). Customary arbitration is defined in the case of *Yaw v*

[349] For detail accounts of the pre-colonial systems of the law in Kenya and elsewhere in Africa, see GS Were and D Wilson, East Africa through a thousand years: A History of the Years AD 1000 to the Present Day (3rd edn Evan Bros London 1984).
[350] See Y Ghai and JPWB McAslan.
[351] Judicature Act 1967 (Kenya) c8 ss 3(1) (a), 3(1) (b), 3 (1) (c). African Customary laws are applied under s 3(2) of the Judicature Act to those who are subject to them.
[352] Republic of Ghana,1992.

Amobie 1958[353], and the practice and procedure being followed in the Native Court or Tribunal where there is a validly concluded arbitration under customary law, and its legal effect is established in the cases of *Dzasimatu v. Dokosi 1993*[354] and *Assampong v. Amuaku1930*[355]. Hence why the present legal formant has not been able to guarantee fair trial is what needs to be investigated in the dissertation, and so therefore, the current role and the functionality of the customary law and the African traditional law in the criminal justice and procedure fairness will be dealt with in more details in the next discussion.

3.1. Customary Courts in Criminal Arbitration in Ghana

In the customary and traditional Courts the head or the leader who overseers adjudication is called the "*Chief*" in common parlance. When the term is used within the context of chieftaincy as an institution, *"chief"* has a special sense or meaning. It means the head or leader of a tribe or clan in a town/s or village/s, duly installed according to the customs of his traditional area, and is in charge of and answerable to the people in the town or village. They are traditional or conventional chiefs whose status is always hereditary and ancestral. Such chiefs act as judges and adjudicate disputes in their palace which is used as the court room, with the council of sub-chiefs and elders. A person made a chief normally possesses special qualities, has unblemished character and is bold. He is considered as the epitome of good manners, gentility and custodian of tradition and

[353] (1958) 3 WALR 406 AT 408.
[354] (1993-94) 1 GLR 463.
[355] (1930)WACA192.

customary law[356] and above all respectable, respectful, law abiding, intelligent and wisdom is hallmark. They have queen mothers who assist them in their administration and speak through a linguist.

There is a unique status and private life of a chief. His private life is not fully his own, but subject to the dictates and demands of the stool or skin[357], the customs and traditions of the people over whom he is a chief. An example of this was the tenor of the decision in *Nsiah v Ameyaw II [1994-95]*[358] in which it was held that once a person becomes a chief, his private life becomes submerged in the general will of his people; and the customs of his people prevail over his private life.

The constitutional and statutory definition of a chief has been established ever since[359]. Meanwhile in the case of the *Republic v Akim Abuakwa Traditional Council; Ex parte Nana Appeanyo II [1980]*[360], a distinction was drawn between chiefs not recognised by the government and those recognised by the government and the function they could perform.

Nevertheless, the current constitution 1992 of Ghana article 277 redefines a "chief" as:

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[356] See S.A. Brobbey- Justice of the Supreme Court of Ghana: The Law of Chieftaincy in Ghana, incorporating customary arbitration, contempt of court, and judicial review, Page 32.

[357] In Ghana, traditional chiefs are either **"enstooled**" or "**enskinned**"- which means to be installed as a leader of a group. Therefore they sit on either stools or skins as their seats.
"Skin"- some traditional chiefs as a custom do not sit on a chair on their throne but rather on a skin of a particular animal such as tiger or a lion as a symbol of their authority and power. Such chiefs are said to be **"enskinned". "Stool"-** It is the seat of a King/chief, or a queen mother. An example is the "Golden Stool" of the Asante King. The stool serves as an authority and power.

[358] [1994-95] GBR 583, CA.

[359] See Under the s.76 of the Local Government Act, 1958 (No. 23 of 1958); s. 91 (1) of the Court Act, 1960 (CA 9); s. 1 of the Chieftaincy Act, 1961, (Act 81); the 1969 constitution articles 153 and 172; Chieftaincy Act 1971 (Act 370) s.48(1); and article 177; and 181 of the 1979 Constitution.

[360] [1980] GLR 799.

"...a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected, or selected and enstooled, enskinned, or installed as a chief or queen mother in accordance with the relevant customary law and usage"

These wording has been repeated verbatim as the definition of a chief in Act 759, s. 57(1); and article 295 (1) of the 1992 constitution. Under article 270 (1) of the 1992 constitution, it is established that the institution of chieftaincy, together with its traditional councils as established by customary law and usage, is hereby guaranteed, and interestingly article 270 (2) of the constitution expressly forbids parliament from making any law on such government recognition by the provision below:

"270 (2) Parliament shall have no power to enact any law which

(a) Confers on any person or authority the right to accord or withdraw recognition to or from a chief for any purpose whatsoever; or

(b) *In any way detracts or derogates from the honour and dignity of the institution of chieftaincy".*

Apparently in the traditional set up, the chief has three or to some extent four broad functions which are judicial, administrative, customary, and until the 1992 constitution came into force, political functions. As relevant to the dissertation, the judicial functions of the chief shall be examined.

The judicial and adjudicatory responsibilities of the chief engage him in constant dispute settlement. Such a responsibility is imposed by the constitution

1992 and statutes such as Act 459 and Act 759, s. 30. Under s. 30, it is established that:

> *"The power of a chief to act as an arbitrator in customary arbitration in any dispute where the parties consent to the arbitration is guaranteed"*[361].

Also the adjudicatory responsibilities are imposed on the chief by custom and tradition. The adjudicatory functions of the chief are determination of private disputes that are sent before him, which includes breaches of certain customs or taboos, civil and criminal (Misdemeanour) cases (to some extent). It is therefore imperative to look more carefully at the criminal cases which can be adjudicated by the chiefs. After settling disputes or complaints, the chief ensures the imposition of appropriate customary sanctions and their enforcement and to that extent, he is by tradition considered as the person responsible for law and order in his area. Some people still cling on to this view despite the existence of the modern panoply of police stations, courts, District/Municipal Assemblies and Chief Executives. The adjudicatory responsibilities of the chiefs as demanded by customs have been codified in Act 759, s. 30; Act 620, and Act 370. The chiefs adjudicate at different levels such as the Judicial Committees of Traditional Councils, Regional Houses of Chiefs or the National House of Chiefs- Ref to chp. 6 &7 (Brobbey).

In addition, Traditional Councils, Regional and National Houses of Chiefs have responsibilities under Act 370, and Act 759 in respect of compilation, assimilation and modification of customary laws.

[361] Section 30 of the Chieftaincy Act (Act 759) 2008.

Determining of whether a chief is a public officer or not has been critical a bit and depends on the context in which the term is used. For the purposes of judicial review or the exercise of supervisory jurisdiction by the High Court and the Supreme Court, it has been established that the position of a chief is not a public office amenable to orders of judicial review. This was one of the decisions in *Republic v High Court Registrar, Kumasi; Ex parte Yiadom 1[1984-86]*[362], which was again applied in *re Wa-Na; Republic v Fijoli-Na; Ex parte Yakubu [1987-88]*[363].

On the other hand, a chief who is a member of the judicial committee of the traditional council, any regional house of chiefs or the National House of Chiefs is deemed to be a public officer under section 26 (5) of Act 370. That status is limited to the exercise of the functions of the judicial committee under Act 370 or Act 759 and for the purpose of the Criminal Code, 1960 (Act 29). Section 26(5) of Act 370 has been repeated verbatim in Act 759, section 33 (6) which establish that:

> *"33 (6) A member of a Judicial Committee or a lawyer of the Committee is in relation to the exercise of a function under this Act a public officer for the purpose of the Criminal Offences Act, 1960 (Act 29)"*[364]

It is certain that the traditional institution is a public office which collaborates with the State Judicial Service and in fact the High Court has supervisory juris-

[362] [1984-86] 2 GLR 606, SC.

[363] [1987-88] 1 GLR 180, CA.

[364] See Section 26(5) of Act 370; and Section 33 (6) of Act 759 (Chieftaincy Act, 2008): AN ACT to revise and consolidate the Chieftaincy Act, 1971 (Act 370) to bring its provisions in conformity with the Constitution and to provide for related matters.

diction[365] over the adjudicating of chieftaincy institutions and courts under the provisions of the Act (759) 2008.

The Chieftaincy Act 2008 establishes that the President[366] shall in accordance with article 195 of the Constitution appoint the staff for a Traditional Council or Divisional Council; and that the National House, a Regional House, a Traditional Council and a Divisional Council shall each have the funds for the performance of their functions as Parliament may from time to time allocate[367]; and monies spent on the Chieftaincy institutions are paid out of the Consolidated Fund[368]; and are subject to the control of the Auditor- General after the end of every financial year[369].

In the traditional set up and under Act 759 s. 58 the categories of Chiefs in Ghana statutory recognised are:

a) The Asantehene and Paramount Chiefs;
b) Divisional Chiefs;
c) Sub-Divisional Chiefs;
d) "Adikrofo"[370]; and
e) Other chiefs recognised by the National House."

Hierarchically, the highest position of the chief constitutionally and legally recognised in the country is that of the paramount chief. This is determinable from articles 271 and 273 of the 1992 Constitution which deal with membership and functions of the National House of Chiefs as the highest chieftaincy institution in the country[371]. As a general rule, only paramount chiefs within the traditional

[365] Article 43 of the Chieftaincy Act 2008.
[366] I.e. is the President of the Republic of Ghana.
[367] See S.67 of the Chieftaincy Act 2008.
[368] See S. 68 (3) of the Chieftaincy Act 2008.
[369] See the Internal Audit Agency Act 2003 (Act 658).
[370] "Adikrofo" or "Odikro" meaning the divisional chief who is a caretaker or supervisor.
[371] S.A. Brobbey, The Law of Chieftaincy in Ghana, page 49.

area can be members of regional houses of chiefs, or national house though there are exceptions to this rule.

It would be very essential to look at issues ancillary to Customary Arbitrations such as the composition of arbitration panel. The panel for any customary arbitration may comprise one or more than one person. The panel retain the authority to trial the case so long as the parties have given voluntary consent to the arbitration and have satisfied other conditions. Sometimes, when summons are made before a chief or the queen mother, and the council of elders under whose jurisdiction a complaint is made, one is compelled to appear before the chief either by will or force. Even before the institution of the police station, the chiefs had their own police (known as the palace police) who work for the traditional council and the entire community. Statutory for instance, before it was expunged by the Supreme Court decision in the case of *Adjei Ampofo v The President of the National House of Chiefs; & Attorney General [2003-2004]*[372] which was a writ challenging Section 63 (b), (d) and (e) of the Chieftaincy Act 2008, (Act 759) claiming that the said Act was in contravention of the spirit and letter of the 1992 Constitution. The section 63 (d) stipulates that:

> *"a person who deliberately refuses to honour a call from a chief to attend to an issue commits an offence and is liable on summary conviction to a fine of not more than two hundred penalty units or to a term of imprisonment of not more than three months or to both and in the case of a continuing offence to a further fine of not more than twenty-*

[372] [2003-2004] SCGLR 418.

five penalty units for each day on which the offence continues".

In this case (9) nine Supreme Court Judges in a unanimous decision passed the ruling that section 63 of the Chieftaincy Act is unlawful and therefore encroached on liberty generally and freedom of movement in particular of Ghanaians and accordingly contravened Articles 14 and 21 of the Constitution 1992. Though according to the President of the National House of Chiefs, Naa[373] Professor John S. Nabila[374]; the Supreme Court ruling render chiefs powerless in summoning people to their courts and is a big threat to the traditional institution, and hence wants steps to be taken to restore the dignity of the institution[375].

In almost all traditional areas where the chief sits as an arbitrator, it is very rare to see a single person constituting the arbitrator. The chief usually sits with his advisers, elders or counselors. Therefore, most arbitrations presided over by chiefs have panel members who are many, according to the custom of the area. In such a situation, the person making a complaint to the chief for settlement hardly has any choice in deciding on the number of the panel. The chief or custom of the area will dedicate who should be. The number of the panel members in that kind of arbitration will differ from one traditional area to the other. In spite of customary demands, a party has the option to object to any particular member sitting on the panel, for stated reasons. The panel members can of course be limited by statute to one or any number.

In court, the rule is that the same panel members who start the trial of a dispute should continue it to conclusion and together give the award or decision. Ideal-

[373] "Naa" meaning a Chief.
[374] Current President of the National House of Chiefs: Naa Professor John Nabila, Wulugu Naba.
[375] www.vibeghana.com, 29th September, 2011.

ly, this rule applies to customary arbitrators as well because the mischief which the rule seeks to address will be the same in court as well as during the customary arbitrations. When the panel changes from one sitting to another, the danger lies in the fact that evidence used to decide the case may vary according to the number. The panel member who withdraws from the hearing may carry with him some evidence which the others who take over may not possess (beside hearsay evidence). An example of this was the case of the *Republic v Ve Traditional Council; Ex parte Atsu [1968]*[376].

In the traditional arbitration, venue and times of sitting is decided by the arbitrators. Members of the panel of arbitrators select their own venue which may be any place from the chief's palace to the private residence of a panel member or in an open space outside a house to which members of the public can have easy access to listen to or participate in the proceedings. The panel members select their times of sitting, taking into account their convenience and that of the disputants and witnesses.

At the traditional court, the presiding judge[377] is the paramount chief of the area and at the Regional and National House of Chiefs; the presiding judge is the elected President who is a paramount chief. Under the Constitution:

> *"(1) the National House of Chiefs consists of five paramount chiefs from each region elected by the Regional House of each region. (3) The National House shall have a President who shall be the head of the National House. (4) The President of the National House shall be elected by the mem-*

[376] [1968] GLR 784.

[377] See Chieftaincy Act 2008 (759), s. 15(3) in the case of the Traditional Council, and in the case of Presidency of Divisional Council, S. 19.

bers of the National House from among their number; and the vice president (5)[378].

Also at the traditional divisional councils, as established under section 13(1) of the Chieftaincy Act 2008:

"The paramount chief of a traditional area or in the case of the Kumasi traditional area, the Asantehene, shall be the president of the Traditional Council"

It is established under article 25(4) that:

"A Judicial Committee of the National House shall be assisted by a lawyer of not less than ten years' standing appointed by the National House on the recommendation of the Attorney-General"[379].

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[378] In accordance with article 271 of the Constitution 1992.

[379] Also applicable to the Judicial Committee of a Regional House of Chiefs at article 28(4) of the Chieftaincy Act 2008. Some photos of the paramount and divisional chiefs in Ghana in their traditional dress have been demonstrated at appendix 6 of the project. Dressing of the chiefs depends on the custom and tradition of the area, as well as the event or occasion of the day.

3.1.2. Procedure at the Customary Court for Arbitration

A party wishing to employ customary arbitration to settle a dispute does not need to start by issuing a writ of summons. A case is initiated when a complaint is made before a chief as explained above or to a panel of arbitrators. The arbitrators will in turn extend an invitation to the person against whom the complaint is made to appear before them to enable them to decide whether the person would agree to their determining the dispute as established in the case of the *Republic v Akrokere Sub-Traditional Council; Ex parte Carr [1980]*[380] which expresses that customary arbitration should not be proceeded by a writ.

3.1.3. Payment of Arbitration Fees

In the traditional court, the disputing parties are expected to pay some fees towards the holding of the arbitration. The time of paying the fee is very important in deciding whether what took place amounted to a customary arbitration or a negotiated settlement. The fees are often paid before the hearing of the arbitration. Normally, when the hearing has been concluded and the award is pronounced, the one found liable would be compelled to pay the fees of the winner to him. This means that the loser will forfeit the initial deposit that he paid for the arbitration and additionally refund the deposit of the winner to him. The fees to be paid differ from one traditional area to the other, and also depending on the nature of the case, and the ability of the parties to pay what is ordered and many other factors. However there is a limit to that and arbitration fees are not supposed to be so high.

[380] [1980] GLR 925.

3.1.4. Hearing and judgement delivery

There is no rule which require arbitrators to hear the parties in any particular manner or to adopt any particular procedure in the cause of settlement of disputes. The panel does not have to comply with the normal pattern followed in the court in the strict sense, but it is certain that chiefs have an informal training of how to settle disputes and therefore the procedure for adjudication is similar to the court of law. It has been emphasised that chieftaincy tribunals are to apply customary laws in resolving disputes and should refrain from the use of English technical rules because their training and background do not confidently qualify them to appreciate and apply those rules. This was emphasised by the Court of Appeal in the case of *Nyamekye v Tawiah [1979]*[381].

The rule is that chiefs or traditional arbitrators are not obliged to apply technical rules or English Court rules in deciding cases and failure to apply or follow such rules and pattern will not invalidate the proceedings. For instance, in the case of *Akunor v Okan [1977]*[382], it was held that since the plaintiff and the parties were heard and were allowed to call witnesses in proof of their respective cases, the arbitration could not be faulted. This confirmed that customary arbitration does not have to be conducted in a judicial manner, contrary to the earlier view expressed in the case of *Badu II v Caesar [1959]*[383].

The main requirement is that the panel members should allow each party to state their case. After that the opposing party may be allowed to put questions to the presenter. The opposing party will then present his case, after which the other party may ask him questions. The panel has the duty to explain the nature of the questions to be asked to the parties. The parties have to be given oppor-

[381] [1979] GLR 265, CA.
[382] [1977] 1GLR 173, CA.
[383] [1959] GLR 410.

tunity to ask questions. There is no obligation to ask questions if a party declines to ask questions after the essence of the questioning has been fully understood by him. The same pattern of presenting evidence and questioning may be adopted when witnesses are called to testify. While testifying, a party or witness may tender any document or object that he may want to use as evidence.

Normally, the petitioner or the plaintiff continue or initiate the trial by giving his evidence-in-chief and state the case. He should be allowed and encouraged to do this by his own free will without any threat, coercion, pressure or undue influence. If the person is represented by a counsel, he may be led in his evidence –in-chief by his counsel. Then the defendant or his counsel will then be invited by the president or chief of the judicial committee to ask the plaintiff questions, that is, to cross –examine the plaintiff. After that, the president and the members of the panel may ask the plaintiff question. Questions from the panel should be so carefully framed. Lastly, counsel for the plaintiff may re-examine the plaintiff provided there was cross-examination[384].

The same procedure of evidence-in-chief, cross-examination, and re-examination is done in respect of the evidence of the witnesses for the plaintiff or the petitioner. Then evidence in support of the defendant through his witnesses may then be adduced. During the trial, evidence in the nature of exhibits may be tendered by the parties or their witnesses. The committee members have to decide on the admissibility of the exhibits or the evidence tendered or adduced. The trial committee have to explain the proceedings to the parties whereby there are no counsels.

The trial procedure outlined here in applies to proceedings in judicial committees of traditional council, regional houses of chiefs and National House of

[384] See S.A. Brobbey, the Law of Chieftaincy in Ghana, 2008 page 285.

Chiefs. The procedure is subject to the rule in LI798[385] and CI27 as well as the provisions of Act 759.

As established under Act 759 of the Chieftaincy Act 2008**,** a Traditional Council shall, conduct its proceedings according to customary law, but for the purpose of compelling the attendance of parties and witnesses, and the production of documents, a Traditional Council shall have the same powers as a District Court in civil matters; and make an award of civil nature including an award of compensation to an injured person[386].

For the protection of parties, counsel and witnesses, it is established under article 38(1) and (2) that:

> *"(1) A party, a lawyer or witness appearing before a Judicial Committee shall have the same protection in respect of statements made in the course of and for the purpose of the proceedings of the Committee that the party would have in the High Court; and*
>
> *(2) A witness before a Judicial Committee shall have the same privileges that the witness would have before the High Court".*

Subject to the above, obstruction of proceedings at the traditional courts is a crime and subject to a punishment. It is emphasized at article 39 that:

> *"a person who, in proceedings before a Judicial Committee, without lawful excuse, proof of which lies on that person,*

[385] The Chieftaincy (Proceedings and Functions) Traditional Councils Regulations, 1972 (LI 798).

[386] See Chieftaincy Act 2008, s. 35(1) and (3).

(a) fails when required by the Committee to produce or deliver a document, answer a question or sign any document, or

(b) willfully obstructs the proceedings of the Committee at any stage, commits an offence and is liable on summary conviction to a fine of not more than two hundred and fifty penalty units or a term of imprisonment of not more than twelve months or to both"[387].

Decisions of customary arbitrations are to be based on proof of facts and evidence which are credible. Rumour should not be used to decide cases. This is so, whether or not the rumour is widespread and very popular. There are technical rules on hearsay which need not be detailed out here. A procedure adopted at judicial committees of traditional councils as provided in Act 370, s. 24 or Act 759, s. 31(1) allows hearsay evidence to be received in the conduct of proceedings. The section, however, forbids any decision to be based solely on hearsay evidence. In order words, hearsay evidence may be considered alongside other evidence before the court in deciding the dispute. If the only evidence before the court is hearsay, then that evidence will not suffice to establish the case.

As general guidelines for traditional judges, it has been established that in deciding cases by numbers or by poll count or on the number of supporters appearing in court to back a contestant is totally wrong. In the case of the *Republic v Kumasi Traditional Council, Ex parte Nana Opoku Agyeman II [1977]*[388], the President of the Kumasi Traditional Council commented on the relevance of

[387] Article 39 (a) and (b) of the Chieftaincy Act 2008 (Act 759).
[388] [1977] 1GLR 360, CA.

counting the supporters of the disputing parties which therefore influenced the judgement; and hence caused the Court of Appeal ruled (as stated in holding (2) of the headnote) that:

> *"It would be a retrograde step and contrary to the modern conception of a fair trial and notions of natural justice, custom and equity for the adjudication of a chieftaincy dispute to be conducted on the basis of a poll-count of opposing sides".*

In fact, a case should not be decided according to the number of witnesses testifying for one side or the other. The rule is that even in court, judgement can be entered for a party on the basis of one witness as against the side with more witnesses, provided certain conditions exist. According to the decision in *Logs & Lumber Ltd v Oppon [1977]*[389], the conditions are that:

(i) the witness was honest;

(ii) there was nothing in his background to cast doubt on his veracity;

(iii) he had no motive to misrepresent the facts or be biased; and

(iv) his evidence was in no way tainted, i.e. he was not an accomplice.

The rule is whether evidence, if even given by a single witness, is entitled to credit. Evidence is weighed, not counted. This was confirmed in the case of *Afful v Okyere [1997-98]*[390].

[389] [1977] 2 GLR 263, CA.
[390] [1997-98] 1 GLR 730, CA.

3.1.5. Criminal Arbitration by Chiefs

The question of whether traditional courts in Ghana still trials or adjudicates criminal cases is what I would like to discuss at this point, which is not a straight forward answer. The simplest would be **Yes** and **No** to some extent. In a strict sense, The 2007 ADR Bill, s. 96 forbids customary arbitrators from settling criminal cases by customary arbitration unless ordered by the court. The court order may be made under Act 459 (Courts Act 1993), s. 73 which establishes that:

> *"Any court, with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree, on payment cases of compensation or on other terms approved by the court before which the case is tried, and may during the pendency of the negotiations for a settlement stay the proceeding for a reasonable time and in the event of a settlement being effected shall dismiss the case and discharge the accused person".*

The state of the law is such that settlement of exclusively criminal matters such as felony cases is dealt with by the law Courts. Customary arbitration cannot be used to settle any case which is considered to be a purely and exclusively criminal matter, i.e., matters which is purely criminal and has no civil liability connotation. This view was confirmed in the case of *Gym v Insaidoo [1965]*[391]. However, certain acts or omissions may give rise to both civil and criminal con-

[391] [1965] GLR 574.

sequences. These may occur in circumstances resulting in causing harm, causing damage, defamation of character and assault. In all these, a person can be charged with a criminal offence and at the same time be subjected to civil liability for the same act or omission. In order words, the suspect may be prosecuted by the police: He may be subjected to civil liability if the complainant decides to take civil action against him for damages flowing from the criminal offences[392]. The distinction where cases dealt by the traditional courts involves civil and criminal cases were drawn in *Ababio v The Republic [1972]*[393]; and also the decision in the case of the *Republic v Alhassan ; Ex parte Abbey [1989-90]*[394]*;* where criminal prosecution was instituted on the same facts that supported a civil claim.

Also, breaches of customs and taboos[395] (explanation is given below) may result in criminal offence and civil liability. The criminal offence may arise where some people seeking to enforce customs react to breaches of the custom or taboo in circumstances that amount to committing the offence of conduct conducive to breach of the peace under Act 29, s. 298 of the Criminal and other Offences (procedure) Act, 1960. An examples of such cases where a person commits a criminal offence and is liable to a fine not exceeding ten penalty units who in a public place disturbs the peace by fighting, abets an unlawful fight or sings a profane and indecent song, or exposes defamatory or insulting writing defined as criminal offence under s. 298 of Act 29 as in the case of *Bosuo v The Republic [1975]*[396]*;* and the *Republic v Nana Okyere Darkwa II [1992-93]*[397].

[392] S.A. Brobbey, 2008, The Law of Chieftaincy in Ghana, page 412.
[393] [1972] 1 GLR 347.
[394] [1989-90] 1 GLR 139.
[395] "Taboos" are forbidden acts which are melted with a firm warning or reprimand and reproach.
[396] [1975] 1 GLR 379.
[397] [1992-93] GBR 1631, CA.

Almost every society in Ghana has its own customs or taboos that are not expected to be breached. Research into them reveals that many of the taboos are admonitions or behests couched in some esoteric or frightening terms; they are aimed at producing fear calculated to induce behaviour that gives respect to accepted social norms and values of that particular community. Breach of taboos is a general concern for the members of the community. They are considered to be a crime. An example is having committed an act which is forbidden in the community such as "*going to fetch water from a river on a forbidden day".* For instance where the conduct is deemed to be one that is considered to be capable of bringing disaster or some calamity onto a whole family, village or town, it may be viewed as a matter rocking the very fabric of society. There is no statute creating customary offences or making infringement of a taboo an offence, except those specifically provided in statutes like Act 370, s. 53 or Act 759, s. 63, yet, societies uphold to taboos as serious offences especially in the villages.

Moreover, putting a person into fetish or invoking a curse unto someone as an oath, are serious offences which sometimes can kill a whole family or cause a disaster in a whole community through the practice of supernatural powers that cannot be scientifically established, and therefore such cases are dealt by the chiefs, because they lack substantial evidence to be tried at the law court yet they are efficacious to cause destruction or serious harm. Such a practice in the traditional certain is a crime. These cases are of rampant in nature currently in Ghana, which is very dangerous. This is whereby people in pursuit of their rights and natural justice rely on "juju"[398] or fetish. For instance, in the case of *Obeng alias Nkobiahene v Dzaba [1976]*[399], the plaintiff and the defendant had

[398] Fetish or shrine powers which is shrouded in mystery, secrecy and darkness; Often called "black powers".
[399] [1976] 1 GLR 172

a dispute over land. The plaintiff swore the (Fesi) fetish on the defendant that the defendant was unlawfully depriving him of his land. The defendant also swore (the same Fesi) fetish on the plaintiff to the effect that the fetish should kill those who had unlawfully taken his land but refused to attorn tenant to him. Both parties agreed to submit the dispute to the fetish for settlement. The plaintiff later sued in the district court for damages for the reason that by the oath of the defendant that the fetish should kill those who ate crops planted by the plaintiff on the disputed land, the defendant had unlawfully prevented him from harvesting his crops. Judgement was entered for the plaintiff. On appeal, it was held that putting a person into fetish could not found a civil action, but in the past regarded as purely criminal rather that civil matter. However, in the modern criminal law of Ghana, it is not covered by written law[400] as a criminal offence, but customary it is an offence and only resolved by chiefs or fetish priest. The efficacy of fetishism is traditionally believed by African and Ghanaians alike but in the court of law, difficult if not impossible to adduce legally as evidence and therefore normally declared inadmissible.

Furthermore, in the case of *Adanuty v Manchie [1969]*[401] Francois J expressed a different view when he held that:

> *"It is of no consequence and indeed of minimal relevance to consider whether fetish as a force is effective. The question is one of mental acceptance, and the fact of its prevalence as a belief among the untutored majority of this land is beyond dispute. It is no part of the court's duty to stamp out fetishes, desirable though this end may*

[400] Sarbah Fanti Law Report, and 1992 Constitution article 19(11) and Act 29, s.2.
[401] [1969] CC 84.

> *be, but it is incumbent on the court in deciding a case of this kind to relate to it the aforementioned prejudices and the superstitions of the illiterate majority."*

In another case where proof in court by fetish priest was a problem is in the case of *Abotchie v Nuumo [1974]*[402], where the defendant was sued for damages for slander. The exact accusation in the slander was that he had described the plaintiff as follows:

> *"Tell your sister (plaintiff) that the reason why I do not speak to her is that she is a witch and she leads a gang of witches to come and eat me up".*

At the trial in the magistrate court, the defendant pleaded justification and offered to call a fetish priest to testify that the plaintiff was in truth a witch. The trial magistrate state a case for the opinion of the High Court as to whether witchcraft could be proved and if so the mode of proof[403]. The High Court in disposing of the issue in his authoritative words[404] expressed that:

"In my considered opinion, the traditional mode or method of proving witchcraft which the defendant intends to adopt or follow has not gained any recognition in court of law…"[405]

Similarly the extent that people within the communities in Ghana use fetish to regulate their lives has been considered again in cases such as *Atomo v Tekpetey*

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[402] [1974]1 GLR 142.

[403] The High Court Judge, Abban J (as he then was) referred, inter alia, to Sarbah Fanti Custoamry Laws, (3rd ed), p 113, and Danquah, Case in Akan Laws and Customs, and concluded that the two books and others on customary law, do not attempt to indicate how or the method to proof the allegation of witchcraft practice.

[404] Abban J (at pages 143-144).

[405] See S.A. Brobbey, the Law of Chieftaincy in Ghana, Pages 418-430.

[1980][406]*;* and *Afful v Okyere (supra) [1997-98]* in customary arbitrations and accusations of criminal actions which are seriously penalised for wrongdoing. Again in such situations when a complaint is made, the customary law of the disputants are used for the arbitration.

In the instances where the law court find cases regarding witchcraft and superstition actionable, such a case would be tried at the law court as in the case of *Afful v Okyere (supra)[1997-98]* above where the Court of Appeal held that:

> *"Although to call somebody a witch under common law was not actionable without proof of special damage, on the authorities under the customary law, it was actionable per se without proof of damage. In the instant case, the parties were Akans*[407]*, and therefore the law applicable was the Akan customary law. Accordingly, the first defendant was guilty of defamation of character when he called the plaintiff a witch and accused her of killing his two children. In the circumstances, the trial judge erred in dismissing the plaintiff's action; and cited Wankyiwaa v Wereduwaa [1963] 1 GLR 332".*

Admittedly, cases of this nature are consistently lodged and resolved at the Asantehene's Palace, and are resolved by Otumfuo Osei Tutu II (The Asantehene); the Paramount Chief (President) of Awua- dumase Traditional Council- Nana Kwabena Korang VI, and all the similar powerful and paramount chiefs in

[406] [1980] GLR 738.

[407] "Akans" are the biggest tribal group in Ghana with a common language known as "Twi". It comprises of the Ashanti, the Fante, and the Akuapem's.

Ghana. In resolving such cases, the chiefs ensure that sacrifices and libation are made and when necessary, restitution, fine, punishment or proper measures are taken after the mediation proceedings.

The next discussion would examine a criminal case which is rape and defilement as a case study witnessed in Ghana recently during my research stay at the Awua-dumase Traditional Council in the Brong Ahafo region on the 17th July 2015 which was heard and tried at the traditional court by the paramount chief of the council and his divisional chiefs. The case was heard in a Ghanaian language known as "Asante Twi" or the "Akan" language under the Akan customary law which is different from the state official English language. However, cases at the traditional native courts could be heard in English through an interpreter whereby the chiefs or the parties do not understand the local dialect. The Akan tribe in Ghana is the largest and its language is the most commonly spoken language in Ghana after English. There are over 100 ethnic groups living in Ghana and each tribe have their customs by which cases are dealt with in other local dialect. The largest ethnic groups in Ghana are **Akan, Moshi-Dagbani, Ewe,** and **Ga.**

3.2. Case Study: Customary Arbitration of Defilement/Rape

During my visit to Ghana on the research stay, I had the privileged to visit the Brong Ahafo Regional House of Chiefs and engaged with the Paramount Chief of the Awua-domase Traditional Council, Nana Kwabena Korang VI from July 7th 2015 to 21 July 2015. The chief was appointed to assist me by the regional council of chiefs due to his enormous and extensive experience on the Akan Customary Law. He is currently a member of the National House of Chiefs,

Brong Ahafo Regional House of Chiefs, and former Vice President of the Brong Ahafo Regional House of Chiefs[408]. Though I am personally Akan, he explained the Akan customary arbitration and adjudication to me as I interviewed him at his palace over questions such as:

- If chiefs are capable of adjudicating cases most especially criminal cases?
- How is it done?
- If customary adjudication proceedings ensure fairness during trial and hearing of cases?
- How effective are judgements enforced?

The renowned Chief explained that during hearing of court proceedings, the registrar of the National or Regional House of Chiefs, or Traditional Council record all proceedings which are forwarded to the Law Court and cited instances where the police are called into issues pending at the traditional courts for further investigations, charges and prosecution most especially when the case involves criminal offences and issues. Referring to the Chieftaincy Act, 2008 (Act 759), s. 33(3) and (4), which establishes that:

> *"(3) In the exercise of its judicial power, the National House or a Regional House, shall have the powers, rights and privileges that are vested in the High Court Judge at a trial in respect of*
> *(a) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise, and*

[408] Nana Kwabena Korang VI was the Vice President of the Brong Ahafo Regional House of Chiefs from 2001-2009; and a current member of the National House of Chiefs. He has been at the House of Chiefs for over 40 years.

(b) compelling the production of documents and the issue of a commission or request to examine witnesses abroad.

(4) Subject to this Act, the practice and procedure of the National House or a Regional House in the exercise of judicial functions shall be regulated by rules made in consultation with the respective House by the Rules of Court Committee."

The distinguished King emphasized that hearing begins by making of plea enquires from the accused whether the accused would plead guilty or not guilty and why. Then the plaintiff and the defendant are heard separately during the proceeding. Witnesses are called to testify and are cross-examined. Witnesses who are workers are paid for appearing before the court. After all the proceedings and questioning have been made, the chiefs would have judgement conference where all the chiefs (panel) would be invited to give their opinions over the case, considering all the evidences and witnesses statements and documents if any, then a decision would be reached. After which parties would be brought into the court, and judgement would be delivered by the President of the House or the Paramount Chief of the Traditional Council who is the sitting judge.

It is interesting to note that enforcement of judgement of House of Chiefs or Traditional Council is done by either the District Court or the High Court. For instance, under the Chieftaincy Act 2008, s. 37 (1) to (4), it is stated that:

"37. (1) On an application made by a party to proceedings before a Judicial Committee of a House of Chiefs in whose favour a judgment or order was made by that Committee, that Commit-

tee shall forward a copy of the judgment or order to the High Court with a request for execution of the judgment or order.

(2) On the payment by the applicant of the prescribed fees, the High Court shall take steps and issue the process necessary for the execution of the judgment or order as it would take or issue if it were a judgment or order of the High Court.

(3) On an application made by a party to the proceedings before a Judicial Committee of a Traditional Council in whose favour a judgment or order was made by the Council, that Council shall forward a copy of the judgement or order of the Council in the proceedings to the District Court that has jurisdiction in the traditional area in question with a request for execution.

(4) On the payment by the applicant of the prescribed fees, the District Court shall take steps and issue process necessary for the purpose of the execution of the judgment or order as it would take or issue if it were a judgment or order of the District Court".

Appeals can be done over cases decided by the traditional courts. For example cases decided by the Traditional Councils can be appealed to the Regional Houses of Chiefs, and from the Regional Houses, to the National House which has appellate jurisdiction in a cause or matter affecting chieftaincy which has

been determined by a regional House (s. 23) of the Chieftaincy Act 2008, and as established under s. 24 of the Chieftaincy Act 2008,

> *"24. An appeal against a decision of the National House in the exercise of it's:*
>
> *(a) Original jurisdiction lies to the Supreme Court, and*
>
> *(b) Appellate jurisdiction lies to the Supreme Court with leave of the National House or of the Supreme Court".*

After this scenario, I was invited by the Paramount Chief who is superior in authority and President of the traditional council to witness a rape and defilement case which had been tried by a divisional chief who is also a lower in ranking under his jurisdiction and has been ordered to re-appear before him for hearing and proceedings. The case was between *Raster v Akua* (unreported) [2015], a 14 year old girl both inhabitants of a village called ***Aboronye*** in the Brong Ahafo Region, Ghana.

3.2.1. Facts of the case

It was heard from the "Odikro[409]" of Aboronye Village at the palace of the Paramount Chief that a week ago a man called Raster who is an adult was coming from the farm when at the outskirt of the village he saw a girl of 14 years old, whom he drag into the bush and forcibly raped and defiled her. This is a taboo said the "Odikro" and therefore the rapist was summoned to appear at his palace

[409] The divisional chief who supervises the Village.

when the complaint was made by the victim's parents. At the hearing he was asked to bring a sheep, drink and an amount of 200 GH Cedi (50 €) for sacrifice to be made on the land. The "Odikro" was questioned by the President of the Traditional Council and his elders the where about of the accused, the victim, and the items collected when he and his elders sat on the case at the village palace. He answered by saying that the accused was supposed to come with them but could not be found in the morning when they were preparing to come, and the victim was sick and could not come, also the items collected were at the village.

In fact, the panel did not spear the divisional chief for such behaviour. He was fined three times for not telling the truth about the matter. He immediately paid 100 Gh. Cedi (25€) as a penalty and a half create of drinks, after which he apologized for his wrong doing claiming he has personal issues which has affected his actions and reasoning. I was given the opportunity to ask the "Odikro" (the divisional Chief) a question over the incidence. So I asked him the following questions in the cause of the proceedings in the "Twi" language[410]:

a) **Nana[411] could you confirm the age of the victim?**

Answer: No. it would be about 16.

b) **Was the victim sent to the hospital after the incidence?**

Answer: No

c) **Is she well, sound, and fit?**

Answer: No. the child is even invalid and already suffering from a minor stroke.

d) **What else did you collect from the accused apart from the money, sheep, and the drink?**

[410] "Twi" also known as the "Akan": as explained elsewhere, is the first unofficial written language in Ghana and widely spoken by majority of Ghanaians.
[411] "Nana" is a title which usage means chief in Ghana.

Answer: Nothing.

e) **Was the money -200 Gh. Cedi (50€) taken for the victim or her parents as a compensation or what?**

Answer: No. Since, the offence was a crime and taboo, the money and the items were for a sacrifice to be made to purify the land to avoid any calamity, and then later a compensation for the victim could be negotiated[412].

3.2.2. Ruling by the Presiding Judge of the Council

The Paramount Chief, Nana Kwabena Korang VI expressed that what the "Odikro" of "Aboronye" has done is very annoying. He must understand. He has no jurisdiction to trial such a criminal case at that level, and behind closed doors. He has condoned and connived with the parties (accused and the victim), and had failed to bring them when he was summoned to do so. He demands proper explanation and all the items taken from the accused should be brought without delay.

The Chief emphasized that this is a criminal case and cannot be handled that way, therefore he would submit the case to the police for the arrest of the divisional chief and his elders at the village, the parents of the victim, and the accused for charges and prosecution at the court of law.

[412] The photo footage of the traditional court and hearing of the rape case during the proceedings have been provided at appendix 7 of the dissertation.

Finally, proper procedure, time and date should be arranged for the sacrifice to be made on the land where the incidence took place, to avoid curse, calamity and ensure productivity. Apparently, just as it has been the procedure after the institution and emergence of the law courts in the Ghanaian communities, traditional chiefs and native courts under their jurisdictions work hand in hand with the police when dealing with cases that involves criminal matters. The reason is that chiefs are accorded with authority and therefore their link to the community makes them the first to be kept informed over any crime and cases that happen within their territory or jurisdiction. Admittedly it is not every community or village that has got a police station to lodge a complaint or effect arrest when crime is suspected or committed. However, every locality has got a local or divisional chief who is mandated traditionally and by the laws of Ghana to be the care taker of the village or area. Though district Council representatives are available who when aware of a committed or suspected crime, could contact the police, yet all the people in such circumstances look forward to the chief to initiate the action no matter whether the divisional or local chief is very young, old, and literate or illiterate. This is where chiefs are seen usurping powers by going beyond their limitations arbitrating criminal cases involving multiple complications that need criminal and forensic experts to investigate and deal with perpetrators. It could be deduced from the above case in the case study scenario that the divisional chief who is lower in rank and authority to the Paramount Chief handled the rape and defilement case the way he wanted meanwhile the procedure was wrong because the local chief should not have ended such a horrible criminal case in his capacity as a village chief or care taker. Such cases end up in prosecution where the culprit if convicted by law court could be put behind bars for 25 years imprisonment in Ghana.

Under the Criminal Office Act 30 (1960), s.101(2) "Whoever naturally or unnaturally carnally knows any child under sixteen years of age, whether with or without his or her consent commits an offence and shall be liable on summary conviction to imprisonment for a term of not less than seven years and not more than twenty-five years". Therefore such rape and defilement case could not have been let loose for paying an amount of 200 Ghana Cedi (equivalent to 50 €), some drinks and a sheep for sacrifice at the village chief's palace.

Admittedly such criminal trials have been going on around the country side in Ghana by some local chiefs, and such arbitration in criminal matters as rape and defilement would not help to serve the purpose of incarceration such as deterrent, punitive, rehabilitation and reformation of the accused to control crime. For instance, according to the Domestic Violence and Victims Support Unit of the Ghana Police Service, in 2014[413] there were official report of **290** rapes and **1111** defilement reported cases. Considering a recent statistics available, a total of **5,752** children were defiled in Ghana from 2010-2014: which breakdowns are **342** of the cases perpetrated by family members of the victims. Also, statistics from the Domestic Violence and Victim Support Unit (DOVVSU) of the Ghana Police Service shows that **1,298** cases were reported in 2014 with only eight of the victims being males. Out of this number, **91** cases were perpetrated by the victims' own family members with **417** of the cases by people close to the victims whilst **790** cases by other people not close to the victims. The report further showed that in 2013, a total number of **1,230** defilement cases were re-

[413] See Rape cases in 2014 published on the 20th March, 2015 by Emmanuel Tomyi of pulse.com.gh

ported and **1,097** cases were recorded in 2012. Additionally, **1,159** defilement cases were reported in 2011 whilst **968** cases were reported in 2010[414].

It is my opinion that enormous cases of defilement and rape in Ghana which happens in the remote areas are never reported to the police and therefore are either settled by traditional chiefs or settled between the culprits and the victims' families which are normally mediated by local and traditional leaders or elders of the community. This practice violates other rights of the victims which are not taken into consideration without due process of the law and above all, such offenders are likely to reoffender or commit similar grave offences and victimize others if such perpetrates are let loose in the hands of traditional leaders and therefore not found culpable by the law.

3.2.3 Customary Law and Human Rights in Ghana

Customary law may be defined as a "normative order observed by a population, having been formed by regular social behaviour and the development of an accompanying sense of obligation.[415]"Once the sole source of law in pre-colonial sub-Saharan Africa, customary law has now been largely subordinated to domestic constitutional law, statutory law and common law. Nonetheless, customary law continues to regulate family law matters, traditional authority, property rights, misdemeanor, and succession in Ghana. Even where there is contradictory domestic statutory law, customary law is often still applied due to long-

[414] See Publication on Saturday 26th March 2016 and Statistics on: http://www.globalnewsreel.com/news/general/dovvsu-statistics-show-5752-children-defiled-in-four-years#sthash.fWARR5Gs.dpuf

[415] Gordon R. Woodman, A Survey of Customary Laws in Africa in Search of Lessons for the Future, in The Future of African Customary Law 9, 10 (Jeanmarie Fenrich, Paolo Galizzi & Tracy Higgins eds., 2011).

standing social practices and community expectations as well as a lack of knowledge of or access to the formal legal system[416].

While customary law continues to have a wide reach, it presents difficulties in terms of ascertaining the substantive content of the law given that it remains largely not codified, differs for each of over 100 ethnic groups living in Ghana, and continuously adapts and changes as a community changes. Since customary law derives its authority from adherence to particular norms in a community, customary norms that are no longer observed by a community are no longer part of the customary law for that community. This further complicates the effort to ascertain the content of the law, however, for it cannot be determined solely by reference to a written act or court decision but must be verified by ongoing observance by the relevant community. This has also led to a divergence between "official customary law" as determined by formal court decisions, written codes, and other written documents and "living customary law," ascertained from the unwritten practices observed by the members of a particular community. In communities governed by customary law, rights and responsibilities are largely determined based on gender, kinship, age, and birth order.

Ghana has a pluralist legal system, inherited from its colonial past as established above, which consists of both formal or state law and customary laws. The 1992 Constitution formally recognizes this pluralist legal system, identifying rules of customary law as one of the sources of law in Ghana[417]. The Ghanaian Constitution under article 11 defines customary law as "the rules of law which by custom are applicable to particular communities in Ghana." The Con-

[416] Harper, supra note 8, at 3. See generally Fenrich & Higgins, Promise Unfulfilled, supra note 8. Johanna O. Svanikier, Women's Rights and the Law in Ghana 30 (1997).
[417] Constitution of the Republic of Ghana, May 8, 1992, ch. 4, Art. 11(3) (1992).

stitution authorizes formal courts to apply both statutory and customary law in resolving disputes[418]. According to the Courts Act of 1993, customary law can be applied by state courts as long as the rules meet the requirements of "equity and good conscience" and they are not incompatible with any existing statutory law[419]. Thus, though customary law is recognized as a legitimate and enforceable source of law, it can be amended by the Constitution and statutes of Ghana, which constitute higher forms of law.

The Chieftaincy Act of 1971 established institutions and procedures for defining and interpreting rules of customary law, which were further confirmed in the 1992 Constitution[420]. The Chieftaincy Act authorized the National House of Chiefs ("NHC") to undertake the progressive study, interpretation and codification of customary law, declare any customary law relating to any subject in any region, and to alter customary law.[421] It also provided statutory recognition to the Regional House of Chiefs ("RHC") in each of the ten regions in Ghana and standardized their structure and functioning.[422] The NHC and each RHC is responsible for appointing a Judiciary Committee, which exercises power to adjudicate issues relating to traditional institutions and affecting traditional communities.[423] In formal court cases involving customary law issues, these committees may advise judges and correct perceived deficiencies on customary law

[418] Richard C. Crook, Access to Justice and Land Disputes in Ghana's State Courts: The Litigants' Perspectives, 50 Legal Pluralism 1, 3 (2004).
[419] Courts Act of 1993 (Act No. 459/1993), § 54.
[420] Constitution of the Republic of Ghana, May 8, 1992, ch. 22 (1992); Chieftancy Act of 1971 (Act No. 370/1993).
[421] Chieftaincy Act of 1971 (Act No. 370/1993), § 40.
[422] Chieftaincy Act of 1971 (Act No. 370/1993), § 6.
[423] Chieftaincy Act of 1971 (Act No. 370/1993), §§ 22(4), 23(4).

matters.[424] Meanwhile customary laws and traditions are unwritten and difficult to know the precise contents of the legal norms in question; they were deposited with elders and transmitted from generation to generation. The reality is that today, this unwritten legal system is also widely applied in the official legal systems of many countries through the use of assessors who have a duty to assist the judge in understanding what the customary law is in a given situation.

Notwithstanding the fact that traditional chiefs adjudicates cases by customary laws, it could be criticised that customary arbitration to some extent run counter to human rights in Ghana. When it comes to fair trial and the procedural rights of the individuals involved in a given case, some traditional chiefs violate many of the rights of either the victim or the defendant. As at now in Ghana, there are many villages where a police station cannot be found and therefore the only place of authority to lodge a complaint is in the traditional leader's (local Chief) house. Most of these chiefs are illiterate and have no idea about human rights laws. Therefore in the cause of intervening in the dispute settlement violates other rights of the individual which should be rather protected. For instance in the case study of this chapter which was a defilement and rape between *Raster v Akua 2015, (supra*), the divisional chief who supervises the village took from the rapist during the hearing and proceedings at the village palace, only 200 Gh. cedi (equivalent to 50 €), a sheep and a bottle of schnapps drink for a sacrifice to be made in the bush where the girl was raped. This was unfolded at the paramount chief's palace, if not, this matter would have been kept secret at the village and no one would hear anything about it. This case was brought to the notice of the paramount chief by an informant (an independent person who was

[424] Foster M. Mijiga, National Democratic Institute, The Role of Traditional Leaders in a Democratic Dispensation 16 (1998).

not happy about the settlement of the case at the village). The victim was not even compensated and was not sent to the hospital for any check-up whether she had contracted any STD decease or has been impregnated by the rapist, which if so violates other rights of the victim such as the right to compensation, good health and personal dignity and security. This case fortunately came to the notice of the paramount chief who after investigating the proceedings, kept the police informed for further arrest and prosecution. The problem and concern is that many of such cases and nature happens in various villages which goes on unheard off and the traditional chiefs prevents such culprits from been prosecuted because it does not seem to them as an obligation to keep the police informed for an appropriate arrest and prosecution to be made. This is why law enforcement bodies in Ghana and the government should educate traditional chiefs and therefore places a limitation even if not an absolute limitation on the traditional chiefs when it comes to criminal cases and adjudication and that should be left to the law court which has the jurisdiction to defend human rights. Chiefs most especially the divisional ones should be made aware of their limits regarding criminal matters and the importance of reporting cases before them involving criminal elements and issues to the police for prosecution. Though most indigents seek access to justice through the chiefs in the villages, it does not mean that chiefs should force themselves to resolve criminal issues beyond their jurisdiction.

In summary, Traditional Chiefs who act as judges at the native courts lack sufficient and consistent legal education, and understanding of the criminal code and procedure. Also, human rights in general and its application seems foreign and intolerable to them. Again case law and data of cases decided by traditional native courts are not available and cases are not published for easy access,

though proceedings at the Traditional Council where the Presiding judge (paramount chief) of the councils adjudicate cases are recorded, because records of the proceedings could be forwarded or requested by the High Court for supervision and enforcement or magistrate court for enforcement, and in the case of the Regional or National House of Chiefs, to the Supreme Court. However, some proceedings at the divisional chief's palaces are not recorded.

I therefore recommend that limitations should be placed on traditional rulers with regards to their authority when it comes to arbitrating on criminal matters. Traditional rulers should be obliged by law to involve the police for further prosecution whenever major criminal cases are before them. Furthermore, records of proceedings at all levels of the traditional courts should be made obligatory for easy access and compilation of case law and data. Again Traditional Rulers should be involved in the Ghana Judicial Services training and consistent legal education which comprises elements such as criminal procedure and human rights in criminal proceedings. This I think would build their capacity and understanding as arbitrators.

3.3 Conclusion

This chapter has actually unfolded how traditional chiefs in Ghana are empowered by constitutional instruments and statutes to perform judicial functions at the customary courts alongside the imported English legal system and procedures. Traditional courts proceedings in binding authority ranges from the Divisional Councils, Traditional Councils, Regional Houses of Chiefs, and the National House of Chiefs. Meanwhile, appeal proceedings follows in the same order from the Lower divisional and traditional councils to the National House of

Chiefs after which further appeals from the National House of Chiefs goes to the Supreme Court. Under the Chieftaincy Act 2008 (Act 759), it has been established that judgements from the Divisional Councils and Traditional Councils are enforced by the Magistrates' Courts and the Circuit Courts respectively; while a judgement at the Regional House of Chiefs are enforceable at the High Courts. Traditional Chiefs are responsible for the compilation, assimilation and modification of customary laws in Ghana under Act 370 and Act 759. Traditional institutions are public office which collaborates with the State Judicial service and are under the supervisory jurisdiction of High Court under article 43 of the Chieftaincy Act 2008. Traditional Courts in Ghana trial all cases with the exception of first degree felony in criminal offences. However, traditional Courts under s. 30 of Act 459 and Act 759 has the power to act as an arbitrator in any dispute and in criminal cases (misdemeanor) when authorized by the court. Nevertheless, it can be criticized to some extent to run in counter with human rights instruments due to the behaviour of some traditional chiefs which must not be permitted to continue because they lack sufficient and consistent criminal procedure education, and are intolerable to human rights application. However, the traditional courts complement the state courts, the police station, and the prosecution services in dispute resolution. These institutions are only available at the regional and district capitals which are far from the indigenous people, and therefore the proximity of the traditional chiefs' palace or court to the local community's put them in charges with the responsibility and duty to hear cases reported to them by their subjects who perceives the Chief's/King's palace as an alternative to the police station or the state court. Apparently, indigenous people become offended when cases involving local people are reported to the police or state court rather than the chief's palace no matter the

gravity and whether the case is civil or criminal which is a tendency to compel local and traditional leaders and elders to deal with serious criminal and human rights violation cases if such leaders are not cautioned to be aware of the consequences of violating such principles. Despite the constrains of traditional native courts to human right norms, fair trial at the native courts can never be disputed because trial proceedings ensures procedure fairness and equity, as well as protection of witnesses. Above all, one thing more remarkable is that judgments delivered by traditional chiefs are instantly honoured and enforced because much authority and respect are attributed to the chiefs by their subjects.

Chapter 4
THE UNITED KINGDOM CRIMINAL LAW PROCEDURE

4.0. Introduction

This chapter provides an innovative approach to the study and understanding of the criminal procedure of England and Wales. It provides readers highly practical and comprehensive explanation of the key substantive, procedural and evidential issues that are encountered in criminal proceedings. I have relied on substantive and case law, and have therefore attempted to explain the law and procedure in an accessible manner within the English legal system by considering the criminal procedure rules in England. The reason why the English criminal law procedure is been considered in the analysis of the right to fair trial in Ghana criminal proceedings is to draw conclusions from the English criminal justice system to improve the Ghana system. Furthermore, the subsequent chapter following chapter 4 shall be a comparison of the UK and Ghana criminal procedure. This has been important due to the English legal system which has been in place and hence practiced in Ghana as a result of colonial affiliations for centuries now. In doing so however; I have established that the responsibility for investigating and prosecuting criminal offence in the UK is shared between the Crown Prosecution Service (CPS) and the Police service. I have considered the legal aid funding regime within the English criminal proceedings and law which proper functioning ensures fair trial, the specific rights of the defence in criminal trial proceedings, appeals, measures of coercion, and the principle of *autrefois acquit* and *convict*.

4.1. The Power to Prosecute in the United Kingdom

In the United Kingdom (England and Wales), the power to prosecute (individuals and companies) is largely the work of the Crown Prosecution Service (CPS), though other bodies such as private prosecution and individual citizens are allowed to prosecute against individuals who are believed to have offended the law. The Crown Prosecution Service is the principal prosecuting authority for England and Wales, acting independently in criminal cases investigated by the police and other investigated bodies. Responsibility for investigating crime, commencing prosecutions and presenting the case at court has been shared amongst a large number of different agencies. The CPS was established as an independent body in 1986 under the Prosecution of Offences Act 1985 s. 1 to prosecute criminal cases[425].

The CPS assumed a dominant role in the prosecution of cases but not the investigation of crime. It works closely with the police and other investigators to advise on lines of inquiry and decide on appropriate charges or other outcomes, in accordance with the Code for Crown Prosecutors, and Casework Quality Standards (CQS). It has some 8,316 other staff including Crown Prosecutors, Associate Prosecutors and support staff who are appointed by the Director of Public

[425] Section 1(1) establishes that: "1) There shall be a prosecuting service for England and Wales (to be known as the "Crown Prosecution Service") consisting of—(a) The Director of Public Prosecutions, who shall be head of the Service; (b) the Chief Crown Prosecutors, designated under subsection (4) below, each of whom shall be the member of the Service responsible to the Director for supervising the operation of the Service in his area; and (c) The other staff appointed by the Director under this section".
See Section 1 (1) (a), (b), and (c) of the Prosecution of Offences Act 1985, CHAPTER 23 c. 23 An Act to provide for the establishment of a Crown Prosecution Service for England and Wales; to make provision as to costs in criminal cases; to provide for the imposition of time limits in relation to preliminary stages of criminal proceedings; to amend section 42 of the Supreme Court Act 1981 and section 3 of the Children and Young Persons Act 1969; to make provision with respect to consents to prosecutions; to repeal section 9 of the Perjury Act 1911; and for connected purposes. [23rd May 1985].

Prosecution (DPP) with the Treasury approval[426]. Historically, in England and Wales, the majority of prosecutions have been initiated by the police. Normally, prior to the commencement of a prosecution, the police will of course, have the responsibility to investigate and obtain evidence about the alleged offence. Under the Pre-Crown Prosecution Service system, they were also responsible for the presentation of the case at the court by employing solicitors who appears for the prosecution in the magistrate's court and instructed counsel for the Crown Court. Since the enactment of the 1985 Act, the CPS has taken over the prosecution of all cases initiated by the police. Also, the statutory charging arrangements introduced by the s. 28 of the Criminal Justice Act (CJA) 2003, establishes that the CPS determines the charges in all but minor cases. Notwithstanding, the police and the CPS work/act in cooperation since in most of the time, it is necessary for the police officer to attend court as witness, to warn private witnesses as to when they will be required to appear at the court or to gather any further evidence that the CPS might need. However, the CPS is independent of the police when it comes to matters of prosecuting offences. The CPS prosecutors prepare cases for court and present cases in both the magistrates' courts and the higher courts. In England and Wales, the Director of Public Prosecutions (DDP) is the head of the Crown Prosecution Service and operates independently, under the superintendence of the Attorney General under the SS. 2 and 3(1) of the 1985 Act. The office of the DDP was created in 1879 during which its role in prosecution system was relatively limited until the enactment of the Prosecution of Offences Act 1985 which requires the DDP to take over the conduct of all criminal proceedings instituted by the police as established

[426] John Sprack, A Practical Approach to Criminal Procedure, pages 66- 73.

under s 3(2) of the Act. For clarity and understanding, it is reproduced and it states that- It shall be the duty of the Director[427]:

- to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force (whether by a member of that force or by any other person);
- to take over the conduct of any criminal proceedings instituted by an immigration officer;[428]
- to institute and have the conduct of criminal proceedings in any case where it appears to him that the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him;
- to take over the conduct of all proceedings begun by summons issued under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles);
- to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences;
- to have the conduct of any extradition proceedings, and to give, to such extent as he considers appropriate, and to such persons as he considers appropriate, advice on any matters relating to extradition proceedings or proposed extradition proceedings;
- to appear for the prosecution, when directed by the court to do so, on any appeal,[429]

[427] This is subject to any provisions contained in the Criminal Justice Act 1987.
[428] See the Immigration Act 1971.
[429] See the process of Appeals under : (i) section 1 of the Administration of Justice Act 1960 (appeal from the High Court in criminal cases);
(ii) Part I or Part II of the Criminal Appeal Act 1968 (appeals from the Crown Court to the criminal division of the Court of Appeal and thence to the Supreme Court); or

- to have the conduct of applications for orders under section 1C of the Crime and Disorder Act 1998. [430]
- to take over any prosecution begun by a person or authority other than the police[431].
- to discharge such other functions as may from time to time be assigned to him by the Attorney General.[432]

The structure is that the DDP is responsible to the Attorney General whilst the Attorney is accountable to Parliament for the work of the Crown Prosecution Service. There are four specialist casework divisions of the CPS which are: the *Specialist Fraud Division* (which also incorporates Welfare Rural & Health), *the Special Crime & Counter Terrorism Division*, and the *Organised Crime Division*. They deal with challenging cases that require specialist experience, including the prosecution of cases investigated. The Crown Prosecution Service in the cause of performing their duties does the following:

- decides which cases should be prosecuted – keeping them all under continuous review;
- determines the appropriate charges in more serious or complex cases – advising the police during the early stages of investigations;
- prepares cases and presents them at court - using a range of in-house advocates, self-employed advocates or agents in court; and

(iii) section 108 of the Magistrates' Courts Act 1980 (right of appeal to Crown Court) as it applies, by virtue of subsection (5) of section 12 of the Contempt of Court Act 1981, to orders made under section 12 (Contempt of Magistrates' Courts).

[430] This is orders made on conviction of certain offences; and section 14A of the Football Spectators Act 1989 (banning orders made on conviction of certain offences).

[431] See s. 6 (2) of the Prosecution of Offences Act 1985 which enables the DPP to perform such a function.

[432] Section 3(1) and (2) of the Prosecution of Offences Act 1985, England and Wales.

- Provides information, assistance and support to victims and prosecution witnesses.

  For all but most minor offences, responsibility for deciding the charge the suspect faces rests with the CPS rather than the police. Normally representatives of the CPS are based in police station, and once the police have completed their investigations, they will pass the file to the relevant CPS representative who will then decide if the suspect should be charged and if so, what charge the suspect should face. In deciding whether the CPS should charge a suspect or not must follow a principle. As established under the Code for Crown Prosecutors basic principles, the decision on whether or not to charge a case against a suspect is based on the Full Code Test as outlined in the Code. The Full Code Test has two stages which is termed the *evidential stage* and *the public interest stage*. At the evidential stage, the Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge. They must consider whether the evidence can be used and is reliable. They must also consider what the defence case may be and how that is likely to affect the prosecution case. A "realistic prospect of conviction" is an objective test. It means that a jury or a bench of magistrates, properly directed in accordance with the law, will be more likely than not to convict the defendant of the charge alleged. (This is a separate test from the one that criminal courts themselves must apply. A jury or magistrates' court should only convict if it is sure of a defendant's guilt.) If the case does not pass the evidential stage, it must not go ahead, no matter how important or serious it may be.

  Furthermore, at the public interest stage; if the case does pass the evidential stage, then the Crown Prosecutors must decide whether a prosecution is needed

in the public interest. They must balance factors for and against prosecution carefully and fairly. Some factors may increase the need to prosecute but others may suggest that another course of action would be better. The CPS will only start or continue a prosecution if a case has passed both stages. Early advice about the charged at the police station enables the prosecutor to determine whether a simple or conditional caution (or a youth caution or a youth conditional caution for a young offender) can be offered as an alternative to prosecution or if not, what appropriate charge should be.

Under section 4.4,-4.6, Code for Crown Prosecutions for Full Code Test, the evidential test is satisfied where an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, more likely than not to convict the defendant of the charge alleged.

Similarly, under the section 4.7-4.12 of the Crown Prosecution Code, which requires that prosecution must be in the interest of the public, takes into consideration the comment by Lord Shawross in 1951 who was the then Attorney General that:

> *"It has never been the rule in this country- I hope it never will be- that suspected criminal offences must automatically be the subject of prosecution*".

On top of the above comments which has been adhered to by successive Attorney Generals, the public interest factors that can affect the decision to prosecute are laid down in the section 4.12(a) to (g) of the Crown Prosecutors Code. It requires the prosecutor to consider questions such as:

(i) How serious is the offence committed?

(ii) What is the level of the suspect's culpability?

(iii) What where the circumstances of and the harm caused to the victim?

(iv) Was the suspect under the age of 18 at the time of the criminal offence?

(v) What is the impact on the community?

(vi) Is prosecution a proportionate response? ; and

(vii) Do sources of information require protecting?

All crown prosecutors have the powers of the director as to the institution and conduct of proceedings as established under s. 1(6) of the 1985 Act. In particular they may authorise the commencement of proceedings in those cases where the DDP's consent to a prosecution is required under the direction of s. 1(7) of the 1985 Act. CPS though exercises their powers under the direction of the director, it is not necessary for them to obtain a specific authority for every action they take on the DDP's behalf. This is well established under the case of *Liverpool Crown Court ex parte Bray* [1987] Crim LR 51, where it was held that an application by the Crown Prosecutor for a voluntary bill of indictment has been made by or on behalf of the DDP and therefore, according to the relevant rules of court, did not require an affidavit in support, even though the Crown Prosecutor had acted on entirely on their own initiatives[433].

It is very important to observe that the CPS does not investigate crimes. They liaise closely with the police but are independent of them.

There are other powers of the DDP in connection with the CPS with regards to the duties that needs to be performed by them. According to S. 8 of the Offences Act 1985, the Attorney General may make the regulations requiring the police to inform the DDP whenever there is a prima facie case that offences falling into certain defined categories have been committed within the police area. Such important crimes that the police ought to keep the CPS informed include

[433] John Sprack, A Practical Approach to Criminal Procedure, pages 65-69.

large –scale drug offences, large –scale conspiracy to contravene immigration laws, criminal libel, and obscenity cases.

Also, by s.10, the DDP is required to issue a Code for Crown Prosecutors, giving guidance on:

(i) When a prosecution should be discontinued;

(ii) Charging policy in general, and

(iii) The factors which make an offence triable either way suitable for summary trial or, as the case may be, trial on indictment.

Apart from the Crown Prosecution Service whose main duty is to prosecute crimes, there are other prosecutors who are also permitted by the law to prosecute which are private prosecutors and even individuals.

In the United Kingdom, about 25 per cent of prosecutions which are not commenced by the police or the Crown Prosecution Service is brought by a wider variety of prosecutors.[434] For instance, the Revenue and Customs Prosecutions Office prosecutes for tax offences, VAT offences, and illegal import and export of drugs; the Department of Work and Pensions prosecutes for fraudulent benefits claims; and Local Authorities prosecutes for breach of food and health safety regulations. Big stores used to prosecutes for shoplifting offences but of recent, this role has been taken over by the CPS and the police and therefore whenever such cases happens, they are handed over to the CPS or the police. The Criminal Justice Act 1987 created a new investigative and prosecuting authority, namely the Serious Fraud Offence (SFO). The office consists of a small number of specialists in anti-fraud work, lawyers, accountants and investigators. The function of the SFO is to assume responsibility for the investigation and prosecution of a small minority of extremely serious suspected frauds per-

[434] See John Sprack, A Practical Approach to Criminal Procedure, pages 72-73.

haps less than 100 cases a year. The office works in collaboration with the police fraud squads, directing them to relevant lines of inquiry. It also has extensive powers to compel those who might have information about a fraud under investigation to answer questions and /or supply documentary evidence. Unlike the CPS, the SFO both investigates suspected major fraud and then, if the evidence is forthcoming, commences and conducts the prosecution.

As understood, apparently, most of the non-police prosecutions in the UK are commenced by the government or quasi- governmental authority. However, a minority of cases are brought by the individuals acting in purely private capacity. As already known, individuals may cross-summon each other for offences such as assault. Occasionally, an individual will feel so outrageous at the decision of the police not to prosecute that the person will take the initiative and commenced proceedings themselves. A famous example was the case of *Whitehouse v Lemon* [1979][435] where Mrs. Mary Whitehouse successfully prosecuted the defendants for blasphemous libel, that being the first recorded prosecution for the offence since 1922. Again, more recently, the parents of a young man who had died through injecting a certain drug both gathered the evidence and then initiated proceedings for manslaughter against the person who had assisted their son in making the injection. The DDP had originally advised the police against any action, and he only took over the prosecution after there has been a committal for trial, and the ultimate result was that the court convicted the person for manslaughter.

Under the section 6 of the Prosecution of Offences Act 1985, the DDP has a discretionary power to take over the conduct of any non-police prosecution. The DDP may then again at their discretion, either continue with the prosecu-

[435] [1979] AC 617.

tion of the case in a normal way, or discontinue the proceedings under s. 23 or simple without any evidence. Provided the DDP is not acting unreasonably, for discontinuing prosecution, its conduct will not be opened to a judicial review by the High Court. For example in the case of in *DDP ex parte Duckenfield* [2000][436], the Divisional Court considered the basis upon which the DDP ought to take over private prosecutions in order to stop them. The policy of the DDP is that it will only intervene to stop a private prosecution on evidential grounds where there is clearly no case to answer, and that provided there is enough evidence to support a private prosecution, the DDP will not intervene to stop it[437]. Prosecution advocates are under the duty to ensure that all supporting evidence and material for the case is put before the court in a fair and dispassionate manner. In particular:

I. When arguing a point of law, a prosecutor must inform the court of any relevant authority from statute or case law, even if that authority does not assist the prosecution case and favours the defendant;
II. All relevant facts known to the prosecutor should be placed before the court including, if the defendant is convicted, any facts relevant to mitigation;
III. If the prosecutor obtains evidence which may assist the defendant (for example, a witness who supports the defence case), the prosecutor must supply particulars of this evidence to the defence; and
IV. If a prosecution witness gives evidence at court which is inconsistent with any earlier statement made by that witness, the prosecuting solicitor should disclose this fact to the defence.

[436] [2000] 1 WLR 55.
[437] Annual Report of the Crown Prosecution Service, obtainable from: http://www.cps.gov.uk.

V. The prosecutor must disclose to the defence solicitor every document obtained from witness statement regarding the case they are dealing with to the defence[438].

Equally, whereby the prosecution after considering some factors decide not to prosecute the offender for some reasons, conditional cautioning can be taken as an option. Conditional Cautions are a statutory disposal introduced for adults by the Criminal Justice Act 2003[439] and for youths by the Crime and Disorder Act 1998 and are operated under Statutory Codes of Practice. Conditional Cautions are one of a range of out-of-court disposals and provide an effective, swift and speedy resolution in appropriate cases. It is issued if the offender admits the offence and accepts the condition(s) given or specified by the CPS or the police officer. If the conditions are complied with or completed within the timescales determined, the case is finalised and there is no prosecution. If, however, the conditions are not complied with, a prosecution may follow. A Conditional Caution differs from a simple caution as there are certain conditions that must be complied with in order to avoid prosecution for the offence committed[440]. The details of the conditional cautioning would have to be examined within the context of the CPS functions as far as crime prosecution is concerned.

The summary of the main issues pointed out under the power to prosecute in the UK is that the discretionary powers of the Director of Public Prosecution (DDP) under s. 6 of the Prosecution of Offences Act 1985 to take over the conduct of any non-police prosecution, and either continue with the prosecution of the case

[438] Deborah Sharpley, Criminal Litigation Practice and Procedure 2014/15.

[439] Provision for Conditional Cautioning is one of the measures introduced by the Criminal Justice Act, 2003. (CJA 2003, Part 3, sections 22-27).

[440] On the 8th April 2013 a Crown Prosecutor decided whether a Conditional Caution was an appropriate disposal for an offender aged 18 or over following a consultation with the police. Again, the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduced changes to the Conditional Caution scheme.

in a normal way, or discontinue the proceedings under s. 23 without any evidence, and again which conduct is not opened to a judicial review by the High Court should be reviewed. Such an authority will enable the DDP to discontinue or stop private prosecution unreasonably.

In my opinion, it is meaningful that all private prosecution should/must solicit for the consent of the DDP before prosecution. However, the discretionary power of the DDP to discontinue/stop prosecution being it public or private should be subject to a judicial review by the High Court.

4.2. Legal Aid in the United Kingdom

The legal aid system in the United Kingdom dates back from 1949. The scheme was initially administered by the Law Society, the professional body which regulates and represents solicitors, until the Legal Aid Act 1988 was enacted which created the Legal Aid Board. Following the doubling of the legal aid budget in the early 1990's a review of the system was carried out in 1997, leading to the Access to Justice Act 1999 and the Legal Service Commission (LSC). The latest review recommended that the Legal Service Commission align more closely with the Ministry of Justice. Until April 2013 the Legal Services Commission (LSC) was a Non Departmental Public Body (NDPB) with statutory duties in relation to the Community Legal Service Fund (CLSF) and Criminal Defence Service (CDS), funding legal advice and representation in civil and criminal law. On 1 April 2013 the LSC was abolished as a result of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. This is an executive agency of the Ministry of Justice (MoJ) created to administer legal

aid from 1 April 2013, called the Legal Aid Agency (LAA)[441]. The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act also made changes to the scope and eligibility of legal aid and to exceptional cases funding. This would be observed into much detail as the dissertation proceeds to look at the provision of legal aid in the UK legal system. It is responsible for legal aid provision only in England and Wales, whiles Scotland and Northern Ireland have their own legal aid systems, administered by the Scottish Legal Aid Board and Northern Ireland Legal Services Commission respectively. The research would not cover the scope of legal aid provisions in Scotland and Northern Ireland as that has not been the initial motive, but rather limit itself to England and Wales.

The Legal Aid Agency provides justice to areas such as crime and civil. It is therefore an imperative to look at how aid is spread in criminal cases. The proceedings, and therefore the summary of the legal aid work provision below would be helpful to understand which levels aids are provided in criminal proceedings:

[441] Commission of Statistics in England and Wales; Legal Aid Agency April 2013 to June 2014 Ministry of Justice Statistics Bulletin Published 25 September 2014.

Legal Aid work provision

Criminal Legal Aid

- ✓ *This includes work carried out in police stations and in courts in relation to people accused of or charged with criminal offences.*
- ✓ *Provides legal advice and representation to people being investigated or charged with a criminal offence.*

Split into crime higher and crime lower:

- *Crime higher is legal representation in the Crown Court and above.*
- *Crime Lower is work carried out by legal aid providers at police stations and in magistrates' courts in relation to people accused of or charged with criminal offences. Prison law is also included within this category.*

Considering the statistical report of legal aid[442], in 2013-14 the overall workload for legal aid consisted of over 1.8 million acts of assistance compared to 2.3 million in 2012-13, a fall of 20 per cent. The LAA spent just over £1.7 billion in 2013-14 on funding advice for criminal matters and civil. Of this, £0.9 billion was spent on criminal legal aid[443].

In contrast, it could be observed that acts of assistance were at their highest in 2009-10. Since this peak the volume has fallen by just over 39 per cent; within this reduction the criminal legal aid area has reduced by almost 14% but the majority of the fall has come from the civil justice area which has reduced by almost two-thirds over this period.

Criminal legal aid provision are provided for cases that are considered eligible for funding from the period one is involved in a case with police. The diagram

[442] Legal Aid Statistics in England and Wales, Legal Aid Agency, Ministry of Justice Statistics bulletin, published on the 25th of September 2014.
[443] See Legal Aid Statistics in England and Wales, report 2014.

below shows the availability of legal aid flows (in bold) throughout the Criminal Justice System (CJS) with legal services touching on the system from start to finish. As a matter of fact, all criminal cases are potentially within the scope of the criminal legal aid scheme, which are subject to two tests- the Interests of Justice test and the means test which operates to exclude some cases from public funding.

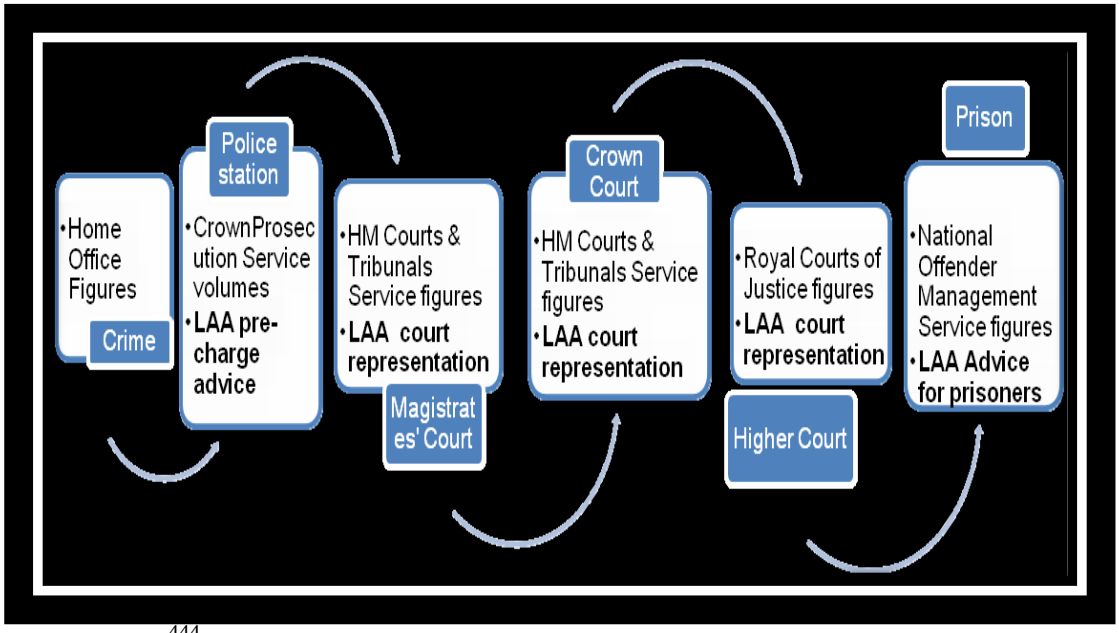
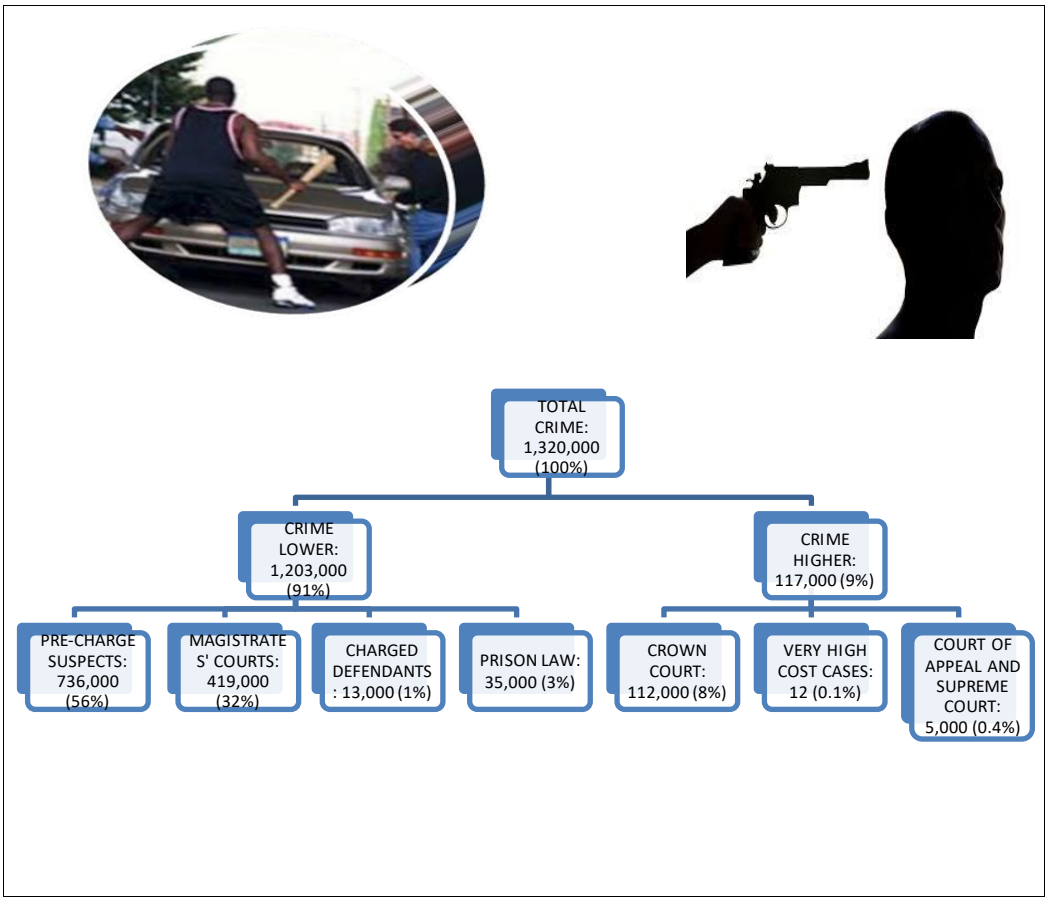


Figure: 4.1[444]

The examples of cases of volume within criminal legal aid area are shown below which include the brake down of 1,320,000 criminal cases comprises of both crime higher and crime lower.

[444] Availability of legal aid flow in England and Wales, 2014.

Figure: 4.2[445]



It could be observed from the above diagram that within the crime lower category, which in total, is 1,203,000 cases, a survey between April 2013- June 2014, pre-charge suspects cases contains 736, 000. Pre-charge work made up 56% of the crime lower workload. This is because anyone in England and Wales who is interviewed by the police or attends a police station can receive advice funded by legal aid either on the telephone or by a solicitor in attendance

[445] Volumes within criminal legal aid area 2013-14 Court Statistics: www.gov.uk/government/collections/court-statistics-quarterly

with the suspect. As a human right, every person with a criminal offence is entitled to defend himself in person or through legal assistance. The legal aid agency has limited control over the volume of police station claims. The majority of the pre-charge workload (84% in April to June 2014) consists of suspects receiving legal help with a solicitor in attendance at the police station[446]. It can also be observed that, defendants charged and therefore represented at the magistrate's court was 419,000 cases which represent 32% of the cases under crime lower. Defendants charged but not sent to court which were represented was 1, 3000 cases which is 1% of the crime lower. Also under prison law, there were 35,000 cases which are 3% classified under the lower crime. Actually, from December 2013, under the Legal Aid Reform programme, there were changes to the scope of legal aid available for prison law[447]. These changes appear to have led to larger falls. Volume of cases dealt under the prison law, fell 36% in the year 2014 in comparison to 2011- 2013[448], but volumes have risen compared to 2007-08, with an increase of 10%. Over 60 per cent of prison law cases between April 2013 to June 2014 were for free standing advice and assistance; whiles advocacy assistance at the Parole Board hearing considered over 4, 000 cases 13% of prison law cases, at a legal aid funded oral hearings; and finally the LAA also funded over 4,000 cases 12% for disciplinary hearing claims, which were heard by Independent Adjudicators (IA).

Equally importantly, it could be deduced from the table at figure 2 above that crime higher recorded 117,000 (9%) of the criminal cases between 2013 and 2014. Cases that were dealt with by the crown court were 112,000 (8%); very

[446] See Workload with pre-charge suspects, Apr-Jun 2011 to Apr-Jun 2014 www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2013/stb-crime-stats-dec-2013.html#tab-Overall-level-of-crime.

[447] www.justice.gov.uk/offenders/parole-board.

[448] Volume of workload with prison law, Apr-Jun 2011 to Apr-Jun 2014.

high cost cases were 12 (0.1%), and cases dealt with by the Appeal Court and the Supreme Court were 5,000 (0.4%) of the cases recorded. The last few years have seen falls in volume in the crime higher category. These have been driven by a fall in the volume of representations in the Crown Court and therefore expenditure in crime higher has also decreased over the last three years.

Legal aid representations provided for the above cases ranges from the magistrates courts, the Crown Courts; and then the appeal courts. Legally aided cases within the Court of Appeal and the Supreme Court are counted within crime higher cases. For example the workload in the Crown Court can be broadly split into the following categories:

1. *Either way offence:* An offence which can be tried either before the magistrates' court or the Crown Court.
2. *Indictable offence:* A criminal offence that can only be tried in the Crown Court.
3. *Committed for sentence:* A case where a magistrate decides that the penalties available to them are inadequate and commits the case to the crown court for sentencing.
4. *Appeals:* The Crown Court deals with appeals from magistrates' court against conviction and sentence.

For instance, there has been an increase of nine per cent in the volume of publicly funded representations within the Crown Court in the last year. This is driven by a 22% increase in either way cases, which is similar to trends in Crown Court completions. The number of trials for indictable only offences in the Crown Court remained almost unchanged from the previous year commit-

tals to the Crown Court for sentencing fell by 9% and appeals against sentencing and verdicts from the magistrates' courts fell by 15%[449].

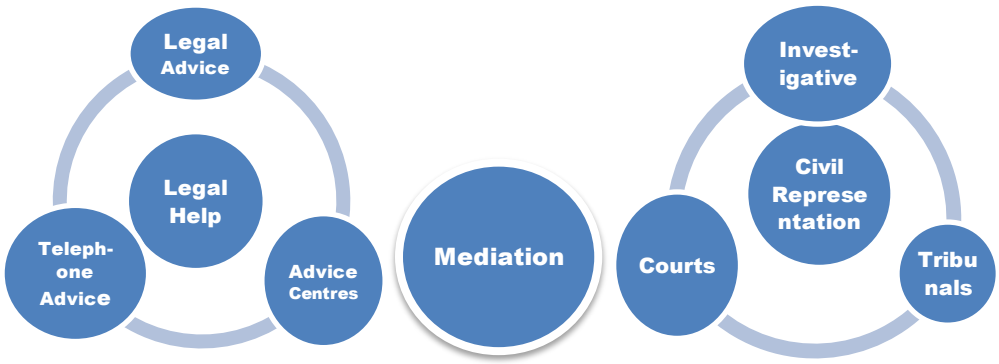
Furthermore, there are also cases funded by the legal aid agency which are classified as Very High Cost Cases (VHCCs). They are those cases in which, if the case were to proceed to trial, it would be likely to last more than 60 days. These cases can span a number of years and while the volumes are relatively small the number of related contracts with providers and the amount spent are high in comparison. The legal aid agency makes decisions in relation to authority to incur expenditure for expert reports and runs a High Cost Case contracting scheme seeking to limit expenditure on the small number of Crown Court cases that account for a large proportion of total expenditure on criminal legal aid. The total expenditure on VHCC in 2013-14 was £57 million, a reduction of 16% compared to the previous year 2012-2013. VHCCs represent less than 1% of the volume of cases but 10% of the overall cost of publicly funded cases in the Crown Court. For each VHCC opened there may be multiple defendants, each represented by a different provider with separate VHCC contracts[450]. Moreover, volumes of cases in the Court of Appeal and the Supreme Court have fallen in the last three years, and expenditure has followed a similar trend. The largest volume in this area comes from the court of appeal. For instance, in 2013-14 court of appeal cases made up 87% of this category. Actually, legal aid services in England and Wales are delivered through two types of service providers, contracted providers and referral providers. There has been a steady reduction in the number of contracted legal aid providers since 2007-08. This decline is driven largely by a fall in the number of civil providers. Criminal legal

[449] Court Statistics (Quarterly) January to March 2014.
https://www.gov.uk/government/collections/court-statistics-quarterly
[450] See report of Very High Cost Cases from 2011-2012, and 2013 -2014.

aid volume is mainly demand led whereas civil legal aid volume is controlled by the LAA awarding a maximum number of new matter starts to each contracted provider. Since 2007-08 the number of civil providers has fallen by 39% (as at the end of the 2013-14 financial years) and criminal providers under contract have decreased by 16%. In the last year the number of civil providers has reduced by 11% compared to the previous year. Crime providers have decreased by 5% over the same period.

Under civil legal aid, it is essential to notice that events and issues in people's lives require legal assistance either in the form of mediation and/or further court appearances. Legal help is usually extended into civil representation with full investigations undertaken or in court representation. The table diagram (figure 4.3) shows the provision of aid in civil matters through legal assistances, mediation and representation.

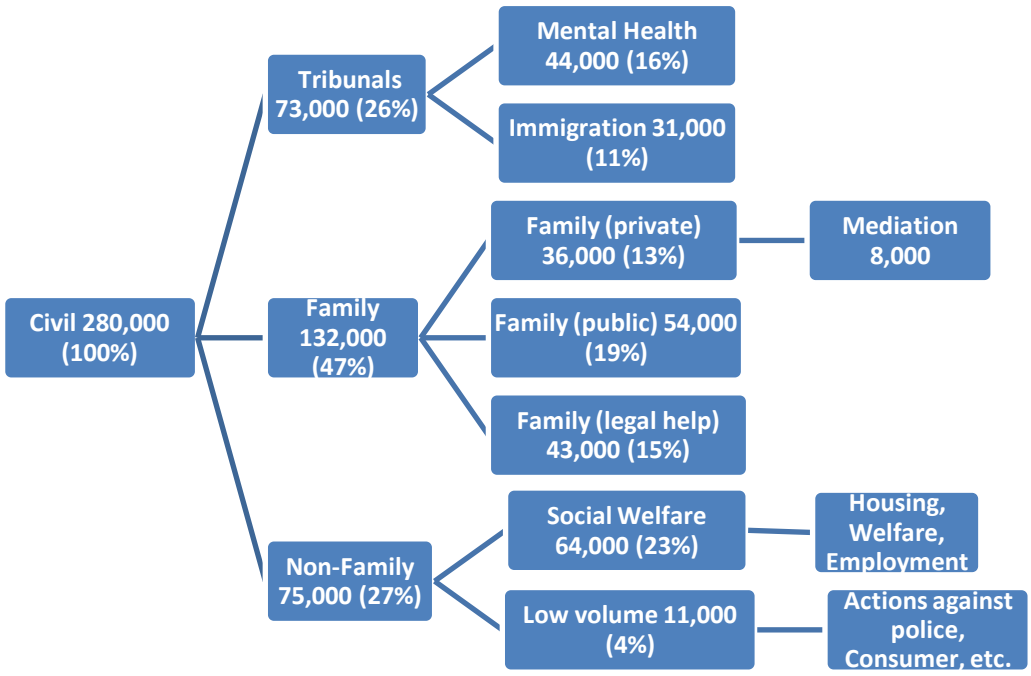
Figure: 4.3



The category of family legal aid covers work on both private and public law and includes work associated with the Children Act, domestic abuse, financial provision and family mediation. Also legal aid is provided and available for

private family law cases if there is evidence of domestic violence or child abuse and for child abduction cases. Some cases are non –family law issues but civil which attract public funding and they cover actions against the police, clinical negligence, consumer and general contract, education, personal injury, civil liberties (public law) and other meritorious cases. Individually, workload on the low volume categories is so low that it is difficult to see specific trends. The diagram (figure 4.4) below shows the number of cases that were recorded between 2013- 2014 within the civil law category.

Figure 4.4



Apart from the above civil cases which received legal aid, there is also other means known as **Exceptional Case Funding** (ECF). Clause 10 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) introduced

the practice of applying for Exceptional Case Funding (ECF) from the 1 April 2013. An ECF application for civil legal services is made where a case falls outside the scope of legal aid but the client or conducting solicitor believes there is evidence to support there being a requirement to provide funding because failure to do so would be a breach of, or having regard to any risk that their European Convention Rights (within the meaning of the Human Rights Act 1998), may be breached. An ECF determination can only be granted if:

- the above exceptional case criteria are met, and
- the relevant criteria set out in the Civil Legal Aid (Merits Criteria) Regulations are met, and
- the relevant criteria set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations are met.

Part 8 of the Civil Legal Aid (Procedure) Regulations 2012 informs that there are particular exceptions that apply to the procedures of ECF. There is no appeal provision only a right to an internal review, there is no emergency provision, or delegated functions. There is however a provision that allows an ECF determination to take effect from a date earlier than the actual date of the determination.

Under the legal aid scheme of England and Wales, a defendant charged with a criminal offence who wishes to be represented by a solicitor in court must either:

- Seek representation by the Court Duty Solicitor;
- Apply to the court for a representation order; or
- Pay privately.

Representation at the court by the duty solicitor is completely free and subject to a means or merits test. However, a duty solicitor can only represent a defendant whom is:

- In custody,
- Charged or requisitioned in connection with an imprisonable offence;
- Applying for a bail (unless the defendant has used a duty solicitor for a previous application);
- At risk of imprisonment for failing to pay a fine or failing to obey a court order.

A duty solicitor may not represent someone in connection with:

- a trial,
- a hearing to send a case to the Crown Court;
- an application for bail (if that person has used a duty solicitor for a previous application); or
- a non-imprisonable offence (unless that person is in custody).

Under normal circumstances, a duty solicitor is most likely to represent a defendant making a first appearance before a magistrates' court who wishes to plead guilty to non-indictable –only offence(s) and be sentenced or who wishes to apply for bail, having been denied post-charge police bail and who therefore appears before the magistrates court in custody. If a defendant wishes to have a further representation beyond the limited scope of the duty solicitor scheme, then the defendant must either represent himself or instruct a solicitor to appear for him under a representation order[451] which is a state funded representation for defendants charged with criminal offences. The process by which represen-

[451] Representation Order is officially applying for public funded legal representation by filling the required forms CRM14 which is an application for Legal Aid in Criminal Proceedings; and CRM 15 which also is a financial Statement for Legal Aid in Criminal Proceedings.

tation order is made and what it entails shall be looked at to ensure clarity and understanding as the discussion proceeds to how representation order is made and what it entails.

As mentioned briefly above, a defendant who requires public funded representation in Court must obtain a representation order. For both magistrates' and Crown Court proceedings a defendant must satisfy a means test and the interest of justice (merits) test. Applying for a representation order, the applicant must complete relevant forms such as CRM14 (Application for Legal Aid in Criminal Proceedings); and also CRM15 (Financial Statement for Legal Aid in Criminal Proceedings). The CRM14[452] form must be completed in all cases whether tried summary or on indictment and contains the interests of justice test and the applicant's personal relevant information, in addition to the CRM15 form. These forms for a representation order are processed administratively by the magistrates' court at which the defendant will make his initial appearance. I would like to unfold the two packages i.e. the CRM14 and the CRM15 to see what and how the forms help to test. The defendants' needs of legal aid and how the Interest of Justice (IoJ) test and the Means Test are detailed on the forms and that is what it accessed. The interest of justice (IoJ) test is automatically satisfied in a case where an accused is charged with an indictable-only offence which is sent to the Crown Court. The applicant needs only to tick the 'indictable' box on the front page of CRM14[453] for it to be processed on this basis. Where an accused is charged with a summary-only or either-way offence, a representation order will only be granted if the IoJ criteria are met. Where an either- way of-

[452] This form can be submitted electronically by using Crim 14 eForm or the form can be handwritten. To consult Criminal Legal Aid Manual (January 2014) see: www.justice.gov.uk/downloads/legal-aid/eligibility/criminal-legal-aid-manual-Jan14.pdf.

[453] A copy of CRM14 can be found on the Legal Aid Agency's website: http://www.justice.gov.uk/forms/legal-aid-agency/criminal-forms/

fence fails the IoJ test, but is subsequently sent to the Crown Court, the IoJ test is automatically satisfied by the sending. Moreover, the IoJ test must be met where a convicted defendant seeks publicly funded representation to appeal against conviction and/or sentence before the Crown Court**.**

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Criminal Legal Aid (General) Regulations 2013) provides that if any of the following grounds apply, the IoJ test is satisfied and a defendant is entitled to a representation order:

I. If proven the defendant is likely to lose his liberty or livelihood or suffer serious damage to his reputation;

II. the case involves a substantial question of law. A substantial question of law might include a legal argument about the *actus reus* and *mens rea* elements of the offence, where, for example, a defendant is pleading not guilty to theft, submitting that she lacked dishonest intent in accordance with *R v Ghost* [1982].[454] In such situations, it is the interest of justice for the defendant to be represented. A substantial question of law also covers challenging the admissibility of evidence including[455]:

- arguments about whether it is appropriate to draw an adverse inference from an accused's silence at the police station under section 34 of the Criminal Justice and Public Order Act 1994;
- applying to have a confession excluded under sections 76 and 78 of the Police and Criminal Evidence Act 1984 (PACE 1984) for breaches of Code C;

[454] [1982] 3 WLR 110.
[455] See Martin Hannibal & Lisa Mountford, Criminal Litigation Handbook 2014-2015, page 152.

- applying to have an identification evidence excluded under section 78 of PACE 1984 for breach of Code D;
- disputing the admissibility of hearsay evidence; and also
- disputing the admissibility of bad character evidence under the Criminal Justice Act 2003.

Actually, for the substantial question of law, the Interest of Justice test requires the defence lawyer to explain precisely the point of law that applies to the accused or applicants' cases.

III. the defendant is under a mental or physical disability or has inadequate knowledge of English such that the defendant is unable to follow the proceedings or put his case;

IV. the defence involves the tracing and interviewing of witnesses or experts cross-examination of a prosecution witness;

V. legal representation is desirable in the interests of someone other than the accused.

The Means Testing (CRM15) also applies to representation orders in the Crown Court and in the magistrates' Court. Some applicants are 'passported' which means they do not need to complete the CRM15. 'Passported' applicants include those:

- Under 18 years; and
- Applicants in receipt of social benefits such as *Income Support, Income Based Jobseeker's Allowance, Guaranteed State Pension Credit.*

The CRM15 actually tests the applicant's financial status and eligibility and therefore on the form, the applicant is required to provide their national insurance number if they are over 16 years of age. In such a process, the applicant for legal aid in completing the means test must complete the CRM15 and also

the CRM 15C. There are different ways and methods of calculating the means test and that depends on whether the case is to be tried at the magistrates' court, or the Crown Court. Means testing in the magistrates' court proceedings is confined to an assessment of income[456] alone. In contrast to Crown Court means testing, capital is not taken into account. The means testing scheme in the magistrates' court is said to be an 'in or out' scheme. The applicant either qualifies in terms of his means, in which case (subject to satisfying the IoJ test) he qualifies for a representational order, or he does not, in which case he is ineligible. The magistrates' court means test comprises of two elements: an initial assessment and a full means test. The initial assessment takes account of the applicant's gross annual income and adjusts it against the applicant's family unit size by applying a 'weighting' formula. Once the applicant's 'weighted' gross annual income figure is determined the applicant will either be:

- eligible; or
- ineligible; or
- a full means test will be required.

On current figures the thresholds are as follows:

- A 'weighted' gross annual income of less than £12,475: with this the applicant passes the means test and need not to complete CRM15.
- Applicant with an annual income greater than £22,325 need to complete the CRM15: With this applicant fails the means test and cannot therefore be granted representation order to cover proceedings in the magistrates' court.

[456] Income here means all total income from all sources such as wages, state benefits (unless specifically disregarded), maintenance payments, benefits in kind, income from savings and investments. The calculation is based on income received in the 12-month period before the application. Disregarded state benefits for this purpose include: attendance allowance; carer's allowance; severe disablement allowance; disability living allowance; housing benefit; council tax benefit; and any payment made out of social fund.

- Also if the applicant's 'weighted' income falls between the lower and upper threshold, a full means test must be undertaken and therefore CRM15 must be completed.

In the cause of this assessment, the applicant is required to produce proof of income such as the most recent wage slip or if self -employed, the most recent tax return. During the assessment of the means test, if the applicant has a partner, the partners' income is included in the assessment process. But a partner's income will not be aggregated whereby the partner has contrary interest including where the partner is:

- the alleged victim; or
- a prosecution witness; or
- both are defendants and there is a conflict between them.

Again, when calculating the means test, the applicant's capital assets are completely ignored in relation to magistrates' court proceedings, but such capital asset shall be considered in relation to proceedings at the Crown Court.

When calculating the full means test, the purpose is to calculate the applicants' annual disposable income and by doing so, deduction are made for income tax and national insurance, housing cost, child care fees, maintenance to a former partner, and an annual living allowance. The means test applies differently to cases triable on indictment. A defendant charged with an indictable –only offence or order-way offence whose case is sent to the Crown Court, will be means tested to determine whether the defendant is eligible and, if so, how much the defendant will have to contribute towards the costs of his defence. The Crown Court scheme is contributory and is assessed against the applicant's income, capital and equity. This also requires the applicant to provide additional information on CRM15/ CRM15C relating to capital and income assets.

Moreover, whereby an applicant annual household disposable income is between £3,399 and £37,499.99 will be subject to a contribution notice. Income-based contributions are set at 90% of disposable income and are payable by six monthly instalments.

For more clarity and comparison, a summary of the key differences between the Means Testing in the Magistrates' Court and the Crown Court is demonstrated and compared below in figure 4.5

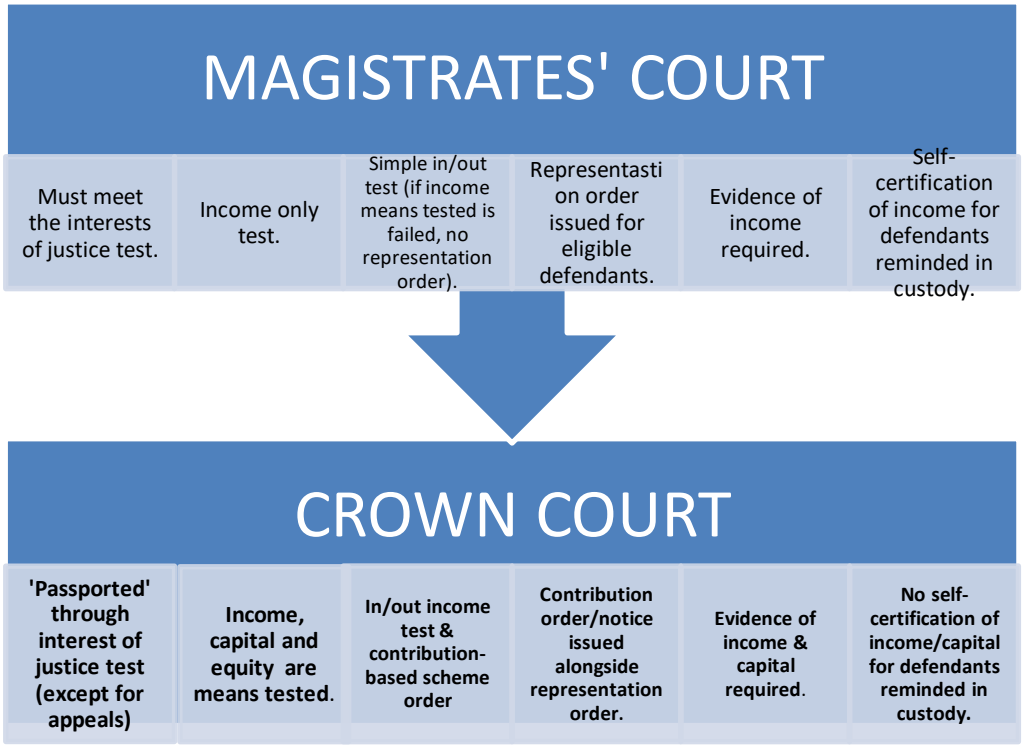


Figure 4.5 *(Means Testing at the Magistrates' Court and the Crown Court).*

Once a representation order is granted by the legal aid agency, it covers the entire proceedings in the magistrates' courts including an application for bail before the Crown Court. It also covers advice about a possible appeal to the

Crown Court against conviction and/or sentence. Where the order granted covers cases triable on indictment, the order will cover the costs of representation in the Crown Court and will extend to obtaining advice when appealing against conviction and /or sentence to the Court of Appeal[457].

More importantly, in case the accused's lawyer deems it necessary to incur disbursement in preparing the defence case which might include instructing an expert witness, an interpreter or enquiry agent or obtaining the transcript of an interview; the Solicitor is permitted to do that. However, the Solicitor should always seek the prior authorization from the LAA to incur expenditure in excess of 100 using Form CRM4 eForm. All that the defence attorney should do is to justify that it is in the interest of the client and therefore reasonable to incur the disbursement and that the amount to be incurred is reasonable.

In the cases whereby the acquitted defendant had incurred expenditure in conducting his defence which is privately funded acquitted defendant; such would be generally be entitled to costs refund from the central funds (Defendants' Costs Order) for such an amount as the court considers reasonably sufficient to compensate for the costs incurred under section 16 of the Prosecution of Offenders Act 1985 (POA 1985)). Whiles these orders are to the discretion of the court's, they are normally awarded unless it is felt that the accused brought suspicion on himself by his conduct and misled the prosecution into thinking the evidence against him was strong than it was[458]. Meanwhile, a legally aided acquitted defendant costs will be obviously met under the representation order.

To bring the discussions on criminal legal aid, and in general aiding people to obtain representation for the interests of justice and fairness into conclusion, it

[457]See Martin Hannibal & Lisa Mountford, Criminal Litigation Handbook 2014-2015, page 158
[458] See guidance at the Practice Direction (Crime: Costs) [1991] 1 WLR 498.

could be observed that public funding on legal aid is gradually declining due to cuts and the government austerity measures.

On the 27th of February 2014, the government published Transforming Legal Aid[459] which actually makes it uncomfortable for criminal defence practitioners[460]. For example, one of the reforms which commenced in March 2014 includes 17.5% cuts in the defence solicitors' fees for over a two year period; and drastic reduction in the number of duty solicitor contracts available. This has raised a question such as *'will justice become a luxury and not a right?*' among legal experts in the United Kingdom. Currently the Ministry of Justice and the Legal Aid Agency have announced[461] that newly entities bidding for Criminal Legal Aid contracts, but which are not yet authorised to practise can apply for the 2015 Duty Provider Crime Contracts as this has been the procedure since the reforms of the policies regarding legal aid in 2014. Firms and practitioners wishing to provide professional services to clients funded by the government-legal aid agency must apply for by completing a Firm Authorisation Application Form whether the applicant is a licensable body, legal services body or sole practitioner. Authorisation is selective and only selected firms or practitioners would have the right to defend clients funded by the legal aid.

Under the discussion of the UK legal aid provision scheme, I have argued that the reduction of legal aid funding due to cuts and government austerity measures has affected the quality functioning of legal assistance and representation. Again, the criteria whereby only authorized and selected firms or practi-

[459] See https://www.consult.justice-gov.uk/digital-communications/transforming-legal-aid-next-steps.

[460] See https://www.lawsociety.org.uk/representation/campaigns/criminal-legal-aid/.

[461] Solicitors Regulation Authority: 14 April 2015, Jane Malcolm, SRA Executive Director of External Affairs, said: "Our turnaround time for applications is relatively short. Some firms may, however, have complex needs which will take more time to work through".
See http://www.sra.org.uk/sra/news/press/criminal-legal-aid-april-2015.

tioners have the right to defend clients funded by legal aid will hamper other experience practitioners to do the same and hence, impact will be greater as to the quality of lawyers contracted. Contracting firms by the legal aid should not be selective provided the firm's standard is approved.

I therefore recommend and propose that for interest of justice, legal aid funding should not be squeezed or affected by government policies and austerity measures.

4.3. Specific Rights of the Defence in UK

This part of the work shall not examine all procedural rights in the English legal system but rather shall briefly consider the right to disclosure of documents to the defence by the prosecution and also by the defence to the prosecution, the right to legal representation, presumption of innocence, right to remain silence, and to be tried in one's presence. Other procedural rights shall be commented briefly in the course of the discussions of the above rights as they pertain in the English legal system. However, the motive of examining them is to epitomize how such functions together to guarantee the right to fair trial.

4.3.1 Right to Disclosure of Documents

Disclosure of documents is an obligation which must be honoured by the ***prosecution***, the ***defence,*** and any ***third party,*** right from the commencement of the trial till the end of the proceedings. These are subject to legal rules to which this part of the dissertation is to examine into much detailed. The common law traditions and statutes obligate the Crown Prosecution Service to serve pre-trial disclosure of evidence upon the defendant. This is crucial to the defendant's right to fair trial. Clearly a defendant cannot be expected to defend allegations made against him unless he is aware of the evidence that will be given in support of those allegations. It would be morally wrong for the prosecution to withhold evidence that weakens the prosecution case or assists the defence case. Although the aim in the adversarial system is to win, there are wider obligations on the prosecutor to assist the search for the truth and to ensure that a miscarriage of justice does not occur.

Disclosure of documents at the pre-trial stage supports the defendant's right to fair trial, and administration of justice by enabling the court and the parties to identify the issues that are likely to be disputed at trial.[462] Under Part 3 of the Criminal Procedure Rules 2013 this is established as a court cases management duty. Pre- trial disclosure of evidence saves court time, and also on the basis of the disclosed evidence, a defendant may be advised to plead guilty at an early stage. Pre-trial disclosure may lead to the evidence of some prosecution witnesses being agreed in written form without the requirement for them to attend court, thereby saving time and expense.

[462] See Martin Hannibal and Lisa Mountford: Criminal Litigation Handbook 2014/15; the decision to prosecute and the prosecution's duties of disclosure of evidence, page 132.

Under the Criminal Procedure and Investigations Act 1996 (CPIA 1996), the legislation imposes onerous disclosure duties upon the prosecution, and also the defendant. This is supplemented by a Code of Practice (Part II CPIA 1996 (s. 23))[463]. As established under the section 26 CPIA 1996, a failure by the Crown Prosecution Service (CPS) to comply with the disclosure obligations clearly affects the fairness of the proceedings and may be the subject of a defence application to stay the proceedings for abuse of process[464].

The police whose duty is to investigate crimes and offences are also under obligation to keep track of investigative materials for disclosure under the Disclosure Code paragraph 5. There is a requirement of the police to record all types of information, including evidence obtained during the investigation such as records of searches of the suspect's person and/or property, evidence and information received verbally. Particularly, the investigative team or officer should retain in a criminal cases: crime reports; custody records; records of telephone calls, final versions of witness statements; interview records; communications between the police and experts such as forensic scientists; information provided by an accused person which indicates an explanation for the offence with which that person has been charged; any material casting doubt on the reliability of a confession; any material casting doubt on the reliability of a witness; and any records of first description of a suspect by each potential witness who purports to identify or describe the suspect, whether or not the description differs[465].

[463] This is often classified as the Disclosure Code. Can be accessed at: http://www.xact.org.uk/information/downloads/CPIA/Disclosure_code_of_practice.pdf.

[464] See disclosure obligations guidelines provided by the Attorney General in December 2013 via: http://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2013.

[465] See paragraph 5 of the Disclosure Code 2013.

The investigative team must indicate which materials cannot be disclosed due to how sensitive[466] the material probably is. Sensitive material is a kind, which is believed not to be in the public interest to disclose. The case where material discloses the identity of an informer was in *Marks v Beyfus [1890]*[467] *and also in Rankine [1986]*[468]. The case of *Ward [1993]*[469] also makes it clear that it is for the court, and the prosecution, to make the final decision as to whether immunity from disclosure should be granted.

Although the CPIA generally disapplies the rules of common law in relation to the prosecution duty of disclosure (s.21 (1)), it preserves' the rules of common law as to whether disclosure is in the public interest (s 21(2)).

Public Interest Immunity (PII) is a thread which runs through the provisions of the CPIA. By s. 3(6), prosecution disclosure is made subject to PII. Section 8(5) of CPIA prohibits the court from ordering disclosure where it would be contrary to the public interest. Section 7A (8) places a similar limitation on the prosecution's continuing duty of review. Sensitive materials which cannot be disclosed are issues regarding:

a) relating to national security;
b) given in confidence; or confidential information;
c) relating to the identity or activities of informants or under-cover police officer;
d) revealing the location of premises used for police surveillance;
e) revealing surveillance techniques and other methods of detecting crime;
f) relating to a child or young person and generated e.g. by a local authority social services department.

[466] See paragraph 6 of the Disclosure Code 2013.
[467] [1890] 25 QBD 494.
[468] [1986] QB 861.
[469] [1993] 1 WLR 619.

There are instances where the prosecution may want to make an application for non-disclosure as set out in the case of *Davis [1993]*[470] as a procedure rule governing public interest immunity [471]. In the European Court of Human Rights case in *Rowe and Davis v UK [2000]*[472], the following points were established from the decision of the Court:

b) the right to fair trial means that the prosecution authorities must disclose to the defence all material evidence in their possession for and against the accused;
c) the duty of disclosure is not absolute and 'in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation which must be weighed against the right of the accused;
d) Only such measures restricting the rights of the defence to disclosure as are strictly necessary are permissible under Art 6(1) of the ECHR (the right to fair trial);
e) any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedure followed in court.

Additionally, there is a leading case regarding Public Interest Immunity (PII) in the House of Lords decision in *R v C; R v H [2004]*[473]. The overriding principle which governs a judge's or magistrates' decision whether to order disclosure is based on ensuring an innocent defendant is not convicted. This principle is derived from the judgment of Lord Taylor CJ in *R v Keane [1994]*[474]:

[470] [1993] 1 WLR 613.
[471] See CrimPR, Part 25.
[472] [2000] 30 EHRR 1.
[473] [2004] 2WLR 335.
[474] [1994] 1 WLR 746.

> *"if the disputed material may prove the accused's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it"*

Disclosure is obligatory where the offence is indictable only; where it is an either-way offence likely to be tried in the Crown Court; or where the defendant is likely to plead not guilty to a matter which is to be tried summarily. It is an obligation to disclose both 'used' and 'unused' materials in the custody of the Crown Prosecution Service (CPS).

The CPS obligation to disclose used materials in the case that can be tried summarily before a magistrates' court is in accordance with the 'Advance Information Rules' established under the Criminal Procedure Rule 2013, Part 10[475]. The prosecution's obligations to provide 'Advance Information' need to be understood in the context of the first hearing before a magistrates' court in connection with an either-way or summary offence which must be an 'effective' hearing. As established[476], effective first hearing requires that:

- a plea be taken;
- the appropriate venue for trial is determined;
- the real issues are identified;
- the case (including sentence) can be concluded on the day or, if not, directions can be given so that it can be concluded at the next hearing or as soon as possible after that.

[475] See 10.2 and 10.3 of the Criminal Procedure Rules 2013 Part 10 (S.I. 2013/1554) as in force on 6 October 2014. The Criminal Procedure Rules 2013 replace the Criminal Procedure Rules 2012 and the Criminal Procedure (Amendment) Rules 2012.
[476] See Criminal Case Management Framework, paragraph 8.8.

Disclosure is also required in terms of indictable –only offence. There are separate disclosure rules regarding offences that are triable only on indictment which arise once the offence has been sent to the Crown Court under section 51 Crime and Disorder Act 1998 (CDA 1998). The CPS will normally serve available advance information at an early stage in an indictable –only case where a request is made and where fairness requires such disclosure. This is particularly important for instance where the CPS has information that might affect a bail decision, as established in the case of *R v DPP, ex p. Lee [1992]*[477].

The CPIA 1996 and the disclosure Code impose duties on the CPS lawyer to disclose unused evidence that will not form part of the prosecution case. The point at which CPS comes under an obligation to disclose arises in three stages:

- When an either-way case is committed or sent to the Crown Court, the disclosure provisions relating to 'unused material' arise.
- If an either-way case is to be tried in the magistrate's court or the offence is summary-only and a not guilty plea has been entered, and
- For an offence triable only on indictment, unused material is included in the case sent bundle[478].

In the case of *R v Vasilou [2000]*[479] the Court of Appeal held that disclosure should include the prosecution witness's previous convictions. This test is objective and requires the prosecutor to decide which evidence might reasonably undermine its case. As a matter of fact, prosecutors will only be expected to an-

[477] [1992] 2 Cr App R 304.

[478] See section 3 CPIA 1996, the disclosure of unused material is emphasised and directed as: "The prosecution must- (a) Disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".

[479] [2000] 4 Arch bold News 1.

ticipate what material might undermine their case or strengthen the defence in the light of information available at the time of the disclosure decision, and they may take into account information revealed during questioning[480]. For instance the guidelines expresses at paragraph 6-10 as regards some assistance to the Crown Prosecutor as to what might need to be disclosed in accordance with section 3 CPIA 1996 establishes that in deciding whether material satisfies the disclosure test, consideration should be given amongst other things to the use that might be made of it in cross-examination; its capacity to support submissions that could lead to the exclusion of evidence; a stay of proceedings where the material is required to allow a proper application to be made; and a court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the ECHR[481].

Certainly, disclosure can be made by either giving a copy of the material to the defence or allowing the defence to inspect it at a reasonable time and place. There is a time limit for initial disclosure of unused material. For instance, in the case of a summary trial, standard directions give the prosecutor 28 days from the date of the defendant's not guilty plea to serve initial disclosure of unused material. For either-way offence sent to the Crown Court, standard directions will determine the date by which the CPS must serve any unused material; and in an indictable-only offence, the time limit for disclosure is directed by the trial judge at the preliminary case management hearing before the Crown Court. Apart from the prosecutors' obligation to disclose materials to the defence, the defendant and counsel is also under an obligation to make disclosure to the prosecutor.

[480] See paragraph 5 of the Revised December 2013 Attorney General's Guidelines on Disclosure.

[481] See paragraph 6-10 of the guidelines on disclosure- December 2013 Attorney-General's Guidelines.

The ***defence*** disclosure to the prosecutor is also an obligatory during the pre-trial disclosure of evidence. For all cases that are tried on indictment, the defendant must serve a defence statement on the prosecutor under section 5 CPIA 1996, once the Crown Prosecution Service has complied or has purported to comply with its disclosure duties established under section 3 CPIA 1996. The service of a defence statement is optional in a case that is to be tried summarily, and above all the defendant must also give written notice of his intention to call defence witnesses as established under section 6C CPIA 1996 irrespective of whether the case is to be tried summarily or on indictment.

Where a defence statement is served, whether in the magistrates' court or the Crown Court, its contents are prescribed by CPIA, s.6A which says that a written statement which:

a. Sets out the nature of the accused's defence, including any particular defences on which he intends to rely;
b. Indicates the matters of fact on which he takes issues with the prosecution;
c. Sets out why he does so; and
d. Indicates any point of law (including those as to the admissibility of evidence or abuse of process) which he wishes to take, and any authority relied on.

One extreme example which contains the degree of detail in which the defence statement must set out was in *Bryant [2005]*[482]. Under s.6B of the CPIA, inserted by the CJA 2003, s. 33(3), applies where the accused has given a defence statement before prosecution disclosure. It requires the accused to provide an 'updated defence statement', or alternatively a statement that he has no changes

[482] [2005] EWCA Crim 2079.

to make to his initial defence statement. Moreover the defence will have to satisfy the court that it has 'reasonable cause to believe':

a) That 'there is prosecution material which might reasonably be expected to undermine the case for the prosecution against the accused or of assisting the case for the accused' (s.7A) as notified; and
b) That the material has not been disclosed to the accused.

Again under section 7A of the Criminal Procedure and Investigative Act (CPIA 1996) (amended by CJA 2003), the prosecutor having complied by the s.3 CPIA, has a continuing duty before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case to review whether any further material could reasonably be considered capable of undermining the prosecution case against the defence case.

There are also principles and to some extent, an obligation on a ***third party*** to disclose information held by them. The CPIA 1996 does not apply to potentially relevant evidence in the possession of a third party as a local authority, hospital, school or a forensic science organisation but which is not directly involved in the case[483]. If a third party will not voluntarily disclose information, either the prosecution or accused may issue a witness summons under section 2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965 (Crown Court) and s.97 Magistrates' Court Act 1980 (Magistrates' Court) requiring the third party to disclose the evidence. The person seeking the witness summons must satisfy the court that the third party:

(ii) Is likely to be able to give or produce material evidence in the case;
(iii) Will not voluntarily attend or produce the evidence.

[483] The Attorney General's Guidelines paragraph 56-57, December 2013, deals with third party disclosure.

However, the third party may resist the application on the basis of public interest immunity in accordance with the procedure set out in s. 16 CPIA 1996. A case in point is *R v Brushett [2001]*[484] where the Court of Appeal considered a disclosure of reports held by social service departments sought by the accused in the case of alleged sexual abuse of children. Their lordships characterized the principle governing disclosure by third parties as 'narrower' than those where the prosecution held such material and therefore granted disclosure.

My personal opinion and conclusion on disclosure of documents as legal norm and principle is that it is well adhered to in the UK when it comes to disclosure of used and unused materials by the prosecutors and the police to the defence.

However, most at times disclosure of documents to the defendant's advocate is not done on time, and hence recommend that, disclosure of documents by the CPS to the defence lawyers in all the stages of the trial should be done on time but not in the courtroom in the course of proceedings in order to give the defence advocates ample time to prepare.

4.3.2 Right to Legal Representation

Under s. 10(3) LASPO, the Director shall make an exceptional case determination where either it is necessary or an appropriate to make the services of representation available to the individual because failure to do so would be a breach of the individual's Convention rights (within the meaning of the Human Rights Act 1998) or a breach". Legal counsel or representation is necessary where withholding of such services would clearly amount to a breach of Article 6 of

[484] [2001] Crim LR 471.

the ECHR ('right to a fair trial'), Article 2 of the ECHR ('right to life') or any other provision of the Convention giving rise to an obligation to provide. The right of free legal assistance at common law is fundamental to fair trial, and also the right of access to justice is a fundamental common law right as directed in *R v Lord Chancellor ex p Witham [1998]*[485]. It has a number of components, one of which is a right of access to legal representation established in *R v Secretary of State for the Home Department ex p Anderson [1984]*. [486]

It is possible that in some circumstances the right to legal representation includes a right to free representation, paid for by the state. However no such right has yet been expressly articulated in the domestic case-law (at least not one that is free-standing of the statutory legal aid scheme) and, in any event, no provision in LASPO provides for the making of exceptional case determinations where necessary to fulfill fundamental common law or constitutional rights, so it is to the Convention we must turn. The right to free legal assistance is explicit under only one Convention article – Article 6(3)(c), as a component of the right to a fair criminal trial – but has been implied into a number of the Convention articles, notably Article 6(1) (in relation to civil trials), Article 5(4), Articles 2, 3 and 8; and Article 13. The ECHR reviewed the various contexts in which the right had been implied in *Savitsky v Ukraine* (2012)[487].

[485] [1998] QB 578.
[486] [1984] 1 QB 778.
[487] (2012) App. No.38773/05- See that the jurisprudence of the Court has addressed the matter of free legal representation in several contexts. Mostly, the issue has been examined under Article 6 § 3 (c) of the Convention, the provision which expressly requires free legal representation in criminal proceedings against the person concerned. The Court has also held that Article 6 § 1 of the Convention may in certain circumstances compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court (see Airey v. Ireland, 9 October 1979, § 26, Series A no. 32, and Bertuzzi v. France, no. 36378/97, §§ 23-32, ECHR 2003-III) or ensuring the principle of equality of arms (see Steel and Morris v. the United Kingdom, no. 68416/01, §§ 63-72, ECHR 2005-II).

Meanwhile provision of representation to non-represented defendants in criminal proceedings is supervised by the legal aid agency which has been functioning perfectly once the applicant fulfills the means and interest of justice test.

4.3.3 Right to Presumption of Innocence

The concept of presumption of innocence is fundamental to the English legal system and is internationally recognised as an essential safeguard. It is the cornerstone of the criminal justice system. An accused person is presumed innocent until proved guilty. The burden of proving this guilt is on the prosecution and it must be proved beyond a reasonable doubt. For instance, in *Woolmington v. DPP (1935)*[488], the accused admitted killing his wife but claimed that the gun had gone off accidentally. The trial judge directed the jury that once the prosecution had shown that the accused had killed his wife the burden of proof shifted to the accused to show that it was accidental i.e. to prove his defence. The House of Lords held that this was incorrect. The burden of proof always lies with the prosecution and once a defence is raised the accused is entitled to be acquitted unless the prosecution disproves that defence. In giving judgment the court explained the presumption of innocence. Viscount Sankey stated:-

> *"it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt… while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient*

[488] (1935) UKHL 1. May 23, 1935.

for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence… Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... the principle ... is part of the common law of England and no attempt to whittle it down can be entertained"

One of the consequences of the presumption of innocence is the placing of the burden of proof on the prosecution. There are exceptions to the rule that the prosecution bears the burden of proof in relation to every issue arising in the course of a criminal trial. Exceptions could be raised -thus by Common law and Statute. If an accused argues that he is unfit to plead then he must prove that unfitness on the balance of probabilities. If an accused raises the defence of insanity or diminished responsibility he must prove, on the balance of probabilities that he was insane at the time of committing the offence. The statutory exception is where the accused raises as statutory defence and the statute provides for the accused to prove this defence on the balance of probabilities. An example is in *People (DPP) v. Byrne (1998)*.

Section 29(2) of the Misuse of Drugs Act 1977 provides that: - "Where it is proved that the defendant had in his possession a controlled drug … it shall be a defence to prove that –

(i) He did not know and had no reasonable grounds for suspecting that (ii) what he had in his possession was a controlled drug … or that he was in possession of a controlled drug…"

In this wise the prosecution was obliged to prove that an accused had, and knew he had a package in his control and that package contained something. The prosecution must also prove that the package contained the controlled substance alleged.

4.3.4 Right to Silence

The right to silence which includes a privilege against self-incrimination is closely related to the presumption of innocence. Self-incrimination is the act of exposing oneself (generally, by making a statement) "to an accusation or charge of crime; to involve oneself or another [person] in a criminal prosecution or the danger thereof." Self-incrimination can occur either directly or indirectly: directly, by means of interrogation where information of a self-incriminatory nature is disclosed; or indirectly, when information of a self-incriminatory nature is disclosed voluntarily without pressure from another person. In the English legal system, accused criminals cannot be compelled to incriminate themselves—they may choose to speak to police or other authorities, but they cannot be punished for refusing to do so and so the right to silence interrelates with the privilege against self-incrimination.

If it is the role of the prosecution to prove that an offence has been committed then flowing from that it should not be the responsibility of the accused person to facilitate the prosecution by being forced to speak.

A defendant in a criminal trial may choose whether or not to give evidence in the proceedings. Further, there is no general duty to assist the police with their inquiries in England. Although certain financial and regulatory investigatory bodies have the power to require a person to answer questions and impose a

penalty if a person refuses, if a person gives evidence in such proceedings, the prosecution cannot use such evidence in a criminal trial under the Youth Justice and Criminal Evidence Act 1999, s. 59 and Sch. 3, which was the response to *Saunders v. UK, (1996) (supra).*

At common law, adverse inferences could be drawn from silence only in limited circumstances in which an accusation of guilt was made. It was necessary that the accused be on even terms with the person making a charge and that it was reasonable to expect the accused to answer immediately the charge put to him (although it was not clear if the rule applied where the accusation was made by or in the presence of police officers).

The Criminal Justice and Public Order Act (CJPOA) 1994 provides statutory rules under which adverse inferences may be drawn from silence and establishes that adverse inferences may be drawn in certain circumstances where before or on being charged, the accused:

- fails to mention any fact which he later relies upon and which in the circumstances at the time the accused could reasonably be expected to mention;
- fails to give evidence at trial or answer any question;
- fails to account on arrest for objects, substances or marks on his person, clothing or footwear, in his possession, or in the place where he is arrested; or
- fails to account on arrest for his presence at a place.

Where inferences may be drawn from silence, the court must direct the jury as to the limits to the inferences which may properly be drawn from silence. There may be no conviction based wholly on silence under s. 38 of the Criminal Justice and Public Order Act 1994. Adverse inferences may be drawn in certain circumstances where before or on being charged, the accused fails to mention a

specific fact that he later relies upon and which in the circumstances at the time the accused could reasonably be expected to mention. If this failure occurs at an authorised place of detention like a police station, no inferences can be drawn from any failure occurring before the accused is allowed an opportunity to consult a legal advisor. Section 34 of the CJPOA 1994 Act reverses the common law position in *R v. Gilbert, (1977)*[489] that such failures could not be used as evidence of guilt. For example a person relies on a fact if he relies upon it in his own testimony or his counsel puts forward a positive case as established in *R v. Webber [2004]*[490].

What is reasonable for an accused to mention depends on all of the circumstances, including the accused's "age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice"- *R v. Argent [1996]*[491]. If a defendant states that he remained silent on legal advice, for adverse inferences not to be drawn, the court must be persuaded that the defendant's reliance on legal advice to remain silent was 'reasonable' and 'genuine'. This point has been made clear in numerous Court of Appeal decisions including *R v Howell (2005)*[492] and *R v Knight (2004)*[493]. The question for the jury is whether silence can only be attributed to the accused having no satisfactory answer to the charge against him as directed in the case of R *v. Hoare and Pierce [2004)*[494]. The section is primarily directed at circumstances where a defendant refuses to reveal his defence until trial that is ambushing the prosecu-

[489] (1977) 66 Cr App R 237 (CA).
[490] (2004) UKHL1.
[491] [1996] EWCA Crim 1728, [1997] 2 Cr App R 27, [1997] Crim LR 449 (16 December 1996).
[492] (2005) 1 Cr App R.
[493] (2004) 1 Cr App R 9.
[494] [2004] EWCA Crim 784, [2005] 1 WLR 1804 (2 April 2004).

tion- emphasized in *R v. Brizzalari, The Times, December 15,*(2003)[495]. An adverse inference is appropriate where the jury conclude that the reason the accused remained silent was that he had no proper answer to the charge put against him. The inferences that may be drawn include "some additional support" for the prosecution case, i.e. that the defendant is guilty.

For instance, in the case of *R v Howell (2005)* quoted above, Howell was suspected of involvement in a serious assault on his flatmate. He told his solicitor, as he would later tell the jury, that he had acted in self-defence when he stabbed his flatmate. His solicitor asked the investigating officers if the victim of the attack had made a written statement. The victim had not made a written statement but had given the investigating officers a detailed verbal account, including the specific allegation that the defendant had attacked him with a knife. The defendant had indicated to his solicitor that the victim might withdraw his allegation. Consequently, the solicitor advised him to make no comment in interview, and during cross-examination, he confirmed he had simply followed his solicitors advice. In summing –up the trial judge instructed the jury to consider whether the defendant had been right to act upon the advice of his solicitor. The Court of Appeal concluded in this case that there were not 'good reasons 'for remaining silent, and therefore it was permissible for the jury to draw an adverse inference on the basis that it had been reasonable to expect the defendant to mention such facts, notwithstanding the advice of his solicitor.

The concept of right to silence is not specifically mentioned in the European Convention on Human Rights but the European Court of Human Rights has held that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards

[495] [2003] EWCA Crim 3080 (CA); and R v. Beckles [2004] EWCA Crim 2766 at para. 6 (12 November 2004) EWCA Crim 3080 (CA).

which lie at the heart of the notion of a fair procedure under Article 6 in *Murray v. UK [1996]* (supra). However, there are exceptions to the rule of the right to silence under the Regulation of Investigatory Powers Act 2000 s.49 and s.53which makes it a criminal offence (with a penalty of two years, or five years with regards to child sex offenses in prison) to fail to disclose when requested the key to any encrypted information.

Also, when a vehicle is alleged to have been involved in an offence, section 172 of the Road Traffic Act 1988, as amended by s. 21 of the Road Traffic Act 1991enables the police to require the vehicle's registered keeper, or any other relevant person, to provide information as to the identity of the vehicle's driver. A special warning is given indicating that refusal to do so constitute an offence in itself. Again, under the Police Reform Act 2002 a person failing to provide a constable in uniform or designated person their name and address where they are suspected of having behaved or behaving in an anti-social manner is a criminal offence. Over here, I have argued that right to silence enable the accused to hide necessary information and evidence which complicates the work of the prosecution team though adverse inference could be drawn from ones silence. Nevertheless, the police and the prosecution should be circumspect when dealing with defendants who rely on their right to silence to avoid violations. It is my opinion that exceptions to the rule of right to silence should be enforced to facilitate the prosecutor necessary information to prosecute offenders.

4.3.5 Right to be tried in one's Presence

Defendants have the right to be tried at their presence on indictment or at the trial except they wave such right. The defendant must be present at the trial in order to enter a plea to the counts on the indictment. In the magistrate court, the position is slightly different, as it is possible where a defendant fails to attend court, for a not guilty plea to be entered on his behalf, although on triable either way offence, this is only possible if the accused had consented to summary trial at an earlier hearing.

If after entering a plea, the defendant absconds or misbehaves and disrupts the proceedings, the trial judge has discretion to continue the trial in the defendant's absence. In practice, this would occur if there was another defendant being tried at the same time and it would be unfair on that defendant to postpone the trial as directed in *R v Jones (No 2) [1972]*[496] and further guidance was given by the House of Lords in *R v Jones [*2002], [2003][497] where the defendants had pleaded not guilty on arraignment but absconded before the date fixed for the trial. The judge after a number of adjournments decided to try them in their absence. This was held by the House of Lords that the discretion to commence a trial in the absence of the defendant should be exercised with the utmost care and caution, and that if the absence is attributable to involuntary illness or incapacity it will very rarely, if ever, be right to do so at any rate unless the defendant is represented and has asked that the trial should begin. Trial judges should therefore ask counsel to continue to represent a defendant who has absconded and counsel should normally accede to such an invitation and defend their absent client as best they properly can in the circumstances. In the same case, the Court of

[496] [1972] 1 WLR 887.
[497] (2002) UKHL 5; (2003) 1 AC 1.

Appeal *(2001) EWCA Crim 168; (2001) QB 862* had set out, in detail, the principles which should guide the English courts in relation to the trial of a defendant in his absence. They are: a defendant has, in general, a right to be present at his trial and to be legally represented; those rights could be waved, separately or together, wholly or in part, by the defendant himself. They might be waived wholly if he deliberately absents himself and withdraws his instructions from those representing him. They might be waived in part if the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings. If the defendant is remanded in custody prior to his trial, he will remain in custody during the trial itself unless the trial judge grants bail, which is very unlikely. For example in *R v Central Criminal Court ex p Guney (1996)*[498] the House of Lords held that when a defendant who has not previously surrendered to the custody of the court is arraigned, he thereby surrenders to the custody of the court at the moment. The result is that the Crown Court judge then has to decide whether or not to grant him bail, unless the judge grants bail, the defendant will remain in custody pending and during the trial.

[498] (1996) Ac 616.

4.4 Bails and Remands

The power of the courts to remand an accused person is closely bound up with the power to grant bail. A remand occurs when a court adjourns a case and either bails the accused for the period of the adjournment or commits the person to custody to be brought before the court on the adjournment date. Under ss. 5 and 10 of the Magistrates' Court Act 1980 (MCA), a magistrate has a general discretion to adjourn cases at any stage prior to or during committal proceedings or summary trial.

Honestly, it is rare for a case of any gravity or complexity to be totally disposed of on the occasion of the accused first appearance. Normally it is either the prosecution would need a time to prepare statement for committal, or serve advance information, or may be ensure that witnesses are available for summary trial; or perhaps the accused will want an adjournment to apply for publicly funded representation for the interest of justice, and also to put the case in order. Normally the only type of cases likely to need only one appearance is where the accused pleads guilty to a relatively minor offence and the court does not consider it needs a report passing sentence. The period of the remand must not exceed eight clear days as established under s. 128 (6) of the MCA 1980. The accused would have to be brought to the court each week for further remands in custody but since the decision of the Divisional Court in *Nottingham Justices ex parte Davies [1981]*[499], the defences have basically only been allowed one, or at most two, fully argued bail applications, and once those chances are exhausted they can only re-open the question of bail if fresh considerations have arisen which were not placed before the bench that originally refused

[499] [1981] QB 38.

bail. The decision in *Ex parte Davies* has been statutorily confirmed by the insertion in 1988 of Pt IIA in Sch 1 to the Bail Act 1976.

Additionally, the Criminal Justice Act 1982 introduces several new subsections into s.128 of the MCA 1980 which basically in effect allow the accused to consent to being remanded in custody for up to 28 days without attending court. However, the s. 128A[500] of the MCA 1980 allows a magistrate to remand an accused in custody for 28 days whether or not the person consents. The possibility of custodial remand in absence does not arise if the accused is unrepresented or if he is a juvenile.

Under the ss. 10(3) and 30(1) of the MCA 1980, where magistrates remand an accused after conviction for the purpose of preparing reports on him, the period of the remand must not exceed three weeks if it is in custody; and four weeks if on bail. A person may be granted bail or refused bail during their arrest and charge by the police at the police station whereby the custody officer and the investigating officer believe that the arrestee should be released under ss. 37 and 38 of the Police and Criminal Evidence Act 1984 (PACE). Also, a magistrate issuing a warrant for the arrest of a person should indicate and consider whether to endorse the warrant for bail, established under s. 117 of the Magistrates' Court Act 1980 (MCA)[501]. A magistrate's court has jurisdiction to grant bail when it remands an accused for the period of an adjournment prior to committal proceedings or summary trial under the ss. 5, 10(4) and 18(4) of the MCA 1980; or when an offender after conviction for the period of an adjournment for reports under s. 10(3) of the MCA. Also the decision to grant bail arises when an accused is sent to the Crown Court for trial on indictment or for sen-

[500] New section inserted by the Criminal Justice Act 1988.

[501] Similarly, a magistrates' Court or the Crown Court on issuing a warrant may back it for bail under s. 117 of the MCA 1980; and s. 81(4) of the Supreme Court Act 1981.

tence which provide respectively that committals for trial and sentence may be in custody or on bail under ss. 6(3) and 38 of the MCA 1980; and again in an occasion when the person in custody is appealing to the Crown Court or the Divisional Court against the decision of the magistrate with regards to bail established under s. 113 of the MCA 1980.

Similarly, the Crown Court has the jurisdiction and power to grant bail to the accused in instances established under s. 81(1) of the Supreme Court Act 1981. A person charged with murder may not be granted a bail, except by a judge in the Crown Court under s. 115 of the Coroners and Justice Act 2009.

Moreover, the High Court has the jurisdiction to grant bail when a person is appealing to it by way of case stated or seeking to quash a decision of the magistrates' court or the Crown court; and likewise the Court of Appeal (acting through a single judge) has jurisdiction to grant bail both to a person appealing to it against a conviction or sentence in the Crown Court, and to a person who, after an unsuccessful appeal to it, is further appealing to the House of Lords under ss. 19 and 36 of the Criminal Appeal Act 1968.

Under section 4 of the Bail Act 1976, the right to bail and the circumstances in which a bail may be refused is dealt with. There is a group of defendants who may be granted bail only if there is 'exceptional circumstances which justify it' and this is categorized under s. 25 of the Criminal Justice and Public Order Act 1994 (CJPOA). That provision covers any person charged with murder, attempted murder, manslaughter, rape, attempted rape, or one of the serious sexual offences added by the Sexual Offences Act 2003, Sch 6, para 32. If the person previously has been convicted in the United Kingdom of one of those offences, or of culpable homicide, there is definitely a restriction on bail for such accused in this category of offences, and applies also on appeals against convic-

tion, or whereby the sentence imposed on that occasion was imprisonment or long-term detention. In *R (O) v Harrow Crown Court [2007]*[502], the House of Lords considered that s. 25 of the Criminal Justice and Public Order Act 1994 is compatible with Art 5 of the European Convention on Human Rights, which guarantees the right to liberty. It did not cast a formal burden of proof upon a defendant to make out the exceptional circumstances allowing bail, and s. 25 should be read down in accordance with s. 3 of the Human Rights Act 1998 so to ensure that it is consistent with art 5 of the ECHR which is the right to liberty. Also in *O'Dowd v United Kingdom [2011]*[503], the European Court of Human Rights came to a similar conclusion, holding that there was good reason to require proof of exceptional circumstances before granting bail to someone who had been convicted of a similar serious offence previously. Where a defendant is charged with murder, the person may not be granted bail unless the court is of the opinion that there is no significant risk that he will commit another offence while on bail which would be likely to cause physical or mental injury to another- s.114 of the Coroners and Justice Act 2009, and s. 6ZA of the Bail Act 1976.

The right to bail under s. 4 of the Bail Act 1976 may be refused as scheduled under the Schedule 1 to the Bail Act 1976 when the court is satisfied that there are substantial grounds for believing that, if released on bail, the accused would fail to surrender to custody; or commit an offence while on bail; or interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or some other person.

Also when the defendant is aged 18 or above, and there is drug test evidence of a specified Class A drug in his body, and therefore refuses to agree to undergo

[502] [2007] 1 AC 247.
[503] [2011] Crim LR 148.

an assessment or a follow-up programme as to drug misuse or dependency his bail could be refused. There is also a new test under section 15 of the CJA 2003 where the offence for which bail is being considered carries a maximum sentence of life imprisonment. Sometimes too, the prosecutor may object to bail of the defendant due to risk and threat to potential witnesses as in *Re Moles [1981]*[504], and confirmed in *Mansfield Justices ex parte Sharkey [1985]*[505], where the Divisional Court accepted counsel's proposition that 'a bail application is an informal inquiry and no strict rules of evidence are to be applied'.

The prosecution has the statutory power to appeal against bail of a defendant it deemed not to be granted bail under the Bail (Amendment) Act 1993. It confers upon the prosecution the right to appeal to the Crown Court against a decision by Magistrates to grant bail. It is limited to cases where:

a. The offence is imprisonable; and
b. The prosecution is conducted by the CPS, or by certain designated public prosecutors prescribed by statutory instrument; and
c. The prosecution made representations against bail before it was granted.

For instance in the case of *Allen v United Kingdom [2011]*[506] the defendant was granted bail at the magistrates' court. The prosecutor appealed while she remained in custody. The judge in the Crown Court refused to allow her to be present for the appeal. She applied to the European Court of Human Rights, claiming that her rights under Art 5 (right to liberty) had been breached because she had not been allowed to be present. The Court held that there had been a violation. The Court expressed that although there was no general right for a de-

[504] [1981] Crim LR 170.
[505] [1985] QB 613.
[506] [2011] Crim LR 147.

fendant to be present at remand hearings; it was important that a defendant should be present at any proceedings at which liberty might be taken away.

The prosecution sometimes too stands against the decision to grant bail when it considers the consequences of a defendant absconding as established in *DPP v Richards [1988]*[507], this is where the prosecution contemplates that the accused may fail to surrender to custody. More over in *Dyson [1943]*[508], following the prosecution objections to bail, the defence representative countered the objection. A custody time limit is also strictly regulated under s. 22 of the Prosecution of Offences Act 1985. This regulation lays down the maximum periods during which the accused can be kept in custody before trial and maximum is 182 days.[509] There is a rule that applies to the accused right to bail when the prosecution fails to comply with the custody time limit, and therefore the exceptions to the right to bail no longer apply[510].

Meanwhile the prosecution can apply for an extension of custody time limit under the criteria laid down by s. 22(3) of the Prosecution of Offences Act 1985, but the application must be submitted before the time expires, and also satisfied the court that the need for the extension is due to:

i. the illness or absence of the accused, a necessary witness, a judge or a magistrate;
ii. the ordering by the court of separate trials in the case of two or more accused or two or more offences; or
iii. Some other good or sufficient cause; and that the Crown has acted with all due expedition.

[507] [1988] QB 701.
[508] [1943] 29 Cr App R 104.
[509] See John Sprack: Criminal Procedure, Bail and Remands, page 105.
[510] The exceptions under Sch 1 to the Bail Act 1976; and Reg. 8 of the Prosecution of Offences (Custody Time Limits) Regulations 1987: SI 1987 No 299.

The grant of bail is always subject to surety or condition at the court under s. 8(2) of the Bail Act 1976.

The problem I have observed from the UK bails and remand regulation is that strict adherence to the custody time limit regulated under s. 22 of the Prosecution of Offences Act 1985, makes it impossible or difficult to kept certain offenders in custody beyond certain days and therefore such commit an offence whiles on bail in many cases.

I therefore recommend and believe that there should be an exceptional rule which would permit the police and the prosecution service to keep dangerous offenders in custody in the course of court proceedings to avoid reoffending without strict adherence to the time limit duration.

4.5. The Trial

The trial proceeding at this section of the project shall consider pre-trial procedure, trial stage proceedings; and the trial of children or young persons (juveniles) because I find it more interesting and think that lessons drawn from the UK regarding juveniles trial could improve how trial of children in Ghana are handled and therefore there should be other ways of correcting children beyond the prisons. Pre-trial period is the time during which a case is managed before actual trial begins. During this period the parties must supply information as to the issues and the way in which they intend to conduct their case; and that the judge must act upon that information by making any orders which seem necessary in order to assist the efficient conduct of the trial. It is during this time that the intended plea of the defendant is made known. The presumption is that if the defendant would plead guilty or not guilty, it should be at the early stage, then much time and resources would not be needed at the trial hearing, but if the defendant on the day of the trial, after a court and a judge have been allocated to the case, lawyers have prepared and witnesses have been summoned to attend court, then it becomes a substantial waste of resource when the defendant then suddenly change the pleading.

It has been seen as desirable that the decision taken prior to trial should be binding, at least to an extent, and this need has led to the statutory provisions on pre-trial rulings. In complex or lengthy matters, a more detailed framework of pre-trial proceedings has been thought necessary, and this is contained in the statutory regime which governs preparatory hearings. There is a procedure to ensure that steps are taken to prepare cases committed to the Crown Court for trial. The procedure is known as the plea and directions hearing (PDH) or the plea and case management hearing (PCMH). The *Consolidated Criminal Practice Direc-*

tion lays down that it should be held within about 7 weeks after committal for trial, within about 14 weeks after sending for trial –pursuant to s. 51 of the Crime and Disorder Act 1998, the defendant is in custody, and within about 17 weeks after sending for trial where the defendant is on bail. For cases which are serious, lengthy, or complex, a case summary should be prepared by the prosecution for use by the judge at the PCMH. If the defendant pleads guilty, the judge should proceed to sentencing wherever possible. Where the defendant pleads not guilty, or his pleas are not acceptable to the prosecution, the parties are expected to inform the court of the inter alia:

a. The estimated length of the prosecution and defence cases;
b. The witnesses the prosecution will call, and the order in which they will call them;
c. Any exhibits, CCTV evidence or electronic equipment required;
d. Any expert evidence to be called;
e. Any requirement for special measures or live TV links;
f. Any applications regarding hearsay or bad character evidence;
g. Whether a defence statement has been served;
h. Whether the defence alleges that the prosecution has failed to disclose any evidence.

During the pre-hearing period, pre-rulings are made by the judges, and also issues are clarified to enable the parties to focus upon them as they prepare for trial. The pre-trial rulings are not irreversible, nor is it subject to automatic reconsideration at any time. Also a pre-trial ruling should not trespass on matters properly reserved for trial. For instance, in *S and L [2009]*[511] the judge's pre-trial ruling that the defence should not be permitted to raise a defence of neces-

[511] [2009] Crim LR 723.

sity was the subject of a successful appeal, since that was a matter which could only be determined at the trial. There are restrictions on the reporting of pre-trial rulings and the proceedings on applications relating to them. Reports may not be published or broadcast until the conclusion of the trial.

Section 28 -38 of the CPIA contain provisions for preparatory hearings in serious, long, or complex cases. They originate from the procedure established for serious fraud cases, which came into force by virtue of the Criminal Justice Act 1987. The decision to hold a preparatory hearing may be made by a Crown Court judge at any time before the jury is sworn, and in fact preparatory hearing is the stage of the trial itself, which may be used in order to settle various issues without requiring the jury to attend-s. 30; and this differs from the pre-trial rulings. Among the powers available to the judge at a preparatory hearing is the power to order the prosecution to give the defence a case statement. Once the prosecution has supplied such a case statement, the judge may order the defence to supply a statement setting out in general terms the nature of the defence and the principal matters on which they take issue with the prosecution case statement, and any points of law or admissibility which they wish to take and authorities on which they intend to rely- s. 31 of the CPIA 1996.

The judge may also make rulings as to any question of law relating to the case, including questions as to the admissibility of evidence –s. 31(2) of CPIA 1996. The purposes for which preparatory hearings may be ordered are set out in s. 29(2) of CPIA 1996. During pre-hearing, special measures are taking for certain witnesses, as established under the Youth Justice and Criminal Evidence Act

1999 (YJCEA)[512]. In *R (S) v Waltham Forest Youth Court [2004]*[513] the Divisional Court held that the fact that the special measures provisions were not available to defendants who might otherwise be thought to be vulnerable witnesses did not contravene Art 6 of the ECHR. The court takes into consideration during the pre-hearing if an accused or a witness is under 18 and vulnerable and therefore his ability to participate effectively as a witness is compromised by his level of intellectual ability or lack of social function, or the person is over 18 but suffering from a mental disorder which prevents effective participation. In the case of *R(C) v Sevenoaks Youth Court [2009]*[514] the steps that would enable a young defendant to participate effectively in the trial was established by Openshaw J. Moreover in *H (Special Measures) [2003]*[515] the Court of Appeal suggested that the trial judge in his discretion might take the following steps to assist a defendant with leaning difficulties:

Ask his legal representatives to provide a detailed defence statement which could be read to the jury if there was concern about his ability to recall events;

If the defendant could recall matters only by reference to a past coherent account of events which he had given, the judge might allow him to refer to it;

If the defendant could not read, it was open to the judge to decide that he could be asked leading questions in respect of the account in the defence statement. Normally at the trial stage, the judge on indictment must be a professional judge -that is whether a High Court judge, Circuit judge or deputy circuit judge, or recorder. The prosecution must also be legally represented at the trial, and like-

[512] See Valuable guidance on special measures contained in Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures.
[513] [2004] 2 Cr App R 335.
[514] [2009] EWHC 3088 (Admin).
[515] [2003] the Times, 15 April 2003.

wise the accused which might have a representation from the Criminal Defence Service or by any qualified defence advocate**.**

Hearing is done in an open court and in public. It is not the parties who have interest in the criminal proceedings but the public as well is concerned that the innocent shall be acquitted and the guilty, convicted, and properly sentenced. Therefore it is a fundamental principle of the common law that justice shall be administered in an open court. The principle was re-stated by Lord Diplock in *AG v Leveller Magazine [1980]*[516].The criminal justice system in the UK is essentially adversarial, and therefore it is the duty of the prosecution to represent the case for the Crown and the role of the defence counsel to represent the accused. During trials, it follows that judges' interventions must be limited to providing a framework in which counsel carry out their duties efficiently and fairly. In *Whybrow [1994]*[517] the appellants complained that the judge had prevented them from given their evidence in chief properly, and had intervened with such frequency and hostility as to deny them a fair trial. The Court of Appeal quashed their convictions, and ordered for retrial. It has been emphasised that judges should exclude irrelevance, discursiveness and oppression of witnesses. In the above case however, the Court of Appeal took the view that the judge's interventions went 'far beyond the bounds of legitimate judicial conduct'. One of the cases on which their lordships relied was *Hulusi [1973]*[518], in which it was held by (per Lawton LJ):

> *"It is a fundamental principle of an English trial that, if an accused gives evidence, he must be allowed to do so without being badgered and inter-*

[516] [1980] AC 440.
[517] [1994] the Times, 14 February 1994.
[518] [1973] 58 Cr APP R 378.

> *rupted. Judges should remember that most people go into the witness –box, whether they be witnesses for the Crown or the defence, in a state of nervousness. They are anxious to do their best. They expect to receive a courteous hearing…that the judge of all people is intervening in a hostile way, then, human nature being what it is, they are liable to become confused… "*[519]

It was succinctly put in *Harirbafan [2008]*[520] that 'Cross –examination by a judge is unacceptable'. During trial proceedings there are special roles played by the prosecuting counsel and the defence as well as the judge, and witnesses. Counsel for the prosecution is not in the court to win case at all cost. Rather, he should present the prosecution evidence as persuasively as possible, and cross examine the defence witnesses with all proper vigour and guile. Nevertheless, as Avory J put it in *Banks [1916]*[521], prosecuting counsel '*ought not to struggle for the verdict against the prisoner, but they ought to bear themselves rather in the character of minister of justice assisting in the administration of justice'*. In *Gomez [1999]*[522], the Court of Appeal endorsed the description of prosecuting counsel as a minister of justice, stating that it was incumbent on him to be betrayed by person feelings, not to excite emotions or to inflame the minds of the jury and not to make comments which could reasonably be construed as racist and bigoted. He was to be clinical and dispassionate.

The defence counsel has an overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved, and

[519] Per Lawton LJ at page 385.
[520] [2008] EWCA Crim 1967.
[521] [1916] 2KB 621.
[522] [1999] All ER (D) 674.

must not deceive or knowingly or recklessly mislead the court. If a procedural irregularity, such as a juror leaving the jury room after they have retired to consider their verdict, comes to the defence counsel's knowledge before the verdict is announced, he should inform the court, he should not keep silent so as to be able to raise the irregularity on appeal should there be a conviction as in *Smith [1994]*[523].

Counsel is permitted to see the judge in private during the proceedings or trial to discuss with him matters relevant to the case in the absence of the parties and the public. As Lord Parker CJ put it in *Turner [1970]* [524] 'there must be freedom of access between counsel and judge'. Since the decision of Turner, the Court of Appeal have stressed in cases such as *Coward [1980]*[525] *and Llewellyn [1977]*[526] , that private access to the judge should be kept to an absolute minimum.[527]. Once an indictment against the accused has been signed there is very little the defence can do to prevent the prosecution going ahead. They can move to quash the indictment, or raise a special plea in bar, or plea that the Crown Court has no jurisdiction to trial the case, but all these remedies are of limited scope and rarely assist in practice. If however, defence counsel thinks that the prosecution is grossly unfair he has one further remedy at his disposal. He can ask the judge to intervene and stay the prosecution. The Crown Court has the inherent power to prevent its process from abuse. For instance, in *Cornnelly v*

[523] [1994] Crim LR 458.
[524] [1970] 2 QB 321.
[525] [1980] 70 Cr App R 70.
[526] [1977] 67 Cr App R 149.
[527] See John Sprack: A Practical Approach to Criminal Procedure, Chapter 20: The course of the Trial, page 317. One clear example of private access being appropriate is where defence counsel, who is to mitigate on behalf of an offender prior to sentencing, receives instructions that his client believes himself to be healthy but is in fact suffering from an incurable disease. Clearly the judge should be told of the offender's ill health.

DPP [1964][528], Lord Devlin stated that where particular criminal proceedings constitute an abuse of process, the court is empowered to refuse to allow the indictment to proceed to trial. There are two main ways by which an abuse of process could take place.

Moreover, in *Beckford [1996]*[529], Neill LJ analysed the authorities and concluded that there were two main bases upon which the power to stay proceedings on the ground of abuse of process was exercised: i.e. where the accused could not receive a fair trial; and where it would be unfair for the accused to be tried which are abuse of process. For instance, undue delays during the trial proceeding constitute an abuse of process. In *Bell v DPP of Jamaica [1985]*[530], the Privy Council accepted that courts have an inherent jurisdiction to prevent a trial which would be oppressive because of unreasonable delay. In the case of Bell, the Privy Council laid down guidelines for determining whether the delay would deprive the accused of a fair trial, and the relevant factors considered were the length of the delay; the prosecution's reasons to justify the delay; the accused's efforts to assert his rights; and the prejudice caused to the accused.

Other instance of abuse of process was in *Dobson [2001]*[531] where the Court of Appeal considered the position where the police had failed to obtain CCTV footage relating to the defendant's defence of alibi. Their Lordships said that, in determining whether there was an abuse of process, it was appropriate to consider:

a) what was the duty of the police;
b) whether they had failed in it by not obtaining or relating the appropriate video footage;

[528] [1964] AC 1254.
[529] [1996] 1 Cr App R 94.
[530] [1985] AC 397.
[531] [2001] All ER (D) 109.

c) whether there was serious prejudice which rendered a fair trial impossible; and
d) whether the police failure was a result of bad faith or serious fault independent of the serious prejudice so that a trial would not be fair.

The prosecution may also call witnesses during the trial, and make available written statement to the Crown Court under s. 51 of CDA 1998. In *Oliva [1965]*[532] for example, the witness had been the victim of an offence of causing grievous bodily harm who made a statement to the police. It is the prosecution's duty to take all reasonable steps to secure the attendance at court of the witnesses whose names appear on the back of the indictment. Where the prosecution wish the case to proceed even though one of their witnesses is absent, the judge should especially consider the extent to which the absent witness might in part support the defence case as directed in *Cavanagh and Shaw [1972]*[533].

There are instances whereby the prosecution may call an additional witness and evidence at trial on indictment even though they did not tender his statement or deposition at committal proceedings or include it in the papers when he was sent for trial at the Crown Court. The obvious reason may be that the prosecution only became aware of the witness relevant evidence during the period between the case leaving the magistrates' court and the trial's commencement. A case in point is *Epping and Harlow Justice ex parte Massaro [1973]*[534]. Normally the prosecution at the trial on indictment is not allowed to take the defence by surprise with evidence of which they have given no prior warning. The rule is that a notice of intention to call an additional witness, together with a written account of the evidence it is proposed he should give, should be served

[532] [1965] 1 WLR 1028.
[533] [1972] 1 WLR 676.
[534] [1973] QB 433.

by the prosecution on both the defence and the court. Usually they serve a copy of a statement signed by the witness which must comply with s. 9 of the Criminal Justice Act 1967. In this state, the defence can object to the additional evidence, and if not, the original statement can be tendered in evidence, thus avoiding the need to call the witness. Where no notice is served the defence should be granted an adjournment if they need it to deal properly with the additional evidence.

As a general rule a witness, whether of the prosecution or the defence, should give his evidence orally in court. The jury can then see him, hear him and decide how trustworthy he is, and the party against whom he is called can challenge his evidence by cross-examination. In certain exceptional cases, however, a deposition or written statement may be read to the jury as evidence, and there is no need to call the maker as a witness. The defence can object to the proposed prosecution evidence as inadmissible. It is a fundamental principle of trials on indictment that questions of law, including admissibility of evidence, are decided by the judge not the jury. In that sense, the defence will have to ask the judge to exclude the evidence to which they object. Should the objection be upheld, it would obviously be prejudicial for the jury to hear reference to the inadmissible material. Where the defence counsel object to the prosecution evidence, the procedure is that before the start of the trial, defence counsel should warn his opponent that he intends to object to certain evidence. In his opening speech counsel therefore refrains from mentioning that evidence. He then calls his remaining evidence in the normal way up to the point when the disputed material would otherwise be introduced. Then one or other counsel (probably defence) invites the judge to ask the jury to leave court, by saying that a point of law has arisen which only concern lawyers. Once the jury has retired to their

room, defence counsel makes his objection to the evidence; prosecuting counsel replies and the judge makes his ruling. If the evidence is inadmissible, the jury hears nothing about it, if it is admissible; it is called immediately upon their returning to court, if inadmissible, nothing would be told about what occurred in their absence. Sometimes too, admissibility of the evidence depends upon the circumstances in which the evidence was obtained, and those circumstances may themselves be in dispute. It is then for the judge to decide:

i) the factual question of how the prosecution got the evidence, and
ii) the legal question of whether, in the light of his findings of fact, the evidence is admissible. In such cases, there has to be a *trial on the 'voir dire'.* This occurs for instance where the defence counsel argues that a confession should be excluded under ss. 76 and 78 of the Police and Criminal Evidence Act 1984.

When police officers testifies to confession as evidence made at the police station, and for instance any contemporaneous note that was taken, and the signed notes containing damaging admissions, is then produced before the judge. Then defence counsel may cross-examine the officer. Typically it will be suggested that threats were made in order to induce the confession; or bail was promised; or the accused was held for an unacceptable long period without access to a solicitor or proper rest. After that the accused himself is at liberty to testify and may also call witnesses such as a doctor who examined him immediately after his release from the police station and saw bruises consistent with his claim that he was beaten up by the police.

All these witnesses give their testimony on a special form of oath, known as the '*voir dire'*, the wording of which is – 'I swear by almighty God that I will true

answer make to all such questions as the court shall demand on me'. During '*voir dire'* cross examination and examination-in chief must relate only to the admissibility or otherwise of the confession. At common law, the accused could not even be asked if the confession was true as established in *Wong Kam-Ming v R [1980]*[535]. The same rule applies under s. 76 of PACE. Unless the prosecution prove that the confession was not obtained in contravention of the section, it must be excluded 'notwithstanding that it may be true'- s. 76(2) (b) of PACE. Once the evidence on the *voir dire* has been given, the judge listens to the counsel's submissions and announces his decision, both as to the facts and their legal consequences. The *voir dire* procedure is intended for the benefit of the defence. For instance, Lord Bridge, giving the judgment of the *Privy Council in Ajodha v The State [1982]*[536], said *obiter* that, at the 'vast majority' of trials where the admissibility of a confession is to be challenged, the procedure already described will be adopted. But as an alternative, it is open to defence counsel merely to impugn the confession before the defence evidence. At the end of the evidence, the defence may then ask the judge to rule the confession inadmissible as a matter of law. If the judge agrees, he will tell the jury in his summing -up to ignore the confession completely or, if there is no case to answer without it, direct them to acquit the accused. In *Airey [1985]*[537], the Court of Appeal quashed Airey's conviction because the judge had not allowed the defence to follow such a course. Also in *Sat-Bhambra [1988]*[538] however, the Court of Appeal held that the defence could not seek a retrospective ruling on the admissibility of a confession on the basis of s. 76 of PACE because of the wording of that section.

[535] [1980] AC 247.
[536] [1982] AC 204.
[537] [1985] Crim LR 305.
[538] [1988] 88 Cr App R 55.

During the trial, both on summary and indictment, at the conclusion of the prosecution's evidence, the defence may make a submission of no case to answer. The submission should be upheld if either there is no evidence to prove an essential element of the offence charged or the prosecution evidence has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. Magistrates during trials are judges of both facts and law, whereas, at a trial on indictment, law is for the judges and facts for the jury. If a submission of no case is upheld, the accused is found not guilty and discharged. If the justices are provisionally minded to uphold the submission of no case to answer, they should call on the prosecution to address them, to avoid the possibility of injustice as established in *Barking and Dagenham Justices ex parte DPP [1994]*[539]. There is no case to answer if the prosecution has failed to adduce evidence on which a jury, properly directed by the judge in his summing-up, could properly convict. A case in point is *Galbraith [1981]*[540].

The Court of Appeal has indicated that a judge must ensure that the case should not go to the jury if it would be unsafe to convict. An example is in the case of *Grant [2008]*[541], where the only evidence against Grant on a charge of robbery was that his DNA was on a balaclava thought to have been used by the robber and recovered near the scene. However, the balaclava also bore traces of the DNA of at least one other person and experts were in any event uncertain that any of the DNA recovered came from the robber. The Court of Appeal held that the trial judge should have stopped the case at the close of the prosecution case. The jury could not properly have been satisfied that Grant was the robber. The

[539] [1994] 159 JP 373.
[540] [1981] 1 WLR 1039.
[541] [2008] EWCA Crim 1890.

evidence proved only that it might have been him. The accused had refused to answer questions when interviewed but he could not have a case to answer on that basis alone as established under section 38 of the Criminal Justice and Public Order Act 1994.

An accused must be represented at the Crown Court. Where an accused is unrepresented at the Crown Court, he should be encouraged to obtain legal representation, or entitled to conduct his own defence throughout, or, indeed to start with a legal representation and dismiss his counsel at any stage of the trial. The judge should assist an unrepresented accused in matters such as the cross-examination of the prosecution witnesses, the giving of his own evidence, and the examination in chief of any witnesses he may choose to call. For instance, a judge's failure to ask the accused if he wishes to call evidence in his defence may lead to any conviction being quashed as in *Carter [1960]*[542].

The judge also has the right to call a witness if, in his opinion, it is necessary for him to do so in the interests of justice. The judge asks the witness questions, and then allows either or both counsel to cross-examine. However, the judge's power to call a witness should be exercised sparingly. In the event, the judge must not call any further prosecution witnesses in a case where the Crown has decided not to continue the prosecution. To do so would be in effect to take the prosecution over as directed in *Grafton [1993]*[543].

The accused must be present at the start of the trial on indictment in order to plead. If he is not, the judge will have to adjourn and, unless there is some good reason for the absence such as sickness, issue a bench warrant for the accused's

[542] [1960] 44 Cr App R 225.
[543] [1993] QB 101.

arrest under s.7 of the Bail Act 1976. But the general rule is that the accused should be present throughout the trial, to hear what the prosecution and witnesses have to say against him, and to answer their allegations. There is a principle that the accused should be present during his trial and must understand the proceedings. That is why failure to ensure that an interpreter translates the evidence constitutes a substantial miscarriage of justice. A case in point is in *Kunnath v The State [1993*[544]*]*. There are two main situations in which the judge has discretion to allow the trial to proceed in the absence of the accused. The first is when he shouts, misbehaves, or otherwise makes such a nuisance of himself that it is impracticable to continue with him present –per Lord Reading CJ in *Lee Kung [1916]*[545]. The second is if he voluntarily absents himself. In *Hayward [2001]*[546], the Court of Appeal considered the principles which the trial judge ought to apply when dealing with an absent defendant.

Then in the trial by jury, the judge would remind the jury of their power to acquit the accused if the prosecution case is not strong not in so many words as in *Kemp [1995*[547]*]* and *Falconer-Atlee [1973]*[548].

After the proceedings in a criminal trial, comes the verdict. A district judge sitting alone normally announces his decision immediately after the defence closing speech. Lay magistrates nearly always retire to consider their verdict. They need not be unanimous. In the event of an even-numbered court being equally divided, the chairman has no casting vote, and it will be necessary to adjourn the case for rehearing by a differently constituted bench. An example is in the

[544] [1993] 1 WLR 1315.
[545] [1916] 1KB 337.
[546] [2001] 3 WLR 125.
[547] [1995] 1 Cr App R 151.
[548] [1973] 58 Cr App R 348.

case of *Redbridge Justices ex parte Ram [1991]*[549]. If the case is trial by jury, the jury room should be private when discussing and deliberating on the verdict. A juror should not be biased and should be reported as in *Box [1964*[550]*]* where the complaint was that a juror was biased because of his prior knowledge of the accused's character. Verdicts could be guilty or not guilty, or guilty of an alternative offence. Normally the juries simply have a choice between acquitting and convicting the accused. Sometimes too however, a third option is open to them. They can find the accused not guilty as charged in the count, but guilty of some other (lesser) indictable offence. These circumstances are established under sections 6(2) to (4) and section 4(2) of the Criminal Law Act 1967. This is illustrated by the facts of the leading case of *Lillis [1972]*[551].

Until 1967, the verdict of a jury had to be unanimous, but the Criminal Justice Act 1967, therefore departed from centuries of tradition by introducing majority verdicts, contained in section 17 of the Juries Act 1974. For instance in *Pigg [1983]*[552], on an appeal against conviction, the Court of Appeal in a borderline case, was swayed in their decision by the fact that the verdict was only by ten to two majority. The position is different where s.17 of the Juries Act 1974 itself is contravened through a majority verdict being returned within the two hour period or the foreman failing to say by what majority the jury decided to convict. The verdict then becomes not a 'proper or lawful one', so in that case an appeal must succeed. This was the case in *Barry [1975]*[553], and *Barry* can contrasted with *Shields [1997]*[554], where although the judge gave a majority direction after

[549] [1991] 156 JP 203.
[550] [1964] 1 QB 430.
[551] [1972] 2 QB 236.
[552] [1983] 1 WLR 6.
[553] [1975] 1 WLR 1190.
[554] [1997] Crim LR 758.

an hour and 47 minutes, this was remedied by telling the jury that it was too early for a majority verdict, and they must reach a unanimous verdict. The jury did not in fact return a verdict until three hours and 47 minutes after their original retirement, and the conviction by a majority of ten to two was upheld by the Court of Appeal.

Where a jury cannot agree upon their verdict, the judge discharges them from giving one. The procedure is that, after given them the majority verdict direction, the judge allows them whatever time he thinks reasonable for further deliberations. If they still do not return a verdict and therefore indicate the impossibility arriving at a decision, the judge discharges the jury. The fact is that discharge of the jury from giving a verdict is not equivalent to an acquittal, but rather the accused may be retried again by a fresh jury on the same indictment, and a plea of *autrefois* will fail. In *Bell [2010]*[555], the defendant had been tried for murder and the jury failed to agree. He was retried but once again the jury could not agree a verdict. The crown sought a further retrial, and the trial judge rejected Bell's application for proceedings to be dismissed as an abused of process. At the third trial, with scientific evidence, the accused was convicted and appealed unsuccessfully at the Court of Appeal.

In general, the verdict would be accepted by the judge if it is either majority or unanimous decision without any procedure irregularity. The judge has no power to reject the jury's verdict however much he may disagree with as in *Lester [1940]*[556] or should he ask the jury any question about the verdict such as why they convicted of manslaughter and not murder. An example was in the case of *Larkin [1943]*[557]. Once the jury has completed giving their verdict they are dis-

[555] [2010] Crim LR 582.
[556] [1940] 27 CR App R 8.
[557] [1943] KB 174.

charged. If the accused has been acquitted on all counts, or convicted of any count, the judge will either proceed to sentence forthwith, or adjourns so that reports on the accused can be prepared. The accused may be released on bail or kept in custody for this period of adjournment, and then the judge would give the sentence by considering the sentencing procedure and the sentencing guide.

With regards to the specific rights of the defence I have argued under bails and remand that life of some witnesses in serious criminal offence becomes more threatened after they have witnessed in an open court in support of the prosecution and conviction made for lack of protection by the police. Again, the juries are sometimes bias during the trials against defendants; whereas some inexperience prosecutors are always determining to secure a conviction through any possible means if the source of evidence is not properly checked. Also, prosecutors intentionally disclose used materials to the defence advocates at the last minute in court so that enough preparation could not be made towards the proceedings by the defence team which put the defendant at risk. As a result, I have proposed that, witnesses in serious criminal cases should be offered protection after court by the police for some time to protect their lives from being at risk. Also, judges should be strict on procedure irregularities with regards to the jury; and the Crown Prosecution Service (CPS) in all trial stages should employ experience lawyers for the prosecutorial roles.

Finally, disclosure of documents by the CPS to the defence lawyers in all the stages of the trial should be done on time but not in the courtroom in the course of proceedings in order to give the defence advocates ample time to prepare, for interest of justice.

4.5.1 Trial of Juveniles

Trial of juveniles by the magistrates is normally in a special court known as the 'youth court'. In other circumstance, it is either obligatory or possible for a juvenile to be tried on indictment or in the adult magistrates' court or still trial on indictment could be at the youth court. A juvenile is a person who has not attained the age of 18 or below 14 years under s. 70 of the Children and Young Persons Act (CYPA) 1969. For the purposes of criminal procedure, children under the age of ten (10) may be ignored as they have not yet reached the age of criminal responsibility. As far as method of trial is concerned, all persons age 18 and over are treated in exactly the same way, and are all adults. Notwithstanding the above procedural, if a person age 18-20 inclusive is convicted of an offence several methods of dealing with him are open to the courts which are not available in respect of offenders who have attained the age of 21. Under the Criminal Justice Act 1991, what was the juvenile court was renamed youth court under s. 70. Under the s. 68, children of 17 years old are also tried at the Youth Court. Like adult accused, juveniles make their first court appearance before magistrates, even if they are ultimately tried on indictment. If a juvenile is charged by himself or with other juveniles, he will appear in the youth court which is a special form of magistrate court. If he is charged jointly with adult, both will come before adult magistrate's court. The decision on whether a juvenile is tried summary or on indictment is taken by the magistrates applying the relevant statutory provisions. The juvenile never has the right to elect trial on indictment. The juvenile accused has no choice to choose which court. Sometimes his legal representative will be asked for their views on which court would be more appropriate. Under s. 24(1) of the Magistrate's Court Act 1980

(MCA), it is provided that a juvenile must be tried summarily in the youth court or in an adult magistrates' court unless:

a) he is charged with an offence of homicide; or
b) he is charged jointly with an adult who is going to be tried on indictment, and the magistrates consider that it is in the interests of justice to commit them both for trial; or
c) the magistrates consider that he could properly be sentenced under the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A), section 91 if he were convicted on indictment, and he is charged with an offence carrying a maximum sentence of 14 years imprisonment or more, or with a serious sexual offence listed in s. 91(1) of the PCC(S)A 2000; or
d) he falls within the ambit of the dangerous offenders provisions of the Criminal Justice Act (CJA) 2003;
e) he is charged with an offence under s.5 of the Firearms Act 1968, which makes him liable to a minimum term sentence under s. 51A of that Act, and was aged 16 or over at the time of the alleged commission of the offence[558].

In all the above cases, with the exception of (d), if the youth court decides that the juvenile must face trial in the Crown Court, he will be sent by means of committal proceedings.

With regards to point (b) above, in determining whether to separate the youth and the adult defendant(s), the Allocation Guideline issued by the sentencing Council states that the factors which the magistrates should consider include:

[558] See John Sprack: Trial of Juveniles on indictment: A Practical Approach to Criminal Procedure, page 187.

i. whether separate trials can take place without causing undue inconvenience to witnesses or injustice to the case as a whole;
ii. the young age of the defendant, particularly where the age gap between the adult and youth offender is substantial;
iii. the immaturity of the youth;
iv. the relative culpability of the youth compared with the adult and whether or not the role played by the youth was minor; and
v. the lack of previous convictions on the part of the youth.

In *R (H) v Southampton Youth Court [2005]*[559], guidance was given on the way in which the issue of venue should be decided, whether trial in the Crown Court or in the youth magistrates' court. In *R (D) v Sheffield Youth Court (2003)*[560], Stanley Burnton J stated that the youth court in sentencing the defendant in accordance of s. 91 of PCC(S) A) 2000, should also consider the sentencing powers of the Crown Court. Section 3C of PCC(S) A) 2000 deals with the committal of dangerous young offenders, and where a juvenile is convicted of an offence specified in the CJA 2003, s. 224, the magistrates must consider whether the criteria for the imposition of a sentence under s. 226 (3) or s. 228(2) of the CJA 2003 are met, and if they are, then must commit the juvenile to the Crown Court for sentence.

By the combination of s. 46 of the CYPA 1933 and s. 18 of the CYPA 1963, it provides that a juvenile who is to be tried summarily shall be tried in a youth court unless:

a) he is charged jointly with an adult; or

[559] [2005] 2 Cr App R (S) 30.
[560] (2003) 167 JP 159.

b) he appears before the magistrates together with an adult; though the prosecution can charge them separately; or
c) he appears before the magistrates together with an adult, and the charge against him arises out of circumstances the same as or connected with the circumstances giving rise to the charge against the adult; or
d) the adult magistrates' court began to hear the proceedings against him in the erroneous belief that he was an adult.

Where (a) above applies, the adult magistrates' court must try the juvenile unless the adult with whom he is jointly charged pleads guilty and he pleads not guilty, in which case the court may, and probably would, remit him to a youth court to be tried under s.29 of the Magistrates' Court Act 1980, and in accordance with the case in *Ex parte Allgood [1994]*[561].

It is crucial to note that the age of the juvenile accused also determine the mode of the trial. For instance, the right of a person charged with an indictable offence to be tried on indictment depends upon whether he is under or over 18 as established in s. 68 of the Criminal Justice Act 1991. His 18th birthday is made a watershed. Unfortunately, the MCA 1980 does not make it clear whether the relevant consideration is the accused's age when he first appears in court charged with offence, or his age at some subsequent stage in the procedure. However, case law on the subject, especially the House of Lords decision in *Islington North Juvenile Court ex parte Delay [1983]*[562], does help to clarify the Act, although there are still some points of doubt.

[561] [1994] the Times, 25 November 1994.
[562] [1983] 1 AC 347.

Trials of juveniles in the youth court is established under s. 45 of the Children and Young Persons Act (CYPA) 1933, which was amended by the Courts Act 2003. Youth Courts differs from the ordinary adult courts in a way that:

a) The general publics are excluded from the youth courts, but only the parties and their legal representatives, and court officials -s. 47 of CYPA 1933;
b) The bench of magistrates hearing the case must consist of no more than three magistrates, and must include a man and a woman under the Youth Courts (Constitution) Rules 1954, r 12;
c) There is a different form of oath swearing. All witnesses in the case, whether juveniles or adults, 'promise before Almighty God to tell the truth, the whole truth', instead of swearing by Almighty God that they will do so- introduced by s. 28 of the CYPA 1963.
d) Where the juvenile is not represented the court may permit his parent or guardian or other 'suitable supporting adult' to assist him in conducting his defence (example by cross-examining prosecution witnesses on his behalf).
e) The media may not report the name or any other identifying details of the juvenile charged or any other juvenile involved in the proceedings- s. 49 of the CYPA 1933; but the prohibition may be lifted by the court in certain circumstances, whether to avoid injustice to the juvenile or to apprehend a juvenile who is unlawfully at large. For example s. 49 of the 1933 Act ceased to applied in *T v DPP; North East Press Ltd [2004]*[563].
f) In general, the atmosphere in a youth court is more relaxed and less formal than in an adult court.

Normally parents of the juvenile defendant are encouraged or required to accompany the children to the court. Where a young child particularly one with

[563] [2004] 168 JP 194.

substantial learning difficulties is being tried, the court should appoint an intermediary to ensure that he is able to communicate with his lawyer , understand the decisions which he needs to make, and give cohesive evidence should he choose to do so. This is duty under the common law and under the overriding objective of the CrimPR to ensure a fair trial as in *R (C) v Sevenoaks Youth Court [2009]*[564].

With regards to the sentencing powers of the courts when dealing with juveniles depending on matters such as his age, record, whether the offence of which he has been found guilty is punishable with imprisonment and what the reports on him say, a juvenile is likely to be dealt with in one or more of the ways like a sentence of detention under s. 91 of the PCC(S) A) 2000 with training order; rehabilitation or reparation order; a fine, or a conditional discharge; or an absolute discharge.

It is also possible to order the juvenile's parent or guardian to enter into a recognizance to take proper care of him or to ensure that he complies with the requirements of a community sentence.

Sentencing powers of the youth court are less extensive than those of the Crown Court in the following ways:

i. it cannot pass a sentence of detention under s. 91 of the PCC(S) A) 2000.
ii. the maximum fine it may impose is £1000 in the case of a young person and £250 in the case of a child- under s.24 (3) and (4); and s. 36 of the Magistrates Court Act 1980.

The relevant date for sentence is the date of conviction, or in the case of a defendant who pleads guilty, the date when a plea is entered as in *Starkey*

[564] [2009] EWHC 3088 (Admin).

[1994][565]. Moreover *in Aldis [2002]*[566], the defendant turned 18 before conviction. It was held that the magistrates had the power by virtue of the CYPA 1963, s. 29 to treat him for purposes of sentence as under 18, provided that he was under 18 at the time when they determined their jurisdiction to try him summarily; more to the point, in *Bowker [2007],* the Court of Appeal was dealing with a case where the offences took place two days before the appellant 18th birthday, but was sentenced sometime after that. But it was clear that the sentencing regime which was applied to an offender is that which flows from his age at the date of conviction.

4.6. Appeals and Sentencing

Appeals ranges from the decision at the Magistrates' Court to the Supreme Court. A decision by a magistrates' court can be challenged by:

a. appeal to the Crown Court, or
b. appeal to the High Court by way of a case stated by the magistrates for the High Court's opinion, or
c. application to the High Court for judicial review of the magistrates' decision.
d. Also appeals to the Crown Court from the magistrates' court are governed by the Magistrates' Courts Act 1980 (MCA), ss. 108 to 110, and CrimPR, Part 63.

[565] [1994] Crim LR 380.
[566] [2002] 2 Cr App R (S) 400.

The Criminal Division of the Court of Appeal hears an appeal of cases decided by the Magistrates' and Youth Courts; Crown Courts or the Divisional Court (Queen's Bench). Prior to 1907, a person convicted on indictment had no general right of appeal, but the trial judge might in his discretion reserve a point of law for consideration by the Court of Crown Cases Reserved. The Criminal Appeal Act of 1907 created the Court of Criminal Appeal, which replaced the Court of Crown Cases Reserved. The court had much wider jurisdiction to hear appeals against conviction based on grounds of fact or mixed law and fact, and appeals against sentence where the appellant argued that his sentence, although lawful, was too severe. However, the Court of Criminal Appeal was abolished by the Criminal Appeal Act 1966 which transferred its jurisdiction to the Criminal Division of the Court of Appeal. The composition for the particular types of hearing is contained in the Senior Courts Acts 1981. The jurisdiction, powers and procedure of the Division are principally governed by the Criminal Appeal Act 1968 (CAA) and the CrimPR, Parts 65 to 73.

The Court of Appeal consists of up to 37 Lords justices of Appeal and certain ex officio judges, in particular the Lord Chief Justice, under the Senior Court Act 1981 s.2(2). Any member of the Court of Appeal is equally entitled to sit in the Criminal and Civil Divisions of the Court.

The Lord Chief Justice is the president of the Criminal Division under s. 3(2) of the Senior Courts Act 1981. He may request any High Court or Circuit Court judge to act as a judge of the division- s. 9(1) of the 1981 Act. A request under s. 9(1) is more in the nature of a command, because it is the judge's duty to comply with it as established under s. 9(3) of the Senior Court Act 1981. When determining an appeal against conviction, a court must consist of at least three judges – s. 55(2) of 1981 Senior Court Act. The same applies when there is an

application for leave to appeal from the Court of Appeal to the Supreme Court and when a person is appealing against a finding that he was unfit to plead or a verdict of not guilty by reason of insanity. Appeals against sentence may be determined by a two judge court. There is nothing to stop a court comprising more than three judges, provided the number is uneven. In fact, five (5) judge courts are a rarity, confined to cases of exceptional importance or difficulty. An example is in *Turnbull [1977]*[567] where the Court of Appeal gave guidance to Crown Court judges on how they should deal with identification evidence. The decision of a court of the Criminal Division may be taken by a majority of its members. If a two judge court is divided on what its decision should be, the matter should be re-argued before a three judge court- s.55(5) of the Senior Court Act 1981; even the judges are not unanimous, the usual rule is that only one judgment is pronounced – s.59. However, the judge presiding in the court may allow separate judgments if he considers that the question raised is one of law and that more than one judgment would be convenient. Normally a single judgment in a case makes for certainty in the law, and certainty in the criminal law is even more important than it is in the civil law[568].

[567] [1977] QB 224.
[568] See John Sprack: An Approach to Criminal Procedure, page 470.

4.6.1 Right of Appeal against Conviction

The right of appeals against conviction is subject to obtaining leave to appeal when that is necessary, and when a person is convicted on indictment, he may appeal to the Court of Appeal against his conviction under the Criminal Appeal Act 1968 s.1(1); and leave to appeal is granted by the court itself, usually acting through a single judge.

Appeals can also be done based on the trial judge's certificate- s. 1(2) (a) of Criminal Appeal Act 1968. A certificate of fitness for appeal may mention a ground of fact, mixed law and fact or pure law. It is very rare for the trial judge to grant a certificate. In appeals, there must be a particular and cogent ground of appeal with a substantial chance of success as directed in *Parkin [1928]*[569], and *Practice Direction (Criminal Proceedings: Consolidation [2002]*[570].

Persons convicted following guilty plea or not guilty plea, can appeal against conviction under s. 1 of the Criminal Appeal Act 1968. But for obvious reasons, the Court of Appeal is most reluctant to grant leave to appeal against conviction if the appellant admitted his guilt in the Crown Court. The classic passage on the matter comes from Avory J in *Forde [1923]*[571], where the Justice expressed that:

> *"A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that upon admitted*

[569] [1928] 20 Cr App R 173.
[570] [2002] 1 WLR 2870.
[571] [1923] 2KB 400.

facts he could not in law have been convicted of the offence charged."

The first of the two situations mentioned above by his Lordship Avory covers *inter alia* cases where a purported plea of guilty is said to have been nullity because of pressure brought to bear on the accused by the judge and/or counsel as in *Turner [1970]*[572]. The second situation does not often arise in practice, since it presupposes that both the prosecution and the defence at the Crown Court were mistaken about the essential elements which the prosecution had to prove to establish the offence charged. In addition to appeals brought within the terms of Avory J's proposition, appeals are heard where a plea of guilty is induced by the trial judge's wrong ruling in law. Thus in *Clarke [1972]*[573] he successfully appealed against a conviction for shoplifting, the facts being that she abandoned her original plea of not guilty after the judge decided that her defence (that she put the goods into her bag in a moment of absent-mindedness and then forget to pay) amounted to a plea of not guilty by reason of insanity. Not surprisingly, Clarke preferred to plead guilty rather than be found not guilty and made the subject of a hospital order. In the circumstances, her change of plea did not preclude her appealing. Finally, there will be occasional cases which are not covered by any of the headings described above, but where the interests of justice demand that the appeal be allowed to proceed. An excellent example is *Lee [1984]*[574]. Although fit to plead, Lee was very low intelligence. He was charged with numerous offences of arson and manslaughter. The case against him consisted entirely of confessions which he had made to the police, but notwithstanding the confessions, he instructed his legal counsel until shortly before the

[572] [1970] 2 QB 321.
[573] [1972] 1 All ER 219.
[574] [1984] 1WLR 578.

trial that he intended to plead not guilty. He then changed his mind and pleaded guilty to all counts. Meanwhile, subsequent investigations by the Sunday Times cast more doubt on the correctness of Lee's confessions. The defence attributed his confessions to his low intelligence, a desire for 'notoriety and publicity' and the remorseless nature of the police interrogation. In the highly unusual circumstances of the case, Lee was given leave to appeal, as Ackner Lord Justice said:

> *"The fact that the appellant was fit to plead; knew what he was doing; intended to make the pleas he did; pleaded guilty without equivocation after receiving expert advice, although factors highly relevant to [whether the appeal should ultimately succeed] cannot of themselves deprive the court of the jurisdiction to hear [the appeal]"*

In *Chalkley [1998]* [575] the Court of Appeal distinguished:

a) cases where an incorrect ruling of law on admitted facts left a defendant with no legal escape from a verdict guilty on those facts; and
b) cases where an accused was influenced to change his plea to guilty because he recognized that as a result of a ruling to admit strong evidence against him, his case was hopeless.

It was held that a conviction under category (a) was unsafe, whereas a conviction under category (b) was not[576]. Also in *Togher [2001]*[577]the Court of Appeal, stated that the approach to an appeal against conviction of a plea of guilty following a judge's ruling depended on a choice between:

[575] [1998] 2 Cr App R 79.
[576] See John Spruce: An Approach to Criminal Procedure; Chapter 26: Appeals from the Crown Court, page 274.
[577] [2001] 3 All ER 463.

a) a ‘narrow’ approach, that an appeal could be entertained only where the ruling left no legal basis for a plea of not guilty; and
b) a ‘wide’ approach, that a plea of guilty following a material irregularity could also found an appeal.

The Court of Appeal adopted the wide approach in preference to the narrower approach adopted in *Chalkley [1998] (supra)*. In particular, the word ‘unsafe’ should be applied in a way compatible with the ECHR. Fairness of trial and safety of conviction went together. If a defendant were denied a fair trial it was almost inevitable that the conviction would be unsafe. Again, if he pleaded guilty in ignorance of matters which might amount to abuse of process and justify a stay of the prosecution, such conviction might properly be set aside.

Multiple appeals are not acceptable in law. There is a single right of appeal. Once an appeal has been dealt with, the appellant is debarred from bringing a second appeal in the matter. This was affirmed in the case of *Pinfold [1988]*[578]. This is the case even if the point to be raised at the second appeal is entirely different from that which was dealt with in the first. The rules which restrict appellants to a single appeal can create a strange anomaly where there are several grounds of appeal without hearing the other. The rule in *Pinfold* does not apply where the case has been referred to the Court of Appeal by the Criminal Cases Review Commission under the powers given to it by s.3 of the Criminal Appeal Act 1995, as in *Thomas [2002]*[579]. Nor does it apply to bar an appeal by the defendant where there has been an earlier reference by the attorney general on the basis that a sentence is unduly lenient, as in *Hughes [2009]*[580].

[578] [1988] QB 462.
[579] [2002] Crim LR 912.
[580] [2009] Crim LR 672.

There is also the right of an appeal against a verdict of 'not guilty by reason of insanity'. Precisely, a person whose appeal is allowed on the ground relating to the finding that the appellant was insane, the Court of Appeal may substitute a verdict of guilty of the offence charged (or guilty of a lesser offence) for the verdict of the jury. The next discussion shall observe appeals against a sentence in the criminal trial.

4.6.2 Appeals against a Sentence

With regards to appeals against a sentence, appellants to the Court of Appeal against sentence fall into two categories- those who were sentenced for an offence following conviction on indictment- s. 9 of the Criminal Appeal Act 1968 (CAA); and those who were sentenced for an offence following summary conviction and committal to the Crown Court for sentence- s. 10 of the Criminal Appeal Act 1968. Another illustration of the way in which the test (safety of the conviction) is applied is provided by the case of *Smith [1999]*[581]. Here the ground of appeal was the wrongful rejection of a submission of no case to answer. Equally, in *Pattinson [1974]*[582], his appeal against a conviction for robbery succeeded because the prosecution's only evidence was a confession which he had allegedly made at the police station and the circumstances of that confession was classified as too bizarre for the police to be believed.

On an appeal against sentence, the Court of Appeal may quash any sentence or order which is the subject of the appeal, and replace it with the sentence or order it considers appropriate provided:

[581] The Times, 31 May 1999.
[582] [1974] 58 Cr App R 417.

a) the sentence it passes or order it makes is one which the Crown Court could have passed or made, and
b) taking the case as a whole, the appellant is not more severely dealt with on appeal than he was by the Crown Court- s. 11(3) of CAA.

It should also be noted that the Attorney-General may refer a sentence to the Court of Appeal if he considers it to be unduly lenient, and their Lordships may then deal with the offender more severely than the Crown Court judge did. The Attorney-General's sentencing references are however quite distinct from appeals by the offender, where the basic rule is still that the Court cannot increase sentence. In *Reynold [2007]*[583] the court of appeal considered the position where the sentencing judge had failed to pass the sentence which the law required upon a dangerous offender, and replaced it with a lawful sentence.

Actually the main function of the Court of Appeal (Criminal Division) is to quash convictions or reduce sentences upon appeal brought by the defendant in Crown Court proceedings. Originally that was its function and the prosecution had no right of redress if it considered that the accused had been wrongly acquitted or sentenced too leniently. However, since 1972, there has been a procedure by which the prosecution can test the correctness of a ruling on law given by the Crown Court judge during the course of the trial which culminated in an acquittal by reporting. Under s. 36 of the Criminal Justice Act 1972, there is a provision that where a person has been tried on indictment and acquitted, the Attorney –General may refer to the Court of Appeal for their opinion any point of law which arose in the case. But before giving their opinion, on the point referred, the Court must hear argument by the Attorney General, and the person acquitted also has the right to be represented at the hearing. Whatever the opin-

[583] [2007] Crim LR 493.

ion expressed by the Court of Appeal, even if they decide that the trial judge was wrong and ought to have convicted the accused, the acquittal would not be affected- s.37(7) of the Criminal Justice Act 1972. However, by making the reference, the Attorney General may obtain a ruling which will assist the prosecution in future cases against other suspects, but cannot set aside the acquittal of the particular accuse whose case gave rise to the reference. A case in point was the *Attorney-General's References (Nos. 1 and 2 of 1979)*[584], where a burglar was acquitted following a ruling that, although there was evidence of entering a building with intent to steal anything of value which might be found therein, s. 9(1) (a) of the Theft Act 1968 required an intent to steal a specific item within the building entered, and the prosecution were not able to prove such an intent.
Moreover, the Attorney-General may refer a case to the Court of Appeal when it considers a sentence to be unduly lenient under sections 35-36 of the Criminal Justice Act (CJA) 1988, where the offender has been sentenced in the Crown Court for either (i) an offence triable only on indictment, or (ii) an offence triable either way[585] . Under s. 36(1) of the CJA 1988, on such a review, their Lordships may quash the sentence and replace it with the sentence they consider appropriate which would be more severe than that imposed by the first instance, but must be a sentence which the Crown Court could lawfully passed. But such a reference would need the granting of a leave by the Court of Appeal. In *Attorney-General's Reference (No 14 of 2003)*[586], the Court of Appeal em-

[584] [1979] 3 All ER 143.
[585] See the Criminal Justice Act 1988 (Reviews of Sentencing) Order: SI 2006, No 1116. Since 1994, the power to refer indictable-only offences was extended to triable –either-way offences such as: indecent assault on a woman or man, threats to kill, cruelty to a person under 16, attempts, or incitement to commit any of these offences. Serious fraud cases like smuggling and drug offences, racially or religiously aggravated assault, criminal damage, public order, harassment, and sexual offence particularly involving children are all included.
[586] The Times 18 April 2003.

phasized the safeguards which applied before any increase of sentence could be ordered.

Furthermore, the prosecution can also appeal against the ruling of the trial judge under the CJA 2003, which is a change in the shape of the Crown Court trial. Under sections 57-74 of the CJA 2003, the new powers introduce two types of appeal which the prosecution can institute as:

I. 'terminating' rulings under ss.57 to 61; and
II. Evidential rulings, which are dealt with in ss. 62-66.

Notwithstanding, the prosecution is prohibited from appealing against rulings on the discharge of the jury. In the case *Thompson [2007]*[587], it was held that the procedure does not apply to a ruling that a count be dismissed[588].

On the other hand, errors could be possible grounds for an appeal. Certainly, the Court of Appeal will be most reluctant to uphold a conviction where the trial was legally error-free. Legal errors therefore form the grounds on which most appeals are argued. Among the commonest grounds of appeal put forward are:

1. Errors in the judge's summing-up. For example, wrongly defining the elements of the offence, failing to leave to the jury a defence for which a foundation has been laid by the evidence, failing to give an adequate direction on the burden and/or standard of proof.
2. Procedural errors in the course of the trial. For instance, allowing the prosecution to amend the indictment when that involved the risk of injustice, allowing evidence to be admitted when it should have been excluded, failing to deal properly with a note from the jury, failing to comply with the statutory limitations on majority verdicts.

[587] [2007] Crim LR 387.
[588] In accordance with Para 2 of Sch 3 to the Crime and Disorder Act (CDA) 1998: (Dismissal of Charges Sent) Rules 1998 (SI 1998 No 3048).

All of these are common examples from an endless list of potential errors in a trial. In the end, however, the crucial question (however many errors there were) is: was the conviction safe?

There are instances when an appellant relies on alleged errors by counsel defending him at the Crown Court as a basis for appeal. Traditionally the Court of Appeal has been very reluctant to accept such arguments. For example in *Clinton [1993]*[589], their lordships said it was rare for a verdict to be quashed because of the defence counsel's conduct of the trial. The correct approach was whether the conviction was unsafe or unsatisfactory under all the circumstances.

More to the point, in *Ullah [2000]*[590], the Court of Appeal emphasized that in a case of this kind, the crucial question was whether the conviction was safe, but ineptitude on the part of counsel was a necessary prerequisite. In considering whether counsel had been incompetent, their Lordships suggested that the test might be whether his conduct was based on such fundamentally flowed reasons that it might properly be regarded as *Wednesbury* unreasonable as a criteria applied in *Associated Picture House Ltd v Wednesbury Corporation [1948]*[591].

Other instances where errors in the trial serves as grounds for an appeal is more over considered in the case of *Nangle [2001]*[592], where the Court of Appeal stated that 'flagrant incompetence' might not now be the appropriate measure to apply in deciding whether to quash a conviction, but in the light of the Human Rights Act 1998 and Art 6 of the ECHR, what was required was that the hearing of the charges against the defendant should be fair. However, if the conduct of his legal advisers was such that this objective had not been met, then the

[589] [1993] 1 WLR 1181.
[590] [2000] Crim LR 108.
[591] [1948] 1 KB 223.
[592] [2001] Crim LR 506.

Court of Appeal might be compelled to intervene. A similar case had been considered by the European Court of Human Rights in *David v Portugal [1999]*[593], where the defence lawyer had only three days to prepare for a complex fraud trial which resulted in a nine-year prison sentence. It was held that the defendant's right under Art 6(3) (c) had been violated, since he had not had the benefit of a practical and effective defence[594].

Normally when appeals are successful, the Court of Appeal would quash the appellant's conviction under s. 2(2) of the Criminal Appeal Act 1968 (CAA). Or the court may also order that the appellant be re-tried. In this regards, the effect of quashing a conviction would mean an acquittal instead of a conviction, and therefore the appellant is treated just as if the jury had found him not guilty- s. 2(3) of CAA. Consequently, any attempt by the prosecution to re-prosecute him for the same offence would be barred by the plea of autrefois acquit *(unless new evidence for retrial which is statutory exception to the rule against double jeopardy under sections 75-97 of the CJA 2003 applies as discussed above under the principles of autrefois convict and autrefois acquit in England and Wales).*

More on retrial, in the case of *Mackenzie [2011]*[595] the appeal was against a finding that the appellant had done the act charged (indecent assault), after he had been found unfit to plea. His appeal succeeded and the Court of Appeal went on to consider whether they could order a retrial. Their Lordships held that there was a statutory lacuna, and that they had no power to order a retrial where an appellant succeed in such circumstances.

[593] [1999] EHRLR 634.
[594] See John Sprack: A practical Approach to Criminal Procedure (4th ed.) on determination of Appeals against Conviction, page 478-479.
[595] [2011] Crim LR 884.

Sometimes too the publicity surrounding the original trial and the appeal makes a retrial not recommendable. For instance in *Taylor [1994]*[596], the Court of Appeal having upheld an appeal against conviction for murder in part because of the sensational and inaccurate publicity surrounding the trial , went on to say:

> *"Moreover, by reason of the view we take of the way in which this case was reported, we do not think that a fair trial could now take place. Hence we do not order a retrial."*

Nevertheless, retrials are sometimes ordered by the Court of Appeal despite the publicity of the case but this is subject to a balance of probability as in *Stone [2001]*[597]. In short, the principal situations where an appeal would be likely to succeed are as follows:

a. **Sentence wrong in law**, an example is the decision in *Reynold (supra) [2007]*.
b. **Sentence wrong in principle or manifestly excessive**.
c. **Wrong approach to sentencing**, if it is apparent from the judges remarks when he passed the sentence.
d. **Wrong procedure prior to sentence**. For instance, in *Newton [1982]*[598], the judge accepted the prosecution version of facts of the offence without hearing evidence, and in *Wilkins [1978]* where antecedents evidence prejudicial to the offender was tendered by an officer without first-hand knowledge of the matters about which he testified, made the Court of Appeal disapproved of such irregularities by reducing the sentences. However,

[596] [1994] 98 Cr App R 361.
[597] [2001] Crim LR 465.
[598] [1982] 77 Cr App R 13.

the Appeal Court sometimes says that the sentence itself was the correct one despite the procedural lapse, and therefore upholds it.

e. **Disparity in sentencing** is sometimes another issue where marked difference in the treatment handed out to co-offenders cannot be justified by either their differing degrees of involvement in the offence or the differing amount of mitigation at their disposal, when more lenient penalty is melted on an equally culpable co-offender than the other. An example is in *Dickinson [1977]*[599].

Evidence in the course of the appeal trial is considered by the Court of Appeal, and therefore has a discretionary power to receive evidence under s. 23 of the Criminal Appeal Act 1968. This power is unfettered, but the factors which the Court ought to take into consideration are listed under s. 23(2), which states that their Lordships should, in considering whether to receive any evidence, have regard in particular to whether it appears incredible; it appears that it may afford any ground for allowing the appeal; it would have been admissible at trial; and there is a reasonable explanation for the failure to adduce the evidence at trial.[600]. Appeals are publicly funded and representation provided whereby the appellant meet the criteria and test for state funded representation, and this may be granted by the Criminal Division itself, and not by the Crown Court. Either the prosecution of defence may appeal to the Supreme Court from a decision of the Criminal Division of the Court of Appeal, but subject to the conditions of:

a. The Court of Appeal certifying that the decision which it is sought to appeal involves a point of law of general public importance, and

[599] [1977] Crim LR 303.

[600] The listed factors are for the Court of Appeal to take into account in exercising their discretion with regards to evidence as in *Parks* [1961] 1 WLR 1484.

b. Either the Court of Appeal or the Supreme Court giving leave to appeal because it appears to them that the point of law is one which ought to be considered by the House.

Such appeals should either be made orally immediately after the court's decision, or it should be made within 14 days of the decision. There is no appeal against a refusal by the Court of Appeal to certify that a point of law of general public importance is involved as established in *Gelberg v Miller [1961]*[601]*; and Dunn [2011]*[602], where it was held that this complied with the ECHR, Article 6. I contend that certain sentences are unduly lenient when the gravity of the offences is considered, and hence proposes that dangerous and multiple offenders must be dealt with more severely in certain circumstances to deter other offenders.

[601] [1961] 1 WLR 459.
[602] [2011] Crim LR 229.

4.7 Measures of Coercion

Certainly, offenders who are charged and prosecuted by the CPS and either remanded or convicted and sentenced by the court for an incarceration are coerced and therefore have their right to liberty limited. However, certain categories of offenders such as those who commit minor crimes for the first time in minor cases are most often than not given a conditional caution by the police in lieu of straight forward prosecution.

Conditional Cautions are a statutory disposal introduced for adults by the Criminal Justice Act 2003[603] and for youths by the Crime and Disorder Act 1998 and are operated under Statutory Codes of Practice. Conditional Cautions are one of a range of out-of-court disposals and provide an effective, swift and speedy resolution in appropriate cases. It is issued if the offender admits the offence and accepts the condition(s) given or specified by the CPS or the police officer. If the conditions are complied with or completed within the timescales determined, the case is finalised and there is no prosecution. If, however, the conditions are not complied with, a prosecution may follow. A Conditional Caution differs from a simple caution as there are certain conditions that must be complied with in order to avoid prosecution for the offence committed[604]. The details of the conditional cautioning would have to be examined within the context of the CPS functions as far as crime prosecution is concerned.

"Conditional Caution" means a caution which is given in respect of an offence committed by the offender and which has conditions attached to it with which

[603] Provision for Conditional Cautioning is one of the measures introduced by the Criminal Justice Act, 2003. (CJA 2003, Part 3, sections 22-27).

[604] On the 8th April 2013 a Crown Prosecutor decided whether a Conditional Caution was an appropriate disposal for an offender aged 18 or over following a consultation with the police. Again, the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduced changes to the Conditional Caution scheme.

the offender must comply as indicated by the section 22 (2) of the (Criminal Justice Act 2003). Conditional cautioning as a disposal is a statutory development of the non-statutory police caution ('simple caution') which has long been available, at the discretion of the police and CPS, as an alternative to prosecution in suitable cases. The basic criteria for a Conditional Caution - i.e. those which must be satisfied before this disposal can be considered are: that the offender is 18 or over; that the offender admits the offence to the authorised person; and that there is, in the opinion of the relevant prosecutor, evidence sufficient to charge the offender with the offence.

There are three types of Conditional Cautions available and these include the following:

1. **Rehabilitative**: This condition is intended to rehabilitate the defendant from for example, attendance at drug or alcohol awareness sessions in an effort to halt the causes of the offending behaviour.
2. **Reparative**: This is categorise into four to deal with:
    - *Restorative Justice* - a condition intending to restore justice to the victim and the community.
    - *Compensation* - a condition to pay a specific amount directly to the victim to compensate them for the crime.
    - *Letter of Apology* - a letter of apology written by the defendant, which will be sent to the victim.
    - *Other reparative* - other conditions imposed on the offender to help repair the harm that has arisen from the crime.
3. **Restrictive**: This condition will be imposed to restrict the offender, for example prohibiting him from entering a certain area, as it is a condition that

supports rehabilitation or even ban the person from travelling to a particular place.

The total number of Conditional Cautions administered before charge in Quarter 1 2014/15[605] was 89; this is down on the comparison quarter[606] by 103. This does not include conditional cautions issued at post charge. Conditional Cautions administered within the quarter were mostly for common assault (25) and for destroying and damaging property (23), a decrease in volume on the comparison quarter of 17 and 105 respectively. At times there is non-compliance of the offender with respect to the conditions given by the CPS. The number of Conditional Cautions in the quarter where the offender failed to comply was 22. This is a decrease on the comparison quarter of 79. The CPS proceeded to prosecution in 12 of these cases; 9 cases were not prosecuted and 1 had their conditions varied. The overall compliance rate for the last 12 months in the first quarter was 44.5 %. Also in quarter 2 of 2014/15[607] 191 conditional cautions were administered at post charge stage compared to 205 in the second quarter of 2013/14[608]. This was mostly for common assault (24) and for destroying and damaging property (31), a decrease in volume on the comparison quarter of 23 and 50 respectively. The number of cases of non-Compliance was 31on the comparison quarter of 47. The CPS proceeded to prosecution in 22 of these cases; 8 cases were not prosecuted and 1 had their conditions varied. The overall compliance rate for the last 12 months in the second quarter was 63.1%.

[605] Crown Prosecution Service Conditional Cautioning Data Quarter 1 2014/2015 (April – June 2014).
[606] Quarter 1 of April-June 2012/2013.
[607] Crown Prosecution Service Conditional Cautioning Data Quarter 2 2014/2015 (July – Sept 2014).
[608] Quarter 2 of July-September 2012/2013.

As a matter of facts, a caution can only be used for adults, in view of the system of reprimands and warnings introduced for juveniles by the Crime and Disorder Act 1998 (CDA). A caution is normally administered in the police station by an officer of the rank of inspector or above. Although a caution does not rank as a conviction, records are kept of them for at least five years and they may be cited in court as evidence of the offender's character[609]. The Crime and Disorder Act 1998 abolishes formal caution in the case of juveniles and replaces it with a scheme of reprimands and warnings. For instance, the police may in some cases issue an oral warning which is normally referred to as 'an informal caution'. Such a warning has no official status and may not be cited in subsequent proceedings, but a formal warning may be cited against the offender. A case in point is that of in *Jones v Whalley* [2006][610], the Divisional Court considered the legal effect of a formal caution. The respondent in this case was alleged to have assaulted the appellant. The defendant admitted the offence, and accepted a formal caution. The appellant refused to accept this way of dealing with the matter, and brought a private prosecution. The magistrates ruled that such a prosecution was an abuse of process, and stayed the proceedings. The appellant appealed on the basis that he had a legal right to prosecute which could not be taken away from him by the police decision to caution in the matter. In this appeal, the Divisional Court allowed the appealed, holding that there was no abuse of process. However, the House of Lords, stressed that allowing the prosecution to proceed in such a circumstances would undermine the various schemes which exist for cautions to be administered and therefore held that such was an abuse of process.

[609] See Home Office Circular (30/2005) for cautioning practice which incorporates revised National Standards for Cautioning.
[610] [2006] Crim LR 67.

Another instances where it was held that the police decision whether to caution or not should be related to the CPS's decision of whether to prosecute or not in the cases of *Chief Constable of Kent ex parte L; R v DPP ex parte B* [1993][611]with regards to juvenile cases. In effect, sections 65 and 66 of the CDA 1998 replaces cautions for juveniles with a scheme of reprimand and warnings with the aim of setting out a series of stages under which the juvenile may expert to be reprimanded for a first offence, warned for the second offence, and prosecuted for the third.

Moreover, section 23 of the Criminal Justice Act 2003 (CJA 2013) establishes the situation where a conditional caution could be available to an offender. This is where:

- the authorised person (in a capacity as a police officer or prosecutor) must have evidence that the offender committed an offence;
- the authorised person decides there is sufficient evidence to charge the offender with the offence and that a conditional caution should be given to the offender in respect of the offence;
- the offender must admit committing the offence to the authorized person; and
- the authorised person must explain the effect of the conditional caution and warn the offender that failure to comply with any aspect of the conditions may result in the prosecution of the offence; and
- the offender must sign a document containing the details of the offence; an admission of guilt; consent to be cautioned and details of the conditions attached to the caution[612].

[611] [1993] 1 All ER 756.

[612] See Code of Practice for Adults Conditional Cautions (April 2013), which can also be accessed at: https://www.justice.gov.uk/downloads/oocd/code-practice-adult-conditional-

Apparently, in addition to the requirements of s.23 of the CJA 2013, as stated above, in deciding whether a conditional caution is appropriate, regards should be given to a range of factors such as the seriousness of the offence, the circumstances of the cases, the views of the victim, and the background, circumstances, and previous offending history of the offender. Conditional cautions normally are a proportionate response to low-level offending which allows the offender to make swift reparation to victims and communities, and therefore always conditions that must be attached to the caution should be appropriate to the offence, achievable and proportionate. The guidance on how adult cases should be prosecuted is provided by the Criminal Case Management Framework (CCMF) which seeks to disseminate good practice and compliance with the Criminal Procedure Rules[613].

The minimum age for a sentence of imprisonment is 21 and prohibits the imprisonment of under -21- s. 89, Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S) A). In fact, a minority of 17 to 20 –year-olds sentenced to detention in a young offender institution serves all or part of the term imposed in prison, but that does not alter the fact that the sentence was one of detention rather than imprisonment. Young offender institutions are for sentenced prisoners under the age of 21. The relevant consideration is the offender's age when sentence is passed, not his age when the offence was committed or even his age when he was found or pleaded guilty if that and the passing of sentence occur on different days. Under s. 83 of (PCC(S) A) 2000, a court shall not pass a first

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cautions-oocd.pdf, and CPS guidance at:
https://www.cps.gov.uk/publications/directors_guidance/adult_conditional_cautions.html (April 2013).

[613] See Criminal Case Management Framework guidance part 1 and 2 for the conduct of adult cases in the Magistrates' Court, and the Crown Court at:
https://www.webarchive.nationalachives.gov.uk/20100512160448/ccmf.cjsonline.gov.uk/

sentence of imprisonment upon an offender who is not legally represented, without giving him a chance to be legally represented.

Sentence of imprisonment could be either concurrent or consecutive. When a court deals with an offender for two or more offences by means of sentences of imprisonment it may either order that the terms of imprisonment shall run at the same time as each other (*concurrent*), or it may order that the terms of the sentence shall run one after the other (*consecutive*). Similarly, if a court passes a sentence of imprisonment on an offender who is already serving a term of imprisonment it may order that the term it imposes shall run concurrently with or consecutively to the other term. The judge or presiding magistrate should expressly state whether prison sentences are concurrent or consecutive. If nothing is said, they are presumed to be concurrent. Where consecutive sentences are imposed for two or more offences the aggregate sentence may exceed that which could have been imposed for any one of them[614]. A case in point is *Blake [1962]*[615] where for five offences under the Official Secrets Act 1911, Blake was sentenced to a total of 42 years' imprisonment, even though 14 years is the maximum for such offence. Consecutive sentences are wrong in principle if they are imposed for offence which, though distinct in law, arose out of a single act so that –looking at what the offender did in a common-sense way- he really only committed one crime. For instance, the case of *Hussain [1962]*[616] illustrates the appellant court's attitude to consecutive and concurrent sentences.

[614] See John Sprack, A Practical Approach to Criminal Procedure, page 415.
[615] [1962] 2 QB 377.
[616] [1962] Crim LR 712.

The principle in general is that sentences should be concurrent if offences arise out of the same incident. For example, in *Noble [2003]*[617] it was held that concurrent sentences should be imposed where multiple deaths arose from a single incident of dangerous driving; and similar reasoning was established in the case of *Cosco [2005]*[618]. With regards to consecutive sentences, they are applied as a matter of policy. For example, it has been affirmed in the case *White [2003]*[619] that a custodial sentence for failure to surrender to bail should be consecutive to any sentence for the offence in respect of which bail was granted[620].

It was emphasized in *Bibi [1980]*[621]as an important principle that, where loss of liberty is inevitable, the sentence should be kept as short as possible. As Lord Lane CJ put it in Bibi:

> *It is no secret that our prisons are at the moment dangerously overcrowded. So much so that sentencing courts must be particularly careful to examine each case to ensure, if an immediate custodial sentence is necessary, that the sentence is as short as possible consistent only with the duty to protect the interests of the public and to punish and deter the criminal. Many offenders can be dealt with equally justly and effectively by a sentence of six or nine months imprisonment as by one of 18 months or three years.*

[617] [2003] 1 Cr App R(S) 312.
[618] [2005] 2 Cr App R(S) 405.
[619] [2003] 2 Cr App R(S) 133.
[620] See Guidelines on Failure to Surrender to Bail at: http//www.sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.
[621] [1980] 1 WLR 1193.

The proposition of Lord Lane quoted above has been reinforced by the provisions of the Criminal Justice Act 1991, and similar sentiments were expressed by Lord Phillips CJ in *Seed and Stark [2007]*[622].

Prison population in England and Wales, keep increasing and overcrowding has been a problem. For instance the number of prisoners stood at **80,937** in September 2007, and by January 2012 had reached **87,668**. In 2015 July, there were **86,019** people in prisons and young offender institutions in England and Wales. The male prison population was **82,055** and the female prison population **3,964**[623]. As at 22 July 2016, the figures as it stands are **85.152** prisoners which brake down comprises of males **81.240** inmates and females **3.912**. Home detention curfew caseload is **2.048.**

Since 1945 the Prison Population has increased from **15000** to **85000**. The rise of the prison population in England since 1945 to 1990 was an average growth rate of 2.5% per year. Between1993-2012 the average growth rate was 3.4% per year and these keeps rising as at 2016. The average custodial sentence for those sentenced to immediate custody for all indictable offences handed down by judges has also increased for instance from 1993 to 16.0%, 2000 to 14.3% and in the year 2015 to 18.8%[624]

Admittedly, people are spending longer time in prisons. The rise of the prison population is due to the increase in the Immediate Custodial Sentenced (ICS) population. As at 28th July 2016, prison population serving less than 4 years is **17%**, population serving more than 4 years (excluding indeterminate) is **46%**,

[622] [2007] EWCA Crim 254.

[623]See Weekly Prison Watch - The Howard League for Penal Reform; Week ending Friday 28 August 2015. www.howardleague.org/weekly-prison-watch.

[624] Percentage is based on prison population figures as at 30 June each year.

those serving indeterminate is **20%** and recall is **16%**[625]. With regards to re-calls, as at 30 June 2016, **6,600** have been recalled under the Criminal Justice and Immigration Act (2008), and the Offenders Rehabilitation Act (2014). Recently, the crimes being dealt with by the courts have become more serious and so there are fewer and fewer prisoners serving short determinate sentences. For instance, in 1993, **54%** of the sentenced prison population were serving sentences of less than 4 years. By June 2003, this population had dropped to **50%** and as at June 2016, only around 1 in 3 (**34%**) sentenced prisoners were serving less than 4 years. The offence that makes-up of the prison population is changing towards offences that carry longer sentences. Comparatively, offences such as Violence against the Person (VATP) in 1993, offenders form **23%** in prison, and by 2016 June, formed **26%**. Sex Offences in 1993 were **10%**, and **17%** in June 2016. Drug Offences in 1993 were **10%** but currently **15%** in June 2016.

Apparently VATP and Sex Offenders are given an Extended Determinate Sentence (EDS) and around **75%** of prisoners serving EDS as at 30 June 2016 were either VATP or Sexual offenders. In 2012, the Imprisonment for Public Protection (IPP) sentence was abolished and a new Extended Determinate Sentence (EDS) was introduced. The majority of EDS are handed down for those convicted of sexual and violent crimes, and are made up of an appropriate custodial term plus an extended period of licence. There is no automatic release at the 'half-way point' of the sentence. The difference between EDS and IPP sentenc-

[625] Recall Offenders: are those who are released from prison on licence to continue serving their sentence under supervision in the community. Such offenders can be recalled to prison if they fail to comply with the conditions in their licence. Conditions could be requirements to be of good behaviour, not to commit further offences, to live and work only as approved by the supervising officer and not travel abroad without permission. Offenders can be recalled to custody from determinate and indeterminate (Life and IPP) sentences, as well as those who have been released on Home Detention Curfew (HDC).

es is that the EDS were 'determinate' whereas the IPP were 'indeterminate'. As more of the EDS's are handed down by judges, the prison population serving determinate sentences of 4 years or more has increased by **2,949** as at June 2016 which is **50%** since June 2015.

Despite the abolition of the IPP by the Criminal Justice Act (2003) in 2012, there are still around **3,998** IPP sentenced prisoners in the prison population as at 30 June 2016 which comprises of **98**% male and **2%** female. Indeterminate include life sentences which consist of either a minimum term (or tariff) that an offender must serve in prison before being considered for parole, or followed by an indeterminate period before parole is granted. So there is what could be called discretionary life sentences under s. 225 of CJA 2003 which covers offences such as rape, and robbery which have a maximum sentence of life or up to the court to determine whether life sentence should be given by considering the seriousness of the offence and the risk to the public or whole life order where the offender will spend the rest of their life in prison. For example, on June 30 2015, there were **56** offenders serving a whole life sentence. These include serial killers such as **Peter Sutcliffe**, **Ian Brady, Dennis Nilsson**, and **Rosemary West[626].** In the UK mandatory life sentences are given by judges to offenders who are guilty of murder under Schedule 21 of the CJA 2003 (as amended)[627], and as at 30 June 2016, **7,361** inmates were serving life sentences and within that, 3 in 4 have a tariff less than or equal to 20 years[628].

Unconvicted prisoners are separated from the convicted prisoners and have the following rights whereas on remand. An unconvicted prisoner may get help and

[626] See Offenders Management Statistics Publications.
[627] https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/life-sentences/
[628] See Statistics.enquiries@justice.gsi.gov.uk , also consult Ministry of Justice: Story of the Prison Population 1993-2016, England and Wales, 28th July 2016.

support such as ask for bail, keep their home and job, get ready for trial, keep in touch with family and friends, carry on being involved with or running a business, as long as it is legal. In the 12 months ending March 2013, the recent statistics, **48,584** people were remanded into custody to await trial. In the same year **35,470** people were remanded into prison convicted but awaiting sentence. This represented a decrease of 11% and 10% respectively from the same time previous year. In the 12 months ending March 2013, **10,900** people remanded in custody were subsequently acquitted. This is significantly lower than in the previous 12 months, however there were **7,400** cases in the Magistrates' court where the remand category was 'not known'. However, in the same year March 2013, **13,900** people remanded into custody went on to be given a non-custodial sentence. The remand population in prison at the end of June 2013 was **10,986**, down 3% from the previous year. Within this total, the untried population increased 1% to **7,755** and the convicted unsentenced population decreased 12% to **3,231**. This is partly due to measures introduced by the Legal Aid Sentencing and Punishment of Offenders (2012) Act[629].

On 30 June 2013, 184 children (under 18) in prison (21% of the total child prison population) were on remand, 35% fewer than the previous year. Keeping Children under custody is very expensive. For instance, in 2013-14 the average cost of placing a child remanded to custody in a Secure Training Centre was £187,000 per annum. This excludes associated costs of custody such as education and transportation. Remand prisoners spend an average of nine weeks held in custody awaiting trial and/or sentencing. Within March 2013, 64% of people received into prison on remand awaiting trial were accused of non-violent offences. 15% were remanded into custody for theft and handling of stolen goods,

[629] LASPO was enacted in December 2012, to restrict the use of remand.

and 9% for drug offences. Prison conditions in the UK is not bad as at now though their right to liberty is coerced, prisoners are treated with dignity. In summary, shorter sentences less than 4 years indeterminate sentences though decongest the prisons; it put the life of the public at risk when inmates are released at the half way point of their sentence. Also, first offenders given conditional cautioning and Offenders under home detention without supervisors are dangerous to the public. I contend that dangerous and violent crime offenders should be given longer sentences in order to avoid risking the life of the general public, and also offenders given conditional cautioning by the CPS must be supervised and quickly prosecuted in case they reoffend.

Having examined the imprisonment procedure and the sentencing powers of the courts in England and Wales, the dissertation shall further examined the right and rule regarding double jeopardy (*autrefois acquit and autrefois convict)* and the exceptions attached to it under the jurisdiction in England and Wales in order to distinguish from double jeopardy rule in Ghana.

4.8 Double Jeopardy Rule in the UK

The rule of double jeopardy as discussed above under the criminal law and procedure of Ghana is a constitutional principle that no one should be prosecuted twice to acquittal or conviction for the same offence. Under this rule, if the accused contends that he has on previous occasion been acquitted or convicted of the offence in question, he can plead '*autrefois acquit'* or '*autrefois convict'* depending on the outcome of the previous trial as discussed under the principle. However, recent legislation in England such as the provision in the Criminal Procedure and Investigations Act 1996 (CPIA) for retrial where '*tainted acquittal'* has been established and also the procedure under the Criminal Justice Act 2003 for retrial of serious offences where new evidence emerges has been enacted against the principle of double jeopardy; which shall be looked into much detail as a distinguish feature regarding '*autrefois acquit'* and *'autrefois convict'*.

Until 1988, whether autrefois did or did not apply had to be decided by a jury sworn in for the purpose. The Criminal Justice Act 1988 provided that:

> *"Where an accused pleads autrefois acquit or autrefois convict it shall be for the judge, without the presence of a jury to decide the issue"*[630].

Should the plea fail, the indictment is put in the normal way, the accused's right to plead not guilty being in no way affected. The applicability of the plea of autrefois is seen in the speech of Lord Morris of Brth-y-Gest in *Connelly v DPP [1964]*[631] which emphasises that a man cannot be tried for a crime in respect of

[630] See Criminal Law Act 1967, s. 6(1) (a); and John Sprack: A Practical Approach to Criminal Procedure, page 281.
[631] [1964] AC 1254.

which he has previously been acquitted or convicted; which might be read subject to the decision in *Beedie [1997]*[632], and to the provisions of the CPIA 1996 and the CJA 2003.

Moreover, in the case of *King [1897]*[633], he had previously been convicted of obtaining credit for goods by false pretences, and was held to be entitled to rely on autrefois convict when subsequently indicted for larceny of the same goods. But the cases markedly inconsistent as to the degree of similarity necessary before it can be said that a later charge is 'substantially' the same as an earlier offence. King may for example, be contrasted with *Kendrick and Smith [1931]*[634] where a conviction for threatening to publish photographic negatives with intent to extort money did not bar a subsequent prosecution for sending letters demanding money with menace, both prosecutions arising out of the same facts.

It is also important to look at what constitutes a conviction or an acquittal in England by considering case laws, and if after all there is a distinguish between acquittals or convictions on indictment and those following summary trial. For a plea to apply, the court trying the case must have been acting within its jurisdiction as established in the case of *West [1964]*[635] where a purported acquittal by magistrate on a charge which they were not entitled to try did not prevent their subsequently committing West for trial or his being convicted. Equally in the case of *Manchester City Stipendiary Magistrate ex parte Snelson [1977]*[636] , it was stated that discharge of the accused by the examining justices after com-

[632] [1997] 2 Cr App R 167.
[633] [1897] 1 QB 214, K.
[634] [1931] 23 Cr App R 1.
[635] [1964] 1 QB 15.
[636] [1977] 1 WLR 911.

mittal proceedings is not an acquittal, nor is the quashing of an indictment following a motion to quash.

Importantly, in the summary trial in the magistrates' court, there is an important distinction between the withdrawal of a charge by the prosecution and its dismissal by the justices[637]. Where the summons is withdrawn without the justices considering the merits, there is no acquittal such as to found autrefois. On the other hand, if the accused plead not guilty and the prosecution formally offer no evidence, so that the justices dismiss the summons, the accused is acquitted and there can be no further proceedings as established in *Grays Justices ex parte Low [1990]*[638].But no plea of *autrefois* can be founded on proceedings where the information is so faulty that the accused could never have been in jeopardy upon it as directed in *DPP v Porthouse [1988]*[639].To sustain a plea of autrefois convict, it is not enough that the court before which the defendant was first charged should have accepted his plea of guilt, or returned a verdict of guilty. It is necessary also that the court should have sentenced him, since the purpose of the doctrine is to avoid double punishment as directed in *Richards v The Queen [1993]*[640].Nevertheless, a finding of 'guilt' in disciplinary proceedings followed by the imposition of a penalty is not a conviction as held in *Hogan and Tompkins [1960]*[641], where prison escapees, who had been punished for the escape by the visiting committee of magistrates under the Prison Rules, could not rely on autrefois convict at a subsequent trial for the offence of escaping by force. More so, it is important to note that acquittals or convictions before foreign courts or by courts martial are in general sufficient grounds for autrefois. For instance, in

[637] See John Sprack: A Practical Approach to Criminal Procedure, page 284.
[638] [1990] 1 QB 54.
[639] [1988] 89 Cr App R 21.
[640] [1993] AC 217.
[641] [1960] 2 QB 513.

Aughet [1919][642], it was affirmed that where however an accused has been convicted and sentenced in his absence by a foreign court, but there is no realistic possibility of his ever returning to the country concerned to serve his sentence, autrefois convict will not apply if he is prosecuted for the same matter in England as again directed in *Thomas [1985]*[643].

Under section 54-57 of the CPIA 1996, which relate to *'tainted acquittals'*, it constitute a major exception to the availability of autrefois acquit. They enable the prosecution of an accused for a second time for a crime of which he has already been acquitted at trial, if the following conditions are met:

a) a defendant has been acquitted of an offence (s. 54 (1) (a); and
b) a person has been convicted of an "administration of justice" offence involving the interference or intimidation of a witness or juror, (s. 54 (1) (b);
c) the court before which that person was convicted "certifies" that there is a real possibility that the acquittal resulted from the interference or intimidation; and that it would not be contrary to the interests of justice to proceed against the acquitted person- s. 54(2).

Under section 54(3) and section 55 of the CPIA 1996, where a court provides a certificate of tainted acquittal, an application may be made to the High Court for an order quashing the acquittal. The High Court will then make an order if the following four conditions set out are satisfied:

1. it appears likely that the acquitted person would not have been acquitted were it not for the interference or intimidation;

[642] [1919] 13 Cr App R 101.
[643] [1985] QB 604.

2. it would not be contrary to the interests of justice to take proceedings against the acquitted person;
3. the acquitted person has been given a reasonable opportunity to make written representations to the court; and
4. it appears likely that the conviction for the administration of justice offence will stand.

These provisions only apply in relation to acquittals in respect of offences alleged to have been committed on or after 15 April 1997.

Under the rules in England and Wales, there is new evidence retrial which is a statutory exception to the rule against double jeopardy. This rule is contained in sections 75-95 of the Criminal Justice Act 2003. Under section 76 which is an application to Court of Appeal, it is enacted that: a prosecutor may apply to the Court of Appeal for an order— quashing a person's acquittal in proceedings within section 75(1), and ordering him to be retried for the qualifying offence, and in this wise a determination would be made whether the acquittal is a bar to the person being retried.

In this wise, the application to the Court of Appeal to quash the acquittal requires the personal written consent of the Director of Public Prosecutions who must be satisfied under s. 76(4)) that: there is evidence as respects which the requirements of section 78 appear to be met, and therefore it is in the public interest for the application to proceed, but should not be inconsistent with the obligations of the UK under Article 31 or 34 of the Treaty on European Union relating to the principle of *ne bis in idem*.

Under the CJA 2003, the Court of Appeal must order a retrial if there is new and compelling evidence in the case; and it is in the interest of justice for the order to be made. As directed under the Act, s. 78 indicate that if there is new

and compelling evidence against the acquitted person in relation to the qualifying offence the person shall be retried. Evidence is new if it was not adduced in the proceedings in which the person was acquitted, and evidence is said to be compelling if it is reliable, substantial and appears highly probative of the case against the acquitted person".

Interest of justice under s. 79 is determined having regards to: (a) Whether existing circumstances make a fair trial unlikely; (b) For the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed; (c) Whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition; (d) Whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.

For instance in *Dobson [2011]*[644], it was held that new scientific evidence in the form of *DNA* linking the defendant to the scene of the murder of Stephen Lawrence (of which he had previously been acquitted) was compelling. An application to order or refuse a retrial in certain circumstance can be the subject of an appeal to the House of Lords on a point of law under s. (81) of the CJA 2003. Normally the acquitted person must be served with a copy of the application within two days, and be charged with the offence in question. He is entitled to attend and be represented at the hearing at the Court of Appeal (s. 80) of CJA 2003; and if a retrial is ordered, it must be an indictment preferred by the direction of the Court of Appeal (s.84) of CJA 2003. For example, retrial provisions

[644] [2011] EWCA Crim 1255.

were utilized in *Dunlop [2006]*[645] . In this case, Dunlop had been tried for murder in 1989 and 1991. The jury failed to agree on both occasions, and an acquittal was then ordered. During the course of 1999, Dunlop confessed to the murder to a prison officer while in prison on an unrelated matter, and he made similar admissions to other people. He then pleaded guilty to perjury in 2000, and was sentenced to six years' imprisonment. In 2006, the Crown applied for an order under s.76 of the CJA 2003 quashing Dunlop's acquittal, and ordering a retrial. On appeal, the Court quashed the acquittal and granted the application for retrial, claiming that it was not unjust for him to be retried. As he had been aware of the possibility that the double jeopardy rule might be altered, and his motive for making some of his confessions was in order to obtain psychiatric help. There are also exceptional circumstances whereby a third trial or retrial is granted which is not considered to be unjust for the interest of justice. For instance, where two juries fail to reach a verdict, the presumption is that the prosecution will not seek a third trial unless there are exceptional circumstances. Factors that might justify a third trial include:

- jury interference (this may require further investigation for an offence of jury interference); and
- additional evidence that has recently come to light and was not available at earlier trials.

The case of *R v Bell [2010]*[646] involved an appeal against conviction for murder, following a third trial. It was argued on behalf of the appellant that the third trial amounted to an abuse of process. The conviction was upheld. The Lord Chief Justice however provided words of caution in relation to the use of retrials as:

[645] [2006] EWCA Crim 1354.
[646] [2010] EWCA Crim 3.

> *"... The jurisdiction which permits a second re-trial after two jury disagreements in circumstances like the present must be exercised with extreme caution. The broad public interest in the administration of criminal justice leads us to the clear view that a second re-trial should be confined to the very small number of cases in which the jury is being invited to address a crime of extreme gravity which has undoubtedly occurred (as here) and in which the evidence that the defendant committed a crime (again, as here), on any fair minded objective judgment remains very powerful."*[647]

The summary of key issues raised under the two limbs of *autrefois* is that new evidence retrial which is a statutory exception to the rule against double jeopardy empowering the prosecutor to apply to the Court of Appeal to quash acquittals and therefore order for a retrial in the UK will compel the prosecutor to relax and relent in their first investigation and evidence for proceedings, considering the fact that they could have a second chance to prosecute when the first fails. Though the rule would enable the prosecution service to prosecute offenders deserving of conviction instead of acquittal due to errors and lack of substantiate evidence. The rule can also be a loophole for criminals to get away if retrials are prohibited by law. Therefore I recommend that there should be a rule to end litigation and therefore a length of time limitation to bar new proceedings for interest of justice; and avoid interference or intimidation so that the exceptional rule against double jeopardy might not be abused.

[647] See the Crown Prosecution Service Website:
http://www.cps.gov.uk/legal/p_to_r/retrials/#a05

4.9. Conclusion

The English criminal justice proceedings has been examined practically and in doing so, it has been necessary to limit it to prosecution of criminal offences, legal aid regime which provide legal representation and counsel for criminal accused funded by the state, specific rights of defence of the accused, trial stages of crime and measures of coercion. Such procedure elements and features have been discussed because it would be relevant in the comparative section of the dissertation at the subsequent chapter which would help to draw conclusions to improve the Ghana criminal system. It could be reflected under this chapter that, when a crime is committed and hence reported, the police decide if they can investigate the case. Investigation of criminal cases sometimes take a long time and even some are never solved and they might not be able to catch the offender, or there might not be enough evidence to charge someone with the crime and therefore prosecute the person. Minor crimes in England and Wales specifically are dealt by the police in a different manner by giving a caution or warning, a police fine-called a penalty notice, and a community resolution. In this wise, the victim sometimes agrees to accept an apology if it is a minor incident or nevertheless, the police may decide to charge a minor crime. Restorative justice approaches can also be used in community resolution in UK. Prosecution never proceeded without the consent of the Crown Prosecution Service (CPS) and the DDP which by so doing distinguishes serious and complex crimes. As a general rule, the CPS considers whether there is enough evidence to prove the case and also if it is of the public interest to bring the case to court. Most crimes are dealt with in the magistrates' court and the court will hold hearing where magistrates or jury decide if someone is guilty of the crime. Serious crimes such as murder or robbery are passed on or dealt by the Crown Court instead of the magistrate court. Offenders are sentenced and coerced and

the motive of their coercion is to punish the offender, protect the public, change the behaviour of the offender, and get the offender to make up for their crime, and cut crime in the future. Sentences melted on individual offenders guilty of crime could be a court fine, a community sentence such as a curfew, unpaid work or going on a drug treatment programme, a prison sentence and a suspended prison sentence- thus where the offender is made to serve their sentence in the community without going to prison. In criminal proceedings in the UK, to enhance fair trial and procedure fairness, it is crucial to disclose used and unused materials by the prosecution to the defence and also by the defence to the prosecution, and therefore disclosure rule is not held to be discretional unless for public interest. Also, Juveniles trials are done at the special court- youth court and special principles are applied to juvenile offenders as compared to adult offenders, and in all cases, procedural rights are up held to enhance fair trial.

Chapter 5

COMPARISON BETWEEN UNITED KINGDOM AND GHANA CRIMINAL PROCEDURES

5.0 Introduction

English law means the legal system of England and Wales, and is the basis of common law legal systems. English criminal law derives its main principles from the common law which is exactly the practice in Ghana and therefore makes the comparison between the two systems more unique and straight forward. Therefore the comparison would avoid the Scottish criminal law and procedure, and that of Northern Ireland but stick only to England and Wales in comparison to Ghana.

Since the criminal law procedure of Ghana has been briefly dealt with at chapters 2 & 3 respectively, it would not be repeated in this chapter. The distinguishing features shall consider the Power to Prosecute, Disclosure Rule, Private Investigation, Legal Aid Funding, Time Duration of Adjudication Process, Double Jeopardy Rule, and Customary Law Proceedings due to the sharp contrast existing between the two systems as well as the reasons for such dichotomy. The reason why the above features have been chosen for examination is that properly comparing and contrasting their functioning would unveil the reasons for the similarities and the differences between the two systems under comparison. The purpose for treating such distinct features is beyond comparing but rather to improve the Ghana system by taking lessons from the English legal framework and system if possible. I have used and capitalized on different approaches with regards to my criticisms and evaluation of the Ghana and the

British criminal proceedings, systems and legal framework; and the reason is that my main focus is on the Ghana system but the British system is so important that it is been used to draw ideas and proposals in order to improve the Ghana system. That is why my criticisms on the UK system have not been so compelling as compared to the Ghana system but it is not that the UK system is without flaws. My main concern in the comparative analysis is not to improve the British system, though some proposals have been raised. However, the use of the British system in improving the Ghana criminal system is useful, crucial and very compelling. As done in the Ghana case, case laws have been used in my endeavour to elucidate and illuminate the constrains of the right to fair trial within the Ghana criminal proceeding, and therefore same method has been used in dealing with the British system of fair trial as it pertains in the criminal procedure law. Though a lot of scholars have written about the English system of fair trial, I deem it as a choice to use case laws and court judgements as done in the Ghana system to create the awareness of the constrains to the full enjoyment of the right to fair trial as a norm within the contemporary legal culture and phenomenon in Ghana criminal proceedings. The English system and case law is more important to the Ghana system because judges, legal practitioners, experts, law students, and scholars in Ghana both read English case laws and judgements more than scholarly work. Interestingly, judges in Ghana from the lower courts to the Supreme Court do cites and quotes English cases in their judgements more often, though English cases are not binding in Ghana, yet they serves as persuasive authority to the judges. It is therefore certainly against this background that the Ghana system is being compared to the English system to draw experience and conclusions to improve the Ghana system.

This section of the dissertation is to examine the distinguishing features of Ghana and the United Kingdom criminal law procedure by considering the prosecutorial roles, disclosure rules, investigation rights, double jeopardy rules, the provision of legal aid, time duration of adjudication process, and the reason why there is an existence of customary law in Ghana as a subsidiary law and traditional institution alongside the constitution and statutes but not available in the legal system of England and Wales. The reason why the above features have been chosen for examination is that properly comparing and contrasting their functioning would unveil the reasons for the similarities and the differences between the two legal systems under comparison and by so doing lessons could be drawn from one to improve the other. The first feature to be distinguished is that of the customary trial procedure because that is what cannot be compared to any of the UK systems.

5.1. Customary Trial Procedure in Ghana

The use of customary arbitration and procedure which functions alongside the Court system in Ghana and it's distinction to England and Wales will be considered first because it is a feature that cannot be compared as affirmed above.

Customary law and trial proceedings exist in Ghana alongside the Courts system as a subsidiary judicial institution which is not available in England and Wales and therefore it is a distinction. Per the 1992 Constitution of Ghana article 11(1) and (2), the laws of Ghana include the "*existing laws*" which also comprise the *rules of customary laws*. Customary laws are interpreted by traditional Chiefs who are experts and are therefore classified as part of the judicial institution in Ghana. Apart from judicial functions, special responsibilities have

been assigned to traditional councils, regional houses of chiefs and the National House of Chiefs in respect of customary law and matters concerning chieftaincy. The role of the National House of Chiefs has been established under article 272 of the 1992 Constitution, Regional Houses of Chiefs under article 274(3) (b), (e), and (f); and traditional councils, and chieftaincy institution as a whole under s. 3 of Act 370. Traditional rulers (chiefs) in Ghana are charged with a responsibility by statute to ensure assimilation, declaration, modification and alteration of customary laws under sections 49 to 55 of Act 759. Also under article 39(2) of the 1992 constitution, it has been enacted that:

> *"(2) The State shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole; and in particular that traditional practices which are injurious to the health and well-being of the person are abolished".*

This implies that the chieftaincy institutions in the cause of interpreting and adjudicating have the power to order abolition of customs which are caught by the provisions of article 39(2).

The judicial committees of chiefs have power to investigate questions relating to the existence and content of customary law which arise during the trial of cases or hearing of appeals. These powers which are exercisable under s. 24 (6), (7), and (8) of Act 370 or s. 31 (7) of Act 759 allow the committees to consult textbooks, reported cases, and expert witnesses on customs and customary law. An example is in *Akenten II v Ayeremah [1997]*[648]. In that case the trial judicial

[648] [1997] SCGLR 384.

committee of chiefs in the Brong Ahafo Regional House of Chiefs appointed a sub-committee to travel to Yeji *(a town)*, the traditional authority from where the dispute emanated, and the sub-committee took evidence on the custom in dispute. Names of chiefs are registered in National Register of Chiefs and are published in the Chieftaincy Bulletin and therefore gazette. A person aggrieved by the decision of the National House of Chiefs not to register the name of a chief may appeal to the Supreme Court under s. 50(7) of Act 370, or s. 59(7) of Act 759.

Membership of houses of chiefs is restricted to chiefs whose names appear in a legislative instrument made by the President under s. 6(2) of Act 370, and s.6(1) of Act 759. The National House of Chiefs is composed of five paramount chiefs from each region (10 regions in Ghana) elected by members of each regional house of chiefs. They thus make a total of 50 members. Under s. 271 (2) of the 1992 Constitution, and Act 370, s.1 (2), (3), (5); and s. 1(3) and (5) of Act 759, it is headed by a President, and assisted by a Vice President.

Since customary law arbitration and proceedings in Ghana have been dealt with under chapter 3 part 3.1 of the dissertation, it would not be repeated over here. However, it is equally important to note that:

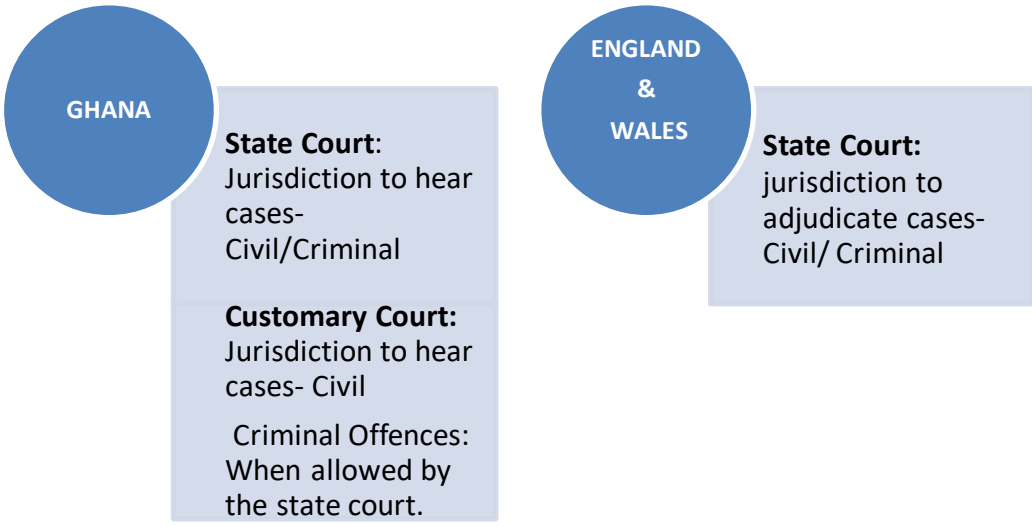
- The power of chiefs to act as an arbitrator in customary arbitration in any dispute is established under-s.30 of Act 759 (Chieftaincy Act 2008).
- The staff of the Traditional Council or Divisional Council is appointed by the President of the State; and therefore the Regional Houses, National House, Traditional Councils and a Divisional Councils are funded out of the

consolidated fund by the state as parliament may allocate to them- article 195 of the 1992 Constitution.

- A lawyer or witness appearing before the Judicial Committee of chiefs for purpose of proceedings have same privileges as before the High Court- s. 38(1) and (2) of Act 759 (2008).
- Criminal cases can be settled through customary arbitration if ordered by the court- s.96 of the ADR Bill 2007.
- With the exception of felony cases, customary courts can settle misdemean-or offences- s. 73 of Act 459 (Court Act 1993).
- In exercising judicial powers, the National House of Chiefs or Regional House of Chiefs shall have the powers, rights and privileges that are vested in the High Court judge at a trial in respect of enforcing the attendance of witnesses and examining them on oath- s. 33(3) and (4) of the Act 759 (2008).
- Enforcement of the judgement of the Houses of Chiefs or Traditional Councils is done by either the District Magistrate Court or the High Court- s. 37(1) to (4) of the Chieftaincy Act 2008.
- Appeals are available over cases decided by the Traditional Councils to the Regional Houses of Chiefs, and to the National House of Chiefs. An appeal against the decision of the National House of Chiefs in the exercise of its jurisdiction lies to the Supreme Court, and appellate jurisdiction lies to the Supreme Court with leave of the National House or the Supreme Court-ss. 23 and 24 (a), (b) of the Chieftaincy Act 2008 (Act759).

It is therefore interesting to observe that in the adjudication of criminal cases or offences Ghana has the State Court institution as well as the Customary Court institution which work together to administer justice while in England and

Wales, the Court is the only institution with jurisdiction to deal with criminal cases or offence. This is represented on a diagram below:



The reason why Ghana has two institutions with the jurisdiction to deal with cases either at the State Court or Customary Court is a distinction to England and Wales. Before the arrival of the colonists (the British) in Ghana (the then Gold Coast), life was organised and revolved around the customary leaders who were the head of the community. The chiefs were the rulers or governors before the coming of the British which means the functions of the traditional leaders by then were political in nature, and therefore included judicial roles in their communities. The advent of the colonialists did not change the status of "chiefs" and "chieftaincy" in Ghana. Chieftaincy means the institution through which the system of African traditional rule was conducted. The policy of the British colonialists who colonialized the Gold Coast (Ghana), notably Lord Lu-

gard, made use of the indigenous institutions found on the ground. The indigenous political institutions were allowed to exist so long as they conduced to facilitating the government of the colonialists.

Under the British system, no effort was made to abolish the indigenous institutions (chieftaincy). The British instituted the European and the Westminster form of government to improve and complement what they found already in existence in the Gold Coast. That led to the dual political and judicial systems made up of the English system and the African indigenous traditional system which have functioned and existed simultaneously alongside each other till now. Article 270 (1) of the Constitution 1992 establishes that the institution of chieftaincy, together with its traditional councils as established by customary law and usage, is hereby guaranteed. Therefore the main reasons why the two institutions function together in Ghana is that they complement each other and both are backed by statutes and constitutional instruments. Also traditional chiefs in Ghana have pervading influence over their subjects and the people of Ghana have confidence in their chiefs and hence cherish and respect their decisions and judgements. Traditional institutions are of great significance to every community in Ghana to the extent that it would be inconceivable to think of its abolition. Communities in Ghana abide and adhere to their customs and such customs are interpreted by the traditional chiefs who are indeed the custodians of the customs.

5.2. Power to Prosecute in Ghana and UK

The power to begin a prosecution in Ghana and the United Kingdom (England and Wales) has not got any sharp contrast as both procedures have been dealt with under chapter 2 with regards to Ghana and chapter 4 in the case of the UK respectively. Under article 88 (3) of the 1992 constitution of Ghana it is clearly enacted that the Attorney-General is sole responsible for the initiation and conduct of all prosecutions of criminal offences against individuals and companies which comprises of the public prosecutors headed by the Director of Public Prosecution. Under s. 56(1) to (3) of Act 30, substituted by s. 3 of Act 633 (2002) the Attorney General may appoint legal practitioners to prosecute on its behalf in a criminal cause, and also the police through an appointment of public prosecutors instrument 1976 (EI 4) are empowered to prosecute at the lower courts such as the magistrate courts and circuit courts. It could be deduced that under the laws of Ghana, private individuals are not permitted to prosecute in criminal cases as established under s. 3 of Act 633 (2002) and s. 139 of the Act 30 (1960). The public prosecution division of Ghana is not an independent body but attached to the Attorney General department, and under the ministry of Justice. Statistically, the Ghana Prosecution Service (GPS) has 145[649] state prosecutors who perform prosecutorial functions in addition to police officers (above the rank of sergeant) authorized by the Attorney –General to prosecute cases at the magistrate and circuit courts. One should not lose sight of the fact that these police officers are not trained to perform prosecutorial roles and some of them do it unprofessionally and hence mislead judges in most instances resulting to wrong convictions or acquittals. In Ghana, State attorneys are available at only Accra which is the capital, and the 10 regional capitals. There are no state attor-

[649] Outcome of my personal interview with the Director of Public Prosecutions of Ghana, and according to statistics and data on the 16th July 2015.

neys or prosecutors at any of the 216 distinctive metropolitan, municipal and district levels where magistrates or circuit courts are situated[650]. In 2014, the state prosecution service prosecuted 740 criminal cases being substantive and cases in motion, 682 cases (appeals, bail application and mitigation of sentences). This statistics is for only Accra the capital[651]. As at July 2015, 359 criminal cases have been prosecuted, out of which 62 cases are at the Appeal Court, and 15 at the Supreme Court (*Statistics available for only Accra)*. Criminal cases in Ghana are investigated by the police and the BNI and therefore under statutes private investigators are not allowed under the jurisdiction of Ghana.

There is an option whereby juvenile offenders are given caution by the police instead of charges and prosecution under s. 12(1) to (8) of the Juveniles Justice Act 2003 (Act 653). Meanwhile cautioning is not available for adults in Ghana.

On the other hand, in England and Wales, the power to prosecute individuals and companies is in the hands of the Crown prosecution Service (CPS) under the s. 1(1) of the Prosecution of Offences Act 1985. However, individual citizens are allowed to prosecute against individuals who are believed to have offended the law. The CPS in England and Wales has some 8,316 who work to prosecute cases in addition to private prosecutions and other special prosecutors who are in charge of Serious Fraud Offences in a caliber of lawyers, accountants, and investigators.

Based on the 2011 census the population of England was 53.012m (84% of the UK), Scotland was estimated at 5.295m (8.4%), Wales was 3.063m (4.8%) and Northern Ireland 1.811m (2.9%).

[650] Statistics from the prosecution division of the Attorney-General Department, Accra.

[651] Statistics and data for prosecution of criminal cases from the other 9 regions in the country are not available at the DPP's department.

Moreover in addition to police investigators in England and Wales, private investigators are allowed to function alongside the police investigators. Private investigators in the UK are not subject to direct licensing or regulation. Powers to regulate under the Private Security Industry Act 2001 defined private investigation as:

> *any surveillance, inquiries or investigations that are carried out for the purpose of—(a) obtaining information about a particular person or about the activities or whereabouts of a particular person; or (b) obtaining information about the circumstances in which or means by which property has been lost or damaged*[652]

The Data Protection Act 1998 required all private investigators (and others) processing personal information to register themselves as a data controller with the Information Commissioner's Office. As of January 2012, some 2,032 registered data controllers claimed they were operating a business as a private investigator. Threshold Security believed that there were between 3,000 and 10,000 investigators operating in the UK [653] [654].

Private investigators have often been involved in tracing witnesses or serving people with court documents, on behalf of lawyers. Law firms may also employ private investigators for surveillance or background checks, or to obtain evidence for use in court[655]. Dan Morrison of Grosvenor Law LLP explained that "most lawyers, particularly in litigation matters, would regularly instruct inves-

[652] Private Security Industry Act 2001 Schedule 2 Section 4.
[653] Ev w6 [Threshold Security].
[654] See House of Commons Home Affairs Committee, Private Investigators Fourth Report of Session 2012-13.
[655] Q 403 [Julian Pike]; Ev 64 [ABI].

tigators".[656] Considering both the Ghana and England system of prosecution, it could be observed that the two systems obligate the prosecution to perform similar roles such as:

1. deciding which cases should be prosecuted having been informed by the police– keeping them all under continuous review; base on two important limbs such as the public interest, and interest of justice;
2. determining the appropriate charges in more serious or complex cases – advising the police during the early stages of investigations;
3. prepares cases and presents them at court - using a range of in-house advocates, self-employed advocates or agents in court (Only under the system of England does public prosecutor appears in both at the lower and the highest courts) to perform prosecutorial duties; and
4. Provides information, assistance and support to victims and prosecution witnesses.

Notwithstanding the performance of the above similar duties, there are similarities and differences between the structure and functions of the Crown Prosecution Service, and the Ghana Prosecution Service. Therefore such a contrast shall be examined below.

[656] Q 403 [Dan Morrison] .

Similarities between the two prosecuting institutions (Ghana/England & Wales)

Ghana	England & Wales
• The prosecution institution is public, and headed by the Director of Public Prosecution with legal standing. • Investigations of crime are done by the police and dockets are given to the state prosecutors for consideration, studying and prosecution. • The GPS has power to discontinue prosecution (*nolle prosequi*) - ss.54 and 55 of Act 30 (1960).	• The Crown Prosecution Service is public and headed by the Director of Public Prosecution – s.1 (1) Prosecution of Offence Act 1985. • Investigations of crime are done by the police and handed over to the CPS for prosecution. • The CPS has the discretion to discontinue prosecution- s. 10 of the 1985 Act.

Differences: Ghana and England Prosecuting institutions

Ghana	England & Wales
• No private prosecution is available. • State prosecutors not available at the police stations and the lower courts.	• Private prosecution is available. • State/ private prosecutors are available at all police stations and courts.

• Prosecutions at the lower courts are done by police officers. • No alternative prosecution method. Once an offence is committed, the police charge the offender, and prosecution proceed. However, conditional caution procedure is available for juveniles under s. 12 of the Juveniles Justice Act 2003 (Act 653). • Inadequate state prosecutors. A population of 25 million plus with 145 state prosecutors who even still complain over conditions of service and most often absent at court due to strike[657] actions against the government. • Private investigation is prohibited by law in Ghana.	• Prosecutions at the lower courts are done by prosecutors (lawyers). • The principle of conditional cautioning is a statutory alternative method to prosecution such as reprimand and warning which is available for juveniles and adults- s. 22(2) of the Criminal Justice Act 2003. • There are adequate prosecutors with sophisticated resources and proper budgetary allocation whereby priority is given to the justice system. • Private investigation is allowed in England and Wales.

[657] State attorneys were on strike for more than a month in July 2015 and failed to appear at the Courts for prosecutions while courts were in session. Judges were compelled to adjourn all cases due to the absence of the prosecutors.

The reasons for the similarities and differences exiting between Ghana and the UK prosecution procedures and functions would be interesting to be looked at and that is certainly what is to be focused. The similarity is due to the fact that the Ghana legal system is based on the English legal system. In fact it is a legacy and therefore the similar legal culture and framework between Ghana and UK is due to colonial relationship between the two nations. However, the differences in the prosecuting institutions and methods employed is due to the reasons that the English legal system gives much priority to standardised the legal norms in order to ensure fairness for the interest of justice in prosecution. Therefore state and private prosecutors who are professionals are allowed to function together which ensures quality and healthy competition in prosecutorial roles and avoid partiality and bias because cases not properly investigated by the police or prosecuted by the Crown Prosecution Service whether intentionally or mistakenly, or perhaps through the principle of *nolle prosequi* could be taken up by either professional and private investigator or prosecutor; though prosecution may need the approval and consent of the director of public prosecution.

Ghana on the other hand as I may put it, has not given priority to fairness and interest of justice and therefore still depends on the police officers who are not professional attorneys or trained prosecutors to prosecute at the Magistrate's and Circuit Courts, where much of the criminal offences and trials such as summary, indictable and either way offences are tried for the mere reasons such as, Ghana is a developing country and therefore does not have the economic strength to employ more state prosecutors. Comparatively, Ghana has a total Gross Domestic Product (GDP) of **37.86** USD billion as at 2015 but the percentage allocated for the justice system has not been available for me. However,

the Gross Domestic Product (GDP) of the United Kingdom was worth **2848.76** billion US dollars in 2015. Report suggests that violent crime costs the UK economy more than £**124** billion a year in 2013[658] which was a total of **7.7**% of the UK's GDP[659] in 2013. It could be observed that the amount the UK spends on its justice system a year is even bigger than the total GDP of Ghana a year. So it is therefore understood that funding could be a factor and therefore a challenge in Ghana which has led to the small number of state prosecutors in the country (145 prosecutors) available only at the regional capitals. However, the numbers of prosecutors are very small for a nation like Ghana. During my interview in Ghana, I realised that the majority of the judges and the director of public prosecution are of the view that Ghana is too young for private prosecution and investigation due to the rate of corruption in the country, but rather the current institution needs to be strengthened. Few of the judges are also of the opinion that instituting a private prosecution alongside the state prosecution as done in the UK would be a great phenomenon to improve the system in Ghana. There is also no conditional cautioning in Ghana for adults as an alternative in lieu of charging by the police and prosecution as compared to UK which is probable because Ghana has not got proper identification of person's method which corresponds to the domiciles of the offenders. Once the offender gets out of the hands of the police, it becomes difficult to trace them or monitor them, hence, the strict adherence to the method of charging, prosecution, and custody of offenders for even simple crimes. However, issuing national identity cards to citizens in a country is also a better way of controlling crime in a sense that criminals can easily be identified and prosecuted. This is what must be done in Ghana and therefore failure to do that cannot be attributed to economic reasons

[658] By Martin Evans, Crime Correspondent 12:01am BST 24 April 2013.
[659] See Office for National Statistics and www.ons.gov.uk/economy/grossdomesticproductgdp.

and therefore use as a yardstick to justify why there is no alternative method of prosecution such as conditional cautioning for lack of identification as it pertains in Ghana.

5.3. Legal Aid Funding in Ghana and England Contrasted

Legal aid funding is available in both jurisdictions under comparison and review but what makes it come under this part is the fact that it is given much priority and therefore functional under the legal system of England and Wales than Ghana where due to its dysfunctional nature many citizens and the accused are not even aware of its existence. Even in Ghana there is a clear tendency that if people are aware of something called legal aid, then everybody would be relying upon the scheme for legal funding meanwhile the scheme is under resourced by the government and the ministry of justice. My personal interview with two Human Rights High Court judges in Ghana and also the Ghana Legal Aid Director recently in Accra during my research revealed that legal aid is poorly resourced and financed and is like it does not even exist in the system. In Ghana the legal aid is controlled by the Legal Aid Scheme Act, 1997 (Act 542), whereas in England and Wales it is regulated by the Legal Aid Act 1988, and Access to Justice Act 1999.

The following can be identified as the disparity between the functioning of legal aid in Ghana and the United Kingdom:

- In England and Wales, criminal and civil legal aid is properly financed by the government and priority is given to interest of justice whereas in Ghana legal aid provision in criminal cases are poorly financed but in civil

cases, much is resolved through alternative dispute resolution (ADR) method.

- In England and Wales, legal aid is provided from the police station-pre-charge advice, representation is provided at the courts (Magistrate, Crown Court, High Court, Appeal Court, and in few instances at the Supreme Court), and further advice is provided to prisoners by legal aid lawyers. Even there is legal help line where individuals can get telephone advice from solicitors for free and legal advice centres. On the contrary, such services are not available in Ghana.
- In England and Wales, interest of justice test and the means test are the two most essential criteria for the award of public funding of a counsel to a defendant by completing the forms CRM14 (Application for Legal Aid in Criminal Proceedings) & CRM15 (Financial Statement for Legal Aid in Criminal Proceedings), but in Ghana the means test is what is considered by completing the application form which test minimum wage of the accused. For example in the UK the interest of justice test is automatically satisfied in a case where an accused is charged with an indictable-only offence which would be sent to the Crown Court. Moreover in the UK where an accused is charged with a summary-only or either-way offence, a representation order will only be granted if the Interest of Justice criteria is met, but where an either-way offence fails the interest of justice test but is subsequently sent to the Crown Court, the Interest of Justice test is automatically satisfied by the sending. In Ghana, the interest of justice test is awful and not given any pre-eminence. This can be depicted from the fact that in uncountable scenarios the accused are not represented because they could not hire the services of a private advocate meanwhile most of them stool

trial at the Circuit or High Court, but for the interest of justice, these defendants should have been provided representation by the legal aid.

- Legal aid services in England & Wales are delivered through two ways-service providers, thus contracted providers and referral providers. This means that a number of law firms have been contracted by the government as indicated in the Legal 500 UK and such are able to handle criminal cases and therefore apply for the payment of the legal services according to the hours they spent on each case and also according to the scale of wages agreed to pay by the legal aid. There are advocates too who deal with cases as they are referred to them and are paid for by the legal aid when such cases are disposed of. Meanwhile in Ghana few cases are referred to lawyers by judges[660] to handle on pro-bono, or claim for their professional fees[661] for each case they are able to dispose of from the legal aid.

The reason for the similarity of instituting a legal aid within both legal systems could be because it is an international legal norm requirement established under article 14(3) (d) of ICCPR[662]. However, the difference in its functioning is because the English system to some extent adheres to interest of justice principle whereas in Ghana interest of justice is not given priority. The availability of legal professionals dedicated to serving within the legal aid in Eng-

[660] In the course of my interview with some High Court and Appeal Court Judges (in charge of specialized criminal court for Fraud and Money Laundering) and crime, I asked a simple question like do you often have an accused standing before you at the hearing without a representation and what do you do in such instances? Proceed to the hearing or you make sure accused has a representation? Most of the answers were we recommend them to the legal aid for representation and most of them get the assistance.

[661] Professional fees scale of the legal aid scheme is 20% of the Bar charging fees.

[662] International Covenant on Civil and Political Rights article 14 (3) (d) states that "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

land is far more higher than Ghana which is because the payment of legal service fees to legal aid advocates by the government as compared to the bar professional fees in England is higher than Ghana legal aid scheme which pays 20% of bar standard fees for each case disposed of by advocates which is not attractive for lawyers to spend their time on legal aid cases.

5.4 Disclosure Rule in Ghana and England: Contrasted

Under Section 182 (1) (a) and (b), and (4) of Act 30 (Criminal Procedure and Juvenile Justice Act of Ghana) dealing with Bill of Indictment and Summary of Evidence, It is established that:

> *"(1) the prosecution shall furnish the Court and the accused with—*
> *(a) a bill of indictment which shall state in writing the charge against the accused;*
> *(b) a summary of evidence which shall comprise a list of the witnesses who the prosecution propose to call at the trial and a summary of the evidence to be given by each witness and a list of the documents and things it proposes to put in evidence at the trial.*
> *(4) The prosecution shall, unless the Court otherwise directs, deliver into the custody of the Court all and things which, according to the summary of evidence, are intended to be put in evidence at the trial."*

Under s. 182 (1) (a) quoted above, it is stated that the prosecution shall furnish the "Court and the accused" which means disclosure of evidence and documents to the court and the defence. However, s. 182 (4) emphasizes that documents in the custody of the prosecutor which includes summary of evidence, as directed by the court shall be delivered into the custody of the court but not to the defence. It is therefore obvious that in Ghana, there is disclosure of documents to the accused in indictable offences, but not in summary offices.

Also under s. 268 of Act 30, it is established that:

> *"(1) At any time before, or during the course of, the trial, the accused may require the police to deliver to the accused a copy of a statement taken by them from a person who is listed in the summary of evidence or in a supplementary summary or is actually called on as witness".*

Mostly in the above situations where there should be disclosure to the defence, to ensure equality of arms which is a right to avoid miscarriage of justice and safeguard fairness, it is considered as discretion of the prosecution to disclose a material to the defence in Ghana. A case in point is *Commissioner of Police v Owusu [1958]* [663] where it was held that while the defence should be allowed very wide latitude, it would be dangerous to lay down a general principle that they must be given any document in the hands of the prosecution simply because a prosecution witness uses the document to refresh his memory on any point, however irrelevant or trivial. A similar instance where the prosecution refused to provide disclosure material to the accused was in *Apaloo v The Repub-*

[663] [1958] WALR 364.

lic [1975][664]. In this case one of the grounds of appeal against the decision of the court was that the trial court erred in refusing an application by the defence under s. 268 (2) of Act 30, to tender in evidence a previous police statement by a prosecution witness which was in conflict with his evidence in court. Meanwhile where a previous statement made by a witness to the police is in conflict with his evidence on oath, it is therefore admissible to discredit or contradict him as affirmed in the decisions of *Poku v The State [1966]*[665] and *Yaro v The Republic [1979]*[666].

In fact the decision of *Poku (supra)[1966]* is surprising as the Supreme Court held that the prosecution was not obliged to call a man who was not their witness and whose evidence they had reason to believe to be untrue and which even if true would negative their case and strengthen the case of the appellant. Also in the case of *Amlalo v The Republic [1979]*[667] the Court of Appeal held that the prosecution could not be blamed for not calling close blood relations of the accused. But it is deducible that the prosecution and the courts in the above two cases presumed the witnesses evidence and disclosure to strengthen the accused case and not the prosecution's case, which in case such is true, then a miscarriage of justice and unfairness has been compromised by the court for backing the prosecution at the detriment of the accused right to disclosure by the said witnesses.

On the other hand, disclosure rules in England and Wales are adhered to from the pre-trial stage as the rules imposes extensive obligations on the Crown Prosecution Service (CPS) to disclose evidence since such right is critical to a defendant's right to a fair trial. The CPS is obliged to disclose used materials in

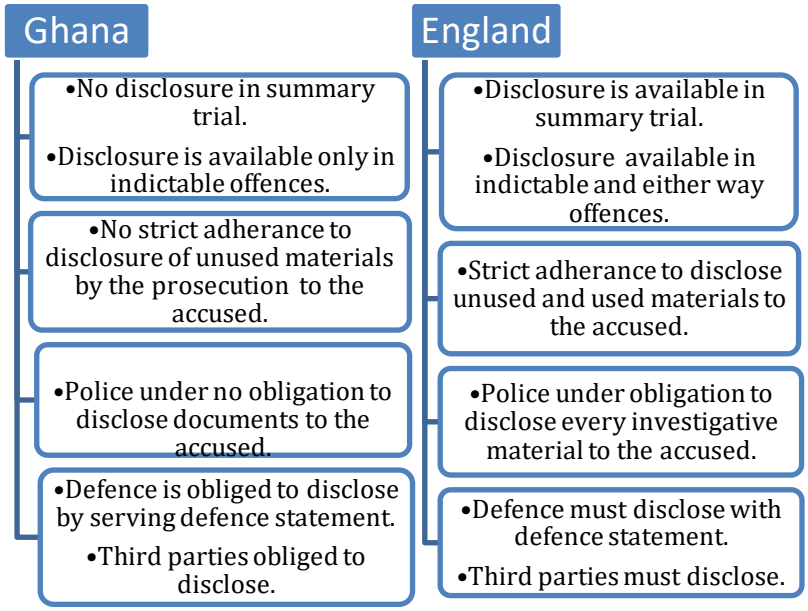
[664] [1975] 1 GLR 156, CA.
[665] [1966] GLR, 262, SC.
[666] [1979] GLR 10.
[667] [1979] GLR, 162.

cases that can be tried summarily before a magistrates' court in accordance with the 'Advance Information Rules' under part 10 of the Crim PR. Also under the Crim PR, Part 22 unused materials regarding the case in the custody of the prosecutor must be disclosed to the defence. There are separate disclosure rules for offences that are triable only on indictment under s. 51 of the Crime and Disorder Act 1998.

Moreover, s. 3 of the CPIA 1996 obligates the prosecution to disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused. Under s. 7A of the CPIA 1996 (as amended by the CJA 2003) the prosecutor is under a continuing duty to disclose throughout the trial proceedings and must communicate to the defendant any material regarding the case. The police/investigators are also under obligation to disclose according to the Disclosure Code (Para. 5).

The reasons for the similarities between the two systems under review are understood to be the fact that Ghana criminal law and procedure, and for that matter legal system is an imported principle and English legal culture. If that is the case, then the disclosure rules in Ghana must exactly reflect the standard of the English rules and principles on disclosure of documents to the defence by the prosecution and also by the accused to the prosecution. However there is a disparity of adherence to the right to disclosure rules in Ghana and UK to a greater extreme by considering statutes regarding disclosure and case laws. Honestly speaking, in the course of my investigation in Ghana, I had no clue why the prosecutions and the courts sometimes are reluctant to disclose documents to the accused. For summary offences under s. 182 (4) quoted above, there is no

obligation for the prosecution to disclose to the accused, but in an indictable offences -s.182 (1). Even this is not strict unless directed by the court which means it is to the discretion of the court. But in fact this is a right of the accused which cannot be in jeopardy. I think it is not wrong to say that right of disclosure is a commodity in Ghana. What I personally see and figure out from the attitude of some judges is to be hard on criminals, and a tendency that criminals deserves no right to presumption of innocence, right to silence, to be defended, right not to incriminate self, and all the procedural rights deserving to be respected which an accused is entitled to until the defendant is proven guilty. Since there is no general rule that once a charge has been made by the police the accused is guilty and straight away must hear the sound of the prisons gate; but until proven guilty beyond reasonable doubt by the prosecution. Therefore the restrictions and discretions on the disclosure rules in Ghana is not fair which in many instances, may result to miscarriage of justice and hinder fair trial. Right to disclosure should not be on compassionate grounds but rather it is a right and must be respected as such in Ghana. Critical look at the Ghana and the UK (England & Wales) disclosure rules unfolds some similarities and differences which are represented on a table form below:



5.5. Bails and Remands

Under the Magistrate Court Act 1980 of England and Wales s. 128(1), it is established that where a magistrates' court has power to remand any person, then, subject to section 4 of the Bail Act 1976 and to any other enactment modifying that power, the court may—

> *"(a). Remand him in custody; that is to say, commit him to custody to be brought before the court, subject to subsection (3A);*
> *(b). Where it is inquiring into or trying an offence alleged to have been committed by that person or has convicted him of an offence, remand him on*

bail in accordance with the Bail Act 1976, that is to say, by directing him to appear as provided in subsection (4)".

Section 3(3) (b) of the Bail Act 1976 allows the court, before granting bail, to require a surety or security to secure the defendant's surrender to custody; and allows the court, on granting bail, to impose such requirements as appear to the court to be necessary. It is further contained under s. 114 (6ZA) of the Coroners and Justice Act 2009 that:

"If the defendant is charged with murder, the defendant may not be granted bail unless the court is of the opinion that there is no significant risk of the defendant committing, while on bail, an offence that would, or would be likely to, cause physical or mental injury to any person other than the defendant."

Notwithstanding the above clause, there is further exceptions to the general right to bail set out in section 25(2) (a), of the Criminal Justice and Public Order Act 1994[668] under which a defendant charged with murder, attempted murder, manslaughter, rape or another sexual offence specified in that section, and who has been previously convicted of such an offence, may be granted bail only if there are exceptional circumstances which justify it.

Furthermore, in England and Wales under s. 115 (1) and (3) of the Coroners and Justice Act 2009 which specially deals with bail decisions in murder cases to be made by Crown Court judges, expresses that:

[668] http://www.legislation.gov.uk/ukpga/1994/33/section/25

> *"(1) a person charged with murder may not be granted bail except by order of a judge of the Crown Court.*
>
> *(3)a judge of the Crown Court must make a decision about bail in respect of the person as soon as reasonably practicable and, in any event, within the period of 48 hours beginning with the day after the day on which the person appears or is brought before the magistrates' court. For the purposes of subsection (3), when calculating the period of 48 hours Saturdays, Sundays, Christmas Day, Good Friday and bank holidays are to be excluded- s. 115 (7)".*

It is therefore no doubt to say with all certainty that all offences under the Criminal law and procedure in England and Wales are bailable offences depending on the circumstance regarding the case and also the discretion of the judge most especially in offences under s. 25 (2) (a) of CJPOA 1994. On the contrary, it is not so in Ghana. Ghana on the other hand had some offences classified as bailable and others are non -bailable.

Custody of persons arrested without warrant under s. 15 of the Act 30, now amended by Act 633 s.2 expresses that:

> *"A person taken into custody without a warrant in connection with an offence shall be released from custody not later than 48 hours after Arrest unless that person is earlier brought before a court of competent jurisdiction".*

Similar expression is also contained under article 14(3) (a) and (b) of the 1992 Constitution of Ghana. Section – 96 (1) (a) and (b) of Act 30 deals with granting of bail which emphasises with or without a surety or sureties, conditioned for his appearance before that court or some other court at the time and place mentioned in the bond. More importantly instances where the court may refuse to grant bail stated under article 96 (7) of Act 30, in offences such as treason, subversion, murder, robbery, hijacking, piracy, rape and defilement or escape from lawful custody; or where a person is being held for extradition to a foreign country has been struck out in the case *Martin Kpebu v. Attorney General [2015]* (supra*).*
So in simply put, until 5th May 2016, cases under article 96(7) of Act 30 listed above were never granted bail no matter what and they were classified as non-bailable cases in Ghana. In this wise, as long as the case is been investigated or trial pending, the accused would be kept in custody on remand even for years. The reasons why some offences were classified as non-bailable in Ghana are stated at s. 96 (5) of Act 30 which is the fear that the accused may not appear to stand trial*;* or interfere with any witness or evidence, or in any way hamper police investigations; or commit a further offence when on bail. This is because Ghana has not got a good mechanism and sophisticated identity cards and data for identification of individual, which corresponds to the domicile of the person. Therefore when defendants run away from police custody, or prison in most instances, and abscond, they cannot be located and be brought to justice. Moreover, non-custodial sentences in Ghana are considered to be a soft punishment which should not be melted on the criminally accused who deserves to be severely punished.

5.6. Duration of Adjudication Process

There is a time allocation for controlling the period in which the accused is permitted to be kept in custody which is Custody Time Limits (CTL) after the police charges to hearing and the period disposing the case in which the case would be sentenced by the judge in England and Wales. Time Limits start from the preliminary stages. The Regulations - Criminal Procedure Rules Part 19 which is Bail and Custody Time Limits apply to the time duration stages as follows:

- from first appearance in custody (i.e. the first appearance before the court charging a person with the offence) to the start of the trial of a summary only offence - 56 days;
- from first appearance in custody to the start of summary trial of an either way offence - 56 days. This period however becomes 70 days in either way cases if either the court allocates Crown Court trial or the defendant elects trial; or 56 days elapse before allocation takes place. From first appearance in custody to committal for trial to the Crown Court - 70 days;
- from the date of committal in custody to the start of the trial in the Crown Court - 112 days.

In the case of indictable only offences sent (and including any either way offence sent with the indictable only offence) to the Crown Court under sections 51 and 51A of the Crime and Disorder Act 1998 (as amended by the Criminal Justice Act 2003), from first appearance in custody in the magistrates' court to the start of the Crown Court trial is - 182 days. Under Section 51 of the Crime and Disorder Act 1998 Regulation 5 paragraph 6B, it is established that where a defendant is sent for trial under section 51, the maximum period of custody between being sent to the Crown Court for an offence and start of trial in relation

to it (i.e. each offence sent) is 182 days less any period, or the aggregate of any periods, during which the defendant has since his/her first appearance for the offence been in the custody of the magistrates' court. Also where a case is committed, transferred or sent to the Crown Court under section 51 and 51A Crime and Disorder Act 1998 and a conviction is quashed by the Court of Appeal with an order for a re-trial under sections 7 and 8 of the Criminal Appeal Act 1968, the custody time limit for a person ordered to be detained in custody will continue to be 112 days (in all cases, whether previously committed, transferred or sent) from the date of preferment of the indictment for the re-trial under Regulations 5(2)(b) and 5(3)(b) of the CTL Regulations; and the draft indictment must be served on the Crown Court within 28 days of the order (rule 14(1) (c) of the Criminal Procedure Rules) and the defendant must be arraigned within two months of the order at a PCMH or leave from the Court of Appeal will be required[669]. It is no doubt that the duration of time limit placed by the law, ensures speedy trial in England and Wales and therefore avoids unnecessary delays in the justice delivery system than in Ghana.

On the other hand, in Ghana, time duration is statutorily defined in the case of juvenile offenders and not adult offenders. For instance under s. 46(1) (a-d) of the Juveniles Justice Act 2003 (Act 653) which deals with duration of detention, it is stipulated that:

> *"(1) where a juvenile or young offender is ordered to be sent to a centre, the detention order shall be the authority for the detention and the period shall not exceed*

[669] http://www.cps.gov.uk/legal/a_to_c/custody_time_limits/#a10

(a) three months for a juvenile offender under the age of sixteen years;

(b) six months for a juvenile offender of or above sixteen years but under eighteen years;

(c) twenty-four months for a young offender of or above the age of eighteen years; or

(d) three years for a serious offence".

Apparently apart from the Juveniles Act which purport to limit time for the trial of juveniles during their period of custody in the course of their trial, ensuring that juvenile cases must not exceed certain time duration to be tried, there is certainly no statute or legislation to bar or limit the period in which adult offenders should be in custody in Ghana. This is the reason why many innocent accused persons or suspects on especially murder charges are kept for many years in the prisons waiting for trial. Duration of adjudication process ranges from 6 –months to 10 years in Ghana most especially on charges of summary offences or indictment. One factor or reason for non-compliance of speedy adjudication or trial within a reasonable time, and no regard to fix duration of trial proceedings in Ghana is the lack of individual accused ability to challenge such violations at the African Commission for Human Rights or the ECOWAS Court of Human Rights. Comparatively, the rate at which cases were previously sent to the ECHR against the UK for violations enables the UK to adhere to the required standard of trial within a reasonable time to avoid the accused from spending longer time in remand or custody which failure to adhere to shall be in contravention to fair trial[670].

[670] See Sander v. United Kingdom (2000), Condron v. United Kingdom (2000-2001).

5.7. Double Jeopardy Rule in Ghana and England

The principle of *ne bis in idem* is applicable and respected in both the Ghana and the jurisdiction of England and Wales. The plea of *autrefois acquits* and *autrefois convicts* are protected rights under the criminal procedures as discussed in chapter 2 with regards to Ghana, and chapter 4 with respect to the UK principle of double jeopardy. The said right in question is here in safeguarded under article 19(7) of the 1992 Constitution of Ghana, and s. 9(1) of (Act 29) 1960 (Criminal Offences Act) as amended by the Criminal Code Act, 2003 (Act 646). Also, the plea of double jeopardy in England and Wales until 1988 was codified under s. 122 of the Criminal Justice Act 1988, which established that where an accused pleads *autrefois acquit* or *autrefois convict* it shall be for the judge, without the presence of a jury, to decide the issue. But it is currently covered under sections 54-57 of the Criminal Prosecution and Investigative Act 1996, and sections 75-95 of the Criminal Justice Act 2003. However, the difference between Ghana and the UK is that the UK has an exceptional rule to the principle of double jeopardy which can be distinguished from the principle in Ghana. Under the rules in England and Wales, there is a new evidence retrial option which is a statutory exception to the rule against double jeopardy. This rule is contained in ss. 75-95 of the CJA 2003. Under s. 76 a prosecutor may apply to the Court of Appeal for an order to quash a person's acquittal and therefore order for retrial when the evidence is compelling. Meanwhile such application to the Court of Appeal shall require the written consent of the Director of Public Prosecutions under s. 76(4) of Act 2003. An example was the case of the murder of Stephen Lawrence where the defendant had been acquitted but

was retried and convicted through new *DNA* scientific evidence in *Dobson (supra) [2011]*.

The similarity between Ghana and the UK is whereby the acquittal or conviction is before a foreign court or by courts martial are in general sufficient grounds for autrefois as in *Aughet [1919](supra).*Where, however, an accused has been convicted and sentenced in his absence by a foreign court, but there is no realistic possibility of his ever returning to the country concerned to serve his sentence, *autrefois* convict will not apply if he is prosecuted for the same matter in England as affirmed in *Thomas [1985](supra).* In Ghana, certificate from the trial judge needs to be provided to indicate that the sentence served under a foreign jurisdiction or if domestic has been completed as a justification. In Ghana the proper methods of proving a previous conviction or acquittal as provided in Act 30, s. 117(1) are by tendering a certified true copy of the court's final order of conviction and sentence or acquittal certified by the registrar of the court to be a genuine copy; a certificate signed by an officer in charge of the prison where the punishment was served; or the warrant of commitment under which the punishment was served. A previous conviction outside the country is proved by a police certificate from that country containing the sentence or order of the court and the fingerprints of the convict- Act 30, s. 117(3). Moreover, a plea of *autrefois acquit* is not sustainable where the accused had merely been discharged but not acquitted – *Kuma v The Republic [1968]*[671].

The reason for the difference is that the UK has the forensic experts, economic power and capacity, as well as the mechanisms to discover new evidence, and has therefore realises that too many cases ended abruptly and defendants who

[671] [1968] GLR 757.

should have been convicted are rather acquitted or vise-versa due to lack of sufficient evidence by the prosecution and the police during the initial hearing, or perhaps innocent people are jailed whereas the real criminal are out there committing more crimes. Without the repeal of the previous legislation it is always impossible to retrial the accused after they have been tried and therefore acquitted or convicted, which becomes a bar to any attempt of the prosecution to initiate new proceedings. However, with the statutory exception to the rule against double jeopardy, which emphatically state that where there is new and compelling evidence in the case –s.78 (1) of the Criminal Justice Act 2003, and if it is in the interest of justice- s.79 of CJA 2003; and most especially when the evidence is reliable, substantial and highly probative.

5.8. Mode of Sentencing and Coercion

There is a disparity of punishment and sentencing methods in Ghana as compared to England and Wales. Different kinds of punishment melted or inflicted for offences in Ghana under s. 294 of Act 30 are: death, imprisonment, detention, fine, payment of compensation, and liability of police supervision; and absolute or conditional discharge. Penalty for murder or manslaughter in Ghana is most of the time by death or life imprisonment if not reduced on mitigation and aggravation factors. Under s. 304(1) and (3) of Act 30, (amended by s. 24 of Act 633) it is stated that:

> *"a sentence of death shall direct that the person condemned shall suffer death… the execution may be by hanging, lethal injection, electrocution, gas chamber or any other method determined by the Court".*

Meanwhile, an exception to the punishment of death is in the case of a juvenile. Under s. 295 (1) of Act 30, sentence of death shall not be pronounced on or recorded against a juvenile offender- an offender who in the opinion of the Court, is under the age of 17 years, but in lieu of the death sentence the Court shall order the detention of the juvenile in legal custody- s. 295(2) . Also pregnant women when convicted of an offence punishable by death, the Court shall order that the woman be tested for pregnancy and where the test is positive, the Court shall pass on her a sentence of imprisonment under s. 312 (1) and (2) of Act 30 (amended by s. 25 of Act 633). Again with regards to juveniles, persons under 15 (17 in the case of a District Court) are not supposed to be sentenced to imprisonment- s. 314 of Act 30. Minimum age for imprisonment is 18 and above- s.32 (1) of the Juvenile Justice Act 2003 (Act 653).

Ghana has had sentencing guidelines for judges since April 2015 which would help when deciding about an appropriate sentence for particular offences. For all along judges had no sentencing guidelines which means defendants could serve different number of years in prison for an offence of same gravity.

By contrast to England and Wales, the penalty for murder is a mandatory life sentence and not death as it is in Ghana, and penalty for manslaughter is simply a discretionary life sentence. Under s.1 (1) of the Murder (Abolition of Death Penalty) Act 1965, an offender age 21 or over who has been convicted of murder must be sentenced to life imprisonment. In England and Wales life imprisonment does not normally mean that the offender will stay in prison for the whole of his natural life. Offender under such condition could be released on licence or consideration comes up on the expiry of the 'minimum term'. Sections 269-277 and Sch 21 of the Criminal Justice Act 2003 lays down a detailed statutory scheme for setting minimum terms in all murder cases, whether the offender is adult or juvenile. Also minimum age for a sentence of imprisonment is 21 under s. 89 of the Powers of Criminal Courts (Sentencing) Act 2000.

Sentences could range from:

a) an absolute or conditional discharge
b) a fine,
c) a community sentence,
d) a suspended sentence, or
e) an immediate custodial sentence.

Before a custodial sentence is passed, a court should have to consider a pre-sentence report as established under s. 152 of the CJA 2003, and also s. 156 (1) of the CJA 2003 regarding aggravating or mitigating factors.

Sentencing guidelines in England and Wales emanates from the 1980's when the Court of Appeal developed the practice of sentencing guidelines when dealing with an appeal against sentence. Under CDA 1998 ss. 80 and 81, the Court of Appeal is charged with the responsibility to produce guidelines for criminal offences, and establishes Sentencing Advisory Panel to act as independent body to assist in its function. Likewise s. 120 of the CJA 2003; deals with both sentencing and allocation of power to sentence or commit to the Crown Court for sentencing by magistrates.

For instance in *Attorney-General's References (Nos 143 and 144 of 2006) [2007]*[672], the Court of Appeal considered the correct approach where there were two co-defendants who had committed a murder jointly, and where one was 17 years and 9 months old, and the other 18 years and 7 months old. Their Lordships considered their age disparity and offenders in question ended up with life sentences with minimum terms of 20 and 21 years respectively- see similar also in *Miah [2011]*[673].

Having considered the above comparison, it is obvious with all certainty the below similarities and differences between Ghana and England.

Similarities (Sentencing and Punishment)

Ghana	England & Wales
• Juvenile sentences are regulated by statutory provisions.	• Juvenile sentences are regulated by statutes and provisions.
• Sentencing guidelines are available for judges.	• Sentencing guidelines are adhered to when sentencing.

[672] [2007] Crim LR 735.
[673] [2011] Crim LR 662.

Differences (Sentencing and Punishment)

Ghana	England & Wales
• Death penalty not repealed.	• Death penalty abolished since 1965.
• Life sentence has no expiry minimum term.	• Life sentence has minimum expiry term[674].
• Minimum age for sentence of imprisonment is 18 and above.	• Minimum age for sentence of imprisonment is 21 and above.
• Community service is not commonly used.	• Community service is commonly used as a punishment in criminal offence instead of custodial sentences.

Certainly, the similarities over the sentencing and punishment procedure and principles in Ghana and England regarding juveniles are due to the adherence to regional and international laws which strictly protects the rights and interest of the child. The African Charter strictly emphasises on the protection of the child and likewise the European Convention. However, the reasons for the difference of sentencing methods and gravity of punishment melted on offenders in the countries under comparison are not an easy task to explore. It could therefore be said that Ghana is very tough on criminal offenders, and hence has zero tolerance for offender. This means that the motive of sentencing and punishing is for

[674] See VINTER AND OTHERS v. THE UNITED KINGDOM [2013] ECHR 645.

punitive reasons and deterrence in the society rather than to reform and rehabilitate offenders.

5.9. Recapitulation of Main Ideas Proposed for Ghana/ UK

Many are the recommendations and proposals I have so far made with regards to the Ghana and UK criminal procedure and the framework to guarantee and improve the right to fair trial, and therefore wish to highlight on the few again following their comparison and analysis.

5.9.1. Recommendations for Ghana

Regarding Customary Law, limitations should be placed on traditional rulers with regards to their authority when it comes to arbitrating on criminal matters. Traditional rulers should be obliged by law to involve the police for further prosecution whenever major criminal cases are before them. Furthermore, records of proceedings at all levels of the traditional courts should be made obligatory for easy access and compilation of case law and data.

There is also an urgent need to increase State Prosecutors from 145 in the whole nation, and private prosecutors and associate prosecutors should be appointed, instituted and introduced alongside the state prosecution service to enhance speedy trials and avoid abuse of prosecution processes by the Attorney-General Department which sole responsibility is to initiates and terminates prosecution of cases in Ghana as established under Article 88 of the Constitution 1992 and s. 54 of Act 30 1960. It would be very imperative for the department of public

prosecution service in Ghana to be able to appeal on behalf of the accused especially in the instances where the accused is unrepresented and for interest of justice where procedure unfairness and abuse of process are detected after the conviction of the accused. This would build public confidence in the criminal justice system. Moreover, Conditional Caution criteria should be instituted as an alternative to prosecution in suitable cases in Ghana by the Ghana Prosecution Services and the police to avoid unnecessary prosecution of minor cases and help to decongest the overcrowded prisons. It is quite imperative to have other ways to coerce beyond prison.

I further recommend that Police officers who exercise prosecutorial roles at the Districts and Circuit Courts should be given progressive legal and procedure training or be eradicated from the system as prosecutors. Police investigators should be given the necessary skills and advance tools or equipment's to undertake proper investigation, and capacity building. Training police prosecutors would help to avoid misleading judges and lawyers, as well as inhibition of the right to fair trial in Ghana.

There should be more constituted Juvenile Courts in each region, and where they are tried by a summary court for any reason, the juvenile should be transferred to the Juvenile Court for sentencing for interest of justice and also for the juvenile's interest. Also institution of more criminal courts should be made to enhance speedy trial.

Another important factor is the use of Interpreters at the lower courts. Interpreters should be adequately trained to enable them perform their duties without any difficulty.

There should be time limit duration on all criminal trial proceedings from start to the end to avoid unreasonable delay and denial of justice in Ghana.

Judges, courts and court officials and law enforcement institutions must uphold and apply human right norms in Ghana.

More so, legal aid must be improved, resourced, financed and strengthened in the country. There should be attractive remuneration for lawyers employed by the legal aid board who takes up legal aid cases. These lawyers must be remunerated just as all lawyers employed in the public sector. The accused that fulfills the legal aid Means Test should be provided with the services of a counsel to guide and represent them to avoid them facing the risk of improper conviction for interest of justice in Ghana.

Concerning bailing and remands, Section 96 of the Criminal and Other Offences (Procedure) Act 30, 1960 which made some offences non-bailable though repealed on the 15th of May 2016 by the Supreme Court, should pave way for a legal procedure to release all remanded prisoners who have been imprisoned for years without substantial evidence and witnesses to convict them from custody.

The Police should be made culpable if they fail to respect the rights of the accused such as to remain silence and protection against self-incrimination for the interest of justice and fairness. Again, the police should be trained on the proper way to investigate crime by training and recruiting forensic experts who can analyse, experiment, test, and make findings to prove crime without resort to beating and coercion of the suspects to extract information for prosecution.

Finally, police investigations and interactions with the criminal suspects must be video recorded from the period of arrest, charging and first court appearance.

The disclosures regime in Ghana ought to be robustly enforced in criminal trials. The laws which permit the prosecution to hide documents intending to be used against the accused should be prohibited and repealed. Disclosure of doc-

uments to the defence in Ghana in all trials should be enforced as a right and not a discretional issue, except for public interest permitted by the law.

Recognition and respect to Procedural Rights must be embraced by the interpreters of the law. Individuals should be made to be aware of their right to a fair trial. For instance, right to the presumption of innocence must be respected, enforced, and consistent in Ghana and its application must be same for all defendants. Besides, the manifest significant of the right to silence in criminal interrogation, investigation and trial must be understood by all law enforcement agents, prosecutors and judges for interest of justice; and must not be prejudiced when exercised; notwithstanding the adverse inference that could be drawn against the silence at the court.

There should be an exceptionally rule to the principle of ***ne bis in idem*** in Ghana, whereby an acquitted and convicted accused could be retried when substantial and compelling evidence is discovered.

I also propose that Non-custodial sentences and alternative sentencing methods such as community service, tagging, and conditional cautioning should be adopted to punish minor offenders instead of direct charging and prosecution leading to jail for minor criminal offences to avoid overcrowding in the prisons.

Sections 46, 49, 49A of the Criminal Offences Act 1960, (Act 29) which pronounces death sentences for murder and manslaughter or attempted to commit murder by convict, and genocide should be repealed from the criminal laws.

Persons wrongfully accused, convicted and sentenced must be adequately compensated after their released.

Regular Training of judges in Ghana will overwhelmingly help to improve the standards and enhance alleviation of minor errors in discharging their duties. Frequent training of judges will refresh their minds, and progressive legal edu-

cation will make them abreast with human rights norms and instruments. The specialised courts should have the equivalent judges. Judges should abide by sentencing guide because long sentences for inmates does not reform to serve the purpose of incarceration but rather harden them. Again Traditional Rulers with responsibility to perform roles as judges at the various native courts should be involved in the Ghana Judicial Services training. Consistent legal education which comprises of elements such as criminal procedure and human rights in criminal proceedings will be very essential for such category of chiefs. This is because the effective and efficient delivery of chiefs' judicial responsibility helps to reduce the work load of the state courts, and I think building their capacity and understanding as arbitrators in the nation is worth with.

I again recommend researchers who are lawyers should be provided for Judges of the Superior Courts to assist them deliver judgments and rulings in good time. On statutory proposal, I recommend that the law making first degree felonies to be mandatorily tried on indictment should be amended to pave way for the Attorney-General to exercise the discretion to try them either summarily or on indictment. On electoral and constitutional issues, I recommend that whenever presidential election results is in dispute and therefore a suit is pending in Ghana, the Supreme Court should endeavor to sit on the case, hear and rule over it before the declared winner be sworn into office by the Chief Justice for interest of justice.

Technologically, computerization of the courts needs to be pursued, whereas introduction of technology can tremendously improve the delivery and access to justice in Ghana; and it must be noted that electronically recorded versions of the accused dockets/ files containing charges and evidence at the custody of the police and prosecutions department at the Attorney General office if kept, could

avoid them getting lost as they are only always available on papers and hard copy, to avoid reconstruction of documents that causes so much delay in prosecution and hearing while the criminal suspects are on custody.

5.9.2. Recommendations for England and Wales

I propose that the discretionary powers of the Director of Public Prosecution (DDP) under s. 6 of the Prosecution of Offences Act 1985 to take over the conduct of any non-police prosecution, and either continue with the prosecution of the case in a normal way, or discontinue the proceedings under s. 23 without any evidence, and again which conduct is not opened to a judicial review by the High Court should be reviewed. Such an authority is too absolute, and will compel the DDP to discontinue or stop private prosecutions unreasonably. Again, the Crown Prosecution Service (CPS) in all trial stages should employ experience lawyers for the prosecutorial roles.

For interest of justice, legal aid funding should not be squeezed or affected by government policies and austerity measures if quality legal aid should be maintained in the United Kingdom.

I further recommend that witnesses in criminal trials and in serious criminal cases should be offered protection after court by the police for some time to protect their lives from being at risk. Also, judges should be strict on procedure irregularities with regards to the jury.

The disclosure of documents by the CPS to the defence lawyers in all the stages of the trial should be done on time but not in the courtroom in the course of proceedings in order to give the defence advocates ample time to prepare.

Custody Time Limit in the UK should be reviewed. I believe that there should be an exceptional rule which would permit the police and the prosecution service to keep dangerous offenders in custody in the course of court proceedings to avoid reoffending.

With regards to Sentencing, I recommend that dangerous and violent crime offenders should be given longer sentences in order to avoid risking the life of the general public. Also, offenders given conditional cautioning by the CPS must be supervised and quickly prosecuted in case they reoffend. Dangerous and multiple offenders must be dealt with more severely in certain circumstances to deter other offenders.

Last but not the least, the Double Jeopardy rule in the UK would avoid hardened criminals getting out of the hook without been punished. However, there should be a rule to end litigation and therefore a length of time limitation to bar new proceedings for interest of justice, and avoid interference or intimidation so that the exceptional rule against double jeopardy might not be abused in the UK criminal proceedings to guarantee fair trial for the interest of justice.

5.10. Conclusion

The discussions under this chapter of the dissertation as a comparative case study of England and Wales; and Ghana criminal law and procedure have unveiled the similarities and the differences existing between the two systems. There is therefore an indication of a sharp contrast between the legal frame work and procedural rights of the two systems under comparison with regards to prosecutorial roles; investigative roles and powers; disclosure rules, bails and

remands of the criminal accused persons; double jeopardy rules; mode of punishment; legal aid funding; and customary law- a distinguished element of Ghana. However, there seems not to be much difference with regards to trial of juveniles except that in Ghana certain courts not meant for juveniles forcibly trial juveniles cases because there are very few Juvenile Courts and as a results such criminal accused juveniles stands the risk of facing higher sentences if not sent to Juvenile Court for sentencing after they have been tried by the normal courts for a reason. The analysis and comparison of the two systems have illuminated that prosecution in the English system functions differently as compared to how it works in Ghana. The English system makes use of private prosecution whereas such option is prohibited in Ghana. The English system has adopted alternative prosecution such as conditional cautioning which is available to both adult offenders and juvenile offenders whereas conditional cautioning option is not available in Ghana for adults but rather for juveniles only. It could also be deduced that Ghana still depends mostly on the use of police officers as prosecutors in almost all the lower courts through the use of an executive instruments which is due to the fact that there are very few state prosecutors in Ghana.

Legal aid a pre-emptive right to legal representation under both the English and the Ghana systems seems to be in jeopardy despite the alarming rate of complaints about the importance of maintaining a higher standard quality of legal aid for interest of justice. However, there is much need to improve legal aid provision by the government and stakeholders in Ghana which would enable suspected accused persons unable to hire defence advocates to defend them, rely on the state funded legal counsel as a norm to avoid high risk of violating their right to fair trial which is very central to equality of arms. When the accused is left to defend himself without a representation in criminal proceedings,

there is a tendency of non-equality of arms between the prosecutor and the defendant which might affect the outcome and the proceedings of the case. But whenever defence advocates are appointed to represent the accused, fair proceedings are guaranteed because it becomes incumbent on the defence attorney to guide the accused throughout the proceedings. As I mentioned in the early stages of the dissertation, what matters in criminal proceedings is not just the outcome of it but rather the fairness of the entire proceedings leading to conviction or acquittal, and it must be noted that a breach in one of the stages of the trial affects the outcome of the entire trial for interest of justice. Therefore it is the duty of the lawyer representing the accused to ensure that all the procedural rights of the accused have been respected. It could be emphasised that in Ghana numerous defendants are subjected to remand custody without bails for years which happens because of lack of legal representation. Many convicted and unconvicted prisoners have the *locus standi* to appeal against their conviction or remand decisions but for lack of an attorney to pursue such cases, they are in jail and therefore under coercion. I wish to contend that the disclosure rule in Ghana which is made discretional to the prosecutors in indictable offences but impossible in summary offences should be repealed for interest of justice and ensure equality of arms between the prosecutors and the defence attorneys.

It also must be recalled that Ghana still has death sentence as a means of punishment for offences under s. 46 (*murder*), s. 49 (*attempt to commit murder by convict*), and s. 49A (*genocide*)[675] under the Annotated Criminal Offences Act 1960 which has not been repealed though execution of inmates under death roll has not been carried out since 1993. Convicted criminal accused are sentenced to death, yet life sentence has no expiry date in Ghana whereas it has a mini-

[675] Genocide was inserted by Act 458 of Ghana.

mum expiry term in England. Furthermore, the disparity of minimum age for sentence in criminal matters is that it stands at 18 years in Ghana, and 21 years in England. The rule of double jeopardy should not be dysfunctional and also care must be taking not to abuse it. Notwithstanding, *autrefois convicts* and *autrefois acquits* principles should not bar prosecution of offenders when compelling evidence are obtained, and cases should be examined on their merits.

The usage of customary law proceedings in Ghana as a complement to the English system should be modified, equipped, and the judges at the traditional native courts who are chiefs/kings or queen mothers should be given regular training to enhance their arbitration skills, knowledge and ideas to function well because its proper functioning as an alternative court shall reduce the workload of the state courts. However, issues and cases involving criminal elements should be left to the law court, and whenever chiefs are allowed to hear cases involving criminal issues by the courts, the police should be kept involved for any necessary and further prosecutions. Nevertheless, it is an acceptable fact that the state system in Ghana is compensated by the customary law which function alongside the imported English Legal System.

The comparative aspects of the criminal procedure of Ghana and the UK would never be meaningful if the impact and influence of the African Charter/ECOWAS Court of Human Rights is failed to be considered over the domestic procedures of Ghana; and likewise the impact of the European Convention and Human Rights on the domestic procedure of the English system. It could be observed that the impact of the African Charter/ ECOWAS stated at the introductory part of the dissertation; and the article 6 enforcement of ECHR on the UK have helped in divers ways to reshape the above procedural rights in both countries under comparison.

However the African Charter has not done much as compared to the ECHR which is due to the fact that it is a young institution and might have difficulty of funding to support its activities and institutions. Furthermore, case laws discussed above and legal instruments of the European Court of Human Rights has *prima facie* liaison and given much recognition and respect to individual procedural rights at the English courts as compared to the impact of the African Charter and the ECOWAS Court of Justice over the Ghana criminal justice system and procedure in protecting the right to fair trial. The fact that the Charter has no direct effect in the domestic criminal proceedings and application makes it difficult to guarantee the right here in question. The direct effect of the Charter in the domestic proceedings of Ghana is very imperative to safe guide the right –fair trial, and without that, judges apply the African Charter in proceedings discretionary. I think it is wrong as some jurist and legal academics perceive the effort to compare Ghana and UK criminal procedure and system as comparing *"father and a son"* or *"apples and mangos"* as some claimed but rather efforts should be made in Ghana to hold the right to fair trial a reality. Many of the lawyers interviewed in Ghana claimed they are not accustomed or have no idea about the proceedings of the African Commission in Arusha – Tanzania, nor the ECOWAS Court of Justice in Abuja-Nigeria. This is very serious if the legal counselors themselves are at a lost to the proceedings of the regional Courts then how could they advise the accused or the lay person or the public?

It is hard time that the African Charter is incorporated into the domestic legal framework of Ghana so that there would not be lack of a constitutional or legislative imperative for interpretative application of international treaties – the Charter in precision. It is clear that courts in Ghana exercise judicial discretion

to apply the African Charter as an aid to interpretation, but the Charter itself however has not been incorporated domestically. In overwhelming majority of cases, judges normally refer to the Constitution and the statutory law in question but never the African Charter.

The Methodology of the survey elaborated at the introductory section of the dissertation was a mechanism employed to work on the comparison of Ghana and England criminal procedure, the percentages of the respondents in the survey is a clear indication that legal professionals in England and Wales are more satisfied with the criminal system and procedure than the respondents in Ghana. The results of the comparative survey (available at appendix 1-3) proves the disparity between the two systems to be too vast which should not be so for the interest of justice because there is nothing like "*Ghana Legal System*" operating in Ghana but rather the "*English Legal System*" and if so, then the true image and norms of the English legal system should be given priority and robustly bring to standard to avoid violations of the right to fair trial. The above comparison is instrumental to draw conclusions to allow for recommendations to improve the criminal procedure and effective functioning of procedural rights in Ghana.

5.11. General Conclusion

This dissertation has discussed the application of the right to fair trial in the criminal process of Ghana. By so doing it has been necessary to limit the discussion to those procedural rights that interrelate with the principle of equality of arms, and hence no attempt was made to discuss all procedural rights in Ghana. Indeed, I did not deal with all procedural rights in terms of arguing for

equality of arms and fair trial but was much selective as to which procedural rights are commonly violated in Ghana. It is clear upon the reflection of the above discussions that the accused in Ghana is disadvantaged in the system and that the present application of articles 14 and 19 of the 1992 Constitution is insufficient to put the accused in relative equality with the state in order to ensure true fairness. The thesis has highlighted certain accused-based rights which, if applied in stricter sense and terms can lead to greater equality and fairness. These rights relate to disclosure, presumption of innocence, trial without undue delay, legal representation, trial in one's presence, not to testify against oneself or incriminate himself, remain silent, call witness and to cross-examine witnesses, and free assistant of an interpreter.

Fairness can only be attained by maintaining a balance between the state prosecution and the accused. The prosecution has certain advantages that the accused does not have. It is clear as established under article 88 of the 1992 Constitution that the Attorney General is responsible for the initiation of every criminal process, and apart from state prosecution, private prosecution is prohibited in Ghana. Also the state prosecution work hand in hand with the police which do the investigation. The prosecutors and police legitimacy include powers of investigation, a permanent team of prosecutors, and access to forensic evidence and budgetary allocation. Certainly the state must possess these powers and resources if it is to maintain social order, nevertheless the accused-based rights referred to earlier, specifically cater for some balance in the system. These rights are not meant to undermine the powers of the state. They are meant to provide equality, fairness and the protection of the accused for the interest of justice. The state has a directorate of public prosecutions which employs full-time lawyers.

However, several accused persons cannot afford legal representation, and are also not represented by legal aid lawyers. This represents grave inequalities in the system. The absence of a legal aid system is of grave concern. Any legal system that fails to provide legal aid for accused persons deprives them of equality before the law. The unrepresented accused is effectively denied access to the legal process and procedures. In many criminal charges and trials, I believe a lawyer should have been there but the people could not have afforded.

Forcing an unrepresented accused to face a trained prosecutor is a great injustice and inconsistent with modern democratic values. The Constitution itself runs counter to the principle of equality of arms by expressly excluding any duty on the state to provide the accused with legal assistance for free where the accused has no financial means to pay for the cost. While the state provides legal assistance in respect of few capital offences, this is not enough. A comprehensive legal aid system is desirable. The ideal system would be the setting up of a public defender system, which allows for the allocation of lawyers to assist suspects from the pre-trial investigations. It is conceded that the resources of Ghana are scarce and as a developing country, there are other pressing social demands. However, legal aid can be instituted incrementally; extending legal aid to all offences that attract minimum sentences this can be done if legal aid is giving the priority by the state for the interest of justice.

Unfortunately, these rights remain in a state of basic application in Ghana as discussed in the dissertation. To some extent, they remain dormant and are not effectively enforced to the benefit of the accused. While the specific rights referred to above are central to equality, they have been applied rather superficially and it is therefore imperative to emphasis that only reconceptualization and revitalisation of the right to a fair trial can ensure meaningful enjoyment of the-

se rights by the accused persons in Ghana which would avoid the vulnerability of the accused in the cause of proceedings.

An equally importantly, the use of the police for prosecutorial duties at the lower courts has created so much problems in Ghana which mislead judges and hence result to wrong convictions or acquittals because such police prosecutors are not trained. It is also obvious that there is an excessive case of abuse of discretion on the part of state prosecutors in Ghana, and most times, there is excessive case of absenteeism on the part of state prosecutors leading to protraction of hearings in the courts.

It is therefore my opinion that if Ghana could adopt the conditional cautioning procedure practiced in the UK whereby first minor criminal offenders are not directly prosecuted but rather given some conditions to be fulfilled in lieu of prosecution which serves as an alternative means of coercion beyond prison, then it would reduce the work load of the public prosecution service and above all avoid keeping minor criminal offenders in prison.

Moreover, the control of the Attorney-General over the criminal proceedings in Ghana is codified under the article 88 of the Constitution 1992, and the s. 54 of the Criminal and Other Offences (Procedure) Act of Ghana (Act 30) which is *Nolle prosequi*. Under s. 54(1) of Act 30, in criminal case, before verdict or judgment, and in the case of preliminary proceedings before the District Court, whether the accused has or has not been committed for trial, the Attorney-General may enter a *nolle prosequi*, by stating in Court or by informing the Court in writing that the Republic does not intend to continue the proceedings. In this case the accused shall be discharged immediately; and shall be released where the accused has been committed to prison- s.54 (2) (a) and (b). I contend that the power of *nolle prosequi* vested in the state prosecutors in Ghana in

many instances is abused due to the non-existence of private prosecution in Ghana. Cases with political interest or influence are most often discontinued and disposed of by the use of the statutory power- *nolle prosequi* without any reason, and when this happens, since private prosecution is prohibited by statutes and therefore unavailable, no other body has the legitimate power to initiate prosecution against such entity again and therefore this has become a loophole within the legal system which can only be fixed by instituting a private or independent prosecutorial body alongside the state Attorney –General department. For instance in *Boateng v Yeboah [1960]*[676] it was held that the entry of *nolle prosequi* puts an end to the criminal proceedings against the accused person; and likewise in the *Republic v Abrokwa [1989-90]*[677] where it was held that the power of the Attorney-General to enter a *nolle prosequi* cannot be the subject of a judicial inquiry, neither can the propriety of the exercise of that power be questioned by the bench.

The powers of the police during investigation process are necessary for the detection and prevention of crime in Ghana. However, if the rights of the individual/individuals are not protected at this stage, manifest unfairness and arbitrary use of powers are inevitable and can ultimately have a grave impact on trial fairness which as a general norm, must be respected and safeguarded throughout the three stages of the trial proceedings. There is the need for improvement in the investigation processes in Ghana because pre-trial investigations are sometimes poorly done. It is as a result of this regard, that modern societies and legal systems have developed protective barriers for the individual. Such procedural formalities obligate the State not to breach some conditions by over exercising its powers to the detriment of the accused. Conditions for limiting the

[676] [1960] GLR 17.
[677] [1989-90] 1 GLR 385.

liberty and privacy of suspects would require the police to obtain warrants which empower them to arrest and search, time limits for detention; and the need to inform suspects of their rights including the right to silence at the time of arrest. These procedural requirements serve to remedy the imbalances between the state and the suspect during the investigations and proceedings. Exclusionary rules also enable the courts to exclude forced confessions and illegally obtained evidence if they are prejudicial. However, these pre-trial protective mechanisms are clearly inadequate and in most instances not properly enforced but rather left to the judge's discretion in Ghana. The accused does not have a mandatory pre-trial right to legal representation, a unique and important requirement for securing any meaningful balance between the state, and the suspect at the pre-trial stage. While confessions made to the police should be confirmed by a judicial officer, this is not the case in Ghana. Confessions in many instances are not obtained voluntary and without coercion. Suspects are severely and extremely beaten by the police to tell the truth and admit charges which violate the right to remain silent and protection against self-incrimination, which inevitably fail to uphold and adheres to the principle of presumption of innocence. The danger is that, a breach of one procedural right, affects the other which makes the issue of justice and fairness questionable. Research and interviews done in Ghana between January- July 2015 in the cause of writing this dissertation and manifest evidence during plea enquires by judges during hearing in court indicates that many police officers and police prosecutors' advices suspects to admit guilty plea in court as a means of getting quick sentence which would avoid the accused from going through the long and frustrating court proceedings and remands in Ghana. Sometimes, during interaction by a judge and an accused person, the accused person would confess that the police

officer asked them to admit or say that for flexible terms and treatment. Provision of legal representation to the criminal accused person from pre-trial stage to the post-trial stage would avoid a situation like this. Article 19 (2) (f) of the Constitution 1992 which establishes that a person charged with criminal offence shall be permitted to defend himself before the court in person or by a lawyer of his choice, is an empty declaration and inadequate because it fails to add "*to be defended by a lawyer of his choice for free if cannot afford the payment of a lawyer"*. Right to legal representation while it is recognised by the Constitution and case law, their application is severely constrained, prejudicial and injurious to the defence of the defendant. The said right in question is constrained by the Constitution and by the absence of resources to support its realisation, makes it an empty declaration. But like all other rights, not only does the constitutional right to legal representation fail to ensure equality of arms; it actually undermines the principle of equality of arms. The Constitution provides that the accused may secure legal representation at his own expense. It entitles the accused to legal representation but does not ensure that the accused gets one. Most often, accused persons are arrested and detained at the police cells for days without their *Miranda* rights being read to them; and the rate at which accused persons are at trial convinced by the police to admit their guilt especially when such accused are not represented by counsel inhibit the process of fair hearing in Ghana.

Furthermore, the investigation of crime is a sole-enterprise process that is monopolised by the state which makes the adversarial system an interest-based. Investigations are conducted by the police or the BNI with almost no judicial involvement. When the police investigate crime, their intention is to build up a case that will result in a conviction and not fairness and interest of justice. This

has been the reason why so many suspects are kept on remand and custody waiting for trial which mostly result to miscarriages of justice and wrongful convictions. Meanwhile, when suspects are wrongly convicted and imprisoned; or are detained for months or years under the section 96 of the Criminal and Other Offences (Procedure) Act, 1960 (amended), which had made some offences non -bailable, such accused are not compensated when acquitted[678] for the period they spent in lawful custody by the state. Most of the first degree offences i.e. 90% are never tried and let loose after few years in custody awaiting trial[679]. Therefore first degree felonies which are mandatorily tried on indictment could be tried on summary. Should the amendment be effected, it will pave way for an effective administration of criminal justice.

Disclosure of documents by the police and the prosecution to the accused remains discretion in Ghana to some extent in indictable offences while in summary trials disclosure of documents to the accused is not possible. During investigations process, the state may seize documents, interview witnesses and obtain incriminating evidence in the absence of and without the participation of the suspect or his counsel if he has. The suspect has little knowledge of the information collected during the investigation. However, the police or prosecution may hide the document/s and intentionally fail to disclose it, meanwhile may interrogate the accused and he is generally expected to answer questions put to him. The general rule in Ghana is that all relevant evidence, except confessions, is admissible no matter how it was obtained.

[678] The High Court could grant bail under article 14(4) of the 1992 Constitution where there has been unreasonable delay.

[679] These facts were established by a state prosecutor and a lecturer at the Attorney General's office in Ghana during my personal interview with him on the 14th July 2015.

Suspects usually do not have the resources or the power to investigate crime. Attempts by the accused to interview possible witnesses to obtain relevant document or other evidence might well be interpreted as interference with the investigation process. Therefore the accused is deprived of accessing the information at the earliest opportunity if disclosure is not made available to him and his defence attorney. The legislature and the courts should ensure that suspects are able to access information, so far as possible, so that they may be able to prepare for their case as the prosecution prepares for theirs for the interest of justice, and also to uphold equality of arms. Article 19(2) (e) of the 1992 Constitution states that criminal accused persons shall be given adequate time and facilities for the preparation of their defence. Apparently adequate facilities in principle should include used and unused materials of the prosecution and police in the course of the proceedings which have to be disclosed to the defence of the accused. However, this is not the case in Ghana in summary offences and some indictable offence.

The presumption of innocence has constitutional endorsement in Ghana under article 19(2) (c) that the criminal accused shall be presumed to be innocent until he is proved or has pleaded guilty. The presumption of innocence should ensure that the burden lies with the prosecution to prove every element of an offence. The state has all the resources to prove offences. It also has sufficient time and forensic experts to analyse the evidence. The decision to take a matter to court is taken by the state after it has sufficiently analysed the evidence. It must be assumed therefore that when charges are instituted, the state is satisfied that it has sufficient evidence to secure a conviction. It is unfortunate therefore that the courts have acquiesced to the legislation of reverse onus clauses which declare the accused guilty, calling upon him to prove to the contrary. The legislature

should refrain from casting the burden of proof on the accused. Otherwise, the accused is significantly disadvantaged in the articulation and realisation of his right to be presumed innocent, a right which is the foil of the state's powers and resources to investigate crime, which the accused does not have.

There are other trial rights which relate to the guarantee of equal participation by the accused at trial. These rights enable the accused to challenge the evidence of the state and to present his evidence. These rights include the right of the accused to be tried in his presence, the right to testify or to remain silent, the right to call witnesses and to Cross-examine witnesses and the right to make submissions. With regards to plea making, the accused person's plea should be taking after the facts of the case are read. The current procedure where the facts are read after plea is not helpful to accuse person.

Again article 19 (2) (g) of the Constitution 1992 emphasises that a person charged with criminal offence shall be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution. Honestly, article 19 (2) (g) of the Constitution 1992 is a mere declaration without effect if a criminal defendant is without a representation. About 80% of suspected criminals in Ghana go through the trial proceedings without legal representation right from the pre-trial stage to conviction or acquittal because they could not afford for the payment of a defence attorney, since legal aid is not able to assist such people. Realistically, it is highly impossible for an accused person to examine in person without a lawyer, the witnesses called by the prosecution on the same conditions as applicable to witnesses called by the prosecution. Legal terminology and procedure is difficult for even non legal

personal who are educated to be understood and let alone the uneducated criminal accused who does not speak or understand English to follow court proceedings. Therefore the failure to provide legal representation to the accused in Ghana is non-compliance of ICCPR article 14 (3) (d) and article 7 (1) (c) of AfCHPR which wordings emphasis "*…to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".* The article 7(1) (c) of AfCHPR *stresses "…the right to defence, includes the right to be defended by counsel of his choice"* and the wording of both international norms does not reflect the wording of article 19(2) (f) of Ghana which should have been the same. It is therefore very sad to observe that article 19 (2) (f) of the Constitution 1992 of Ghana fails to incorporate fully the wording of article 14 (3) (d) of ICCPR; and article 7(1) (c) of AfCHPR into the domestic laws because it omits the wording:

> "*…to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".*

Because of the non-application of the principle of equality of arms, these rights do not receive immediate application. They rather receive contingent application. Therefore, failure to apply them does not attract immediate sanction. The African Charter as a young instrument has still not been fully incorporated into the domestic laws of Ghana and therefore Article 7 of the Charter which guarantees fair trial is given recognition discretionary by judges.

In Ghana, sanction will depend on whether the accused was prejudiced as a result of their non-application. What is unfortunate about this approach is that the

courts will not necessarily be in a position to know what prejudice the violation of these rights would have caused the accused. The courts have similarly held that failure to advise an accused of his right to legal representation will only amount to an irregularity if the accused was prejudiced. Again, even where the evidence is overwhelming, it is true that an attorney could have succeeded in tearing such evidence into shreds, which the accused could not do. It is well-known that in cases where lawyers have later entered the fray and succeeded in recalling witnesses for cross-examination, their presence and participation demonstrably lead to acquittals where convictions seemed probable or certain, had a lawyer not appeared. Therefore had the accused been informed of such right, he would have decided to secure the services of counsel and the results of the trial would have been different. It is clear, therefore, that effective application of the principle of equality of arms would avoid situations where the application of constitutional rights is contingent and not immediate. The fact that the evidence is overwhelming might be because the accused is not allowed to counter it due to the violation of a constitutional right. It can be said, therefore, that the non-application of equality of arms results in an inefficient system.

The right to be tried without delay and within a reasonable time guaranteed under the articles 14(4) and 19(1) of the 1992 Constitution, as well as s. 77 of the Criminal and Other Offences (Procedure) Act of Ghana (Act 30) have been in the state of compromised to the detriment of the accused. The culture whereby suspects are easily picked and detained by police or BNI on mere charges when evidence are yet to be put together has been the practice in Ghana. Dockets of suspected criminals when submitted to the attorney general's office takes so long before prosecution is initiated by the public prosecution department whiles the accused for all this while is kept in police custody or on remand prisons

waiting for trial. Some of the dockets get lost in the hands of the police in the cause of investigations. Meanwhile such files/dockets are not available electronically. When this happens, the police try to reconstruct the files/dockets which take longer time to finish whiles the accused remained in custody for all such period. Many suspects wait for years in custody waiting for trial whereas others are even forgotten in the prisons especially in the situations where the trial judge is transferred or died and such an accused is without representation. The death of a judge or transfer has been a problem for speedy hearing until the case of *Adomako Anane v Nana Owusu Agyemang and 7 others [2013] (unreported)*[680]. In this case on the 26th February 2014, the Supreme Court of Ghana departed from a decision that if a judge should begin a case, must finish; but rather a new judge should take the case, study and rule over the case. More so, reasonable time in Ghana is not defined but has been a practice to be between (six) 6 months and (nine) 9 years in first and second degree felonies.

Customary law proceedings in Ghana and adjudication procedure administered by the traditional chiefs are a complement to the state or English legal system. As established in the main thesis project, traditional chiefs are responsible for the compilation, assimilation and modification of customary laws in Ghana under Act 370 and Act 759. Traditional institutions are public office which collaborates with the State Judicial service and are under the supervisory jurisdiction of the High Court under article 43 of the Chieftaincy Act 2008. The traditional courts complement the state courts, the police station, and the prosecution services in dispute resolution. These institutions are only available at the regional and district capitals which are far from the indigenous people and therefore the proximity of the traditional chiefs' palace or court to the local people

[680] Civil Appeal No. J4/42/2013.

put them in charges with the responsibility and duty to hear cases reported to them by their subjects who perceives the Chiefs/Kings palace as an alternative to the police station or the state court. Customary law is a dynamic way of allowing the indigenous leaders in the society who are closer and attached to their subjects; administer fairness to foster justice and integration among their people through traditional norms, statutes, culture and institutions. However, it could be observed that the highest percentage of the traditional leaders who are either chiefs, queen mothers, or paramount chiefs acting as presiding judges in the native courts, are not legal experts or even educated. Though few of the paramount chiefs or divisional chiefs are legal academics, High Court or Appeal Court judges, Professors, and other professionals, the majority of them lack sufficient and consistence legal training and understanding of the criminal or civil code and statutes to handle cases. The complexity of the law and its dynamism places limitations on the chiefs to perform such functions effectively. Also, human rights in general and its application seems foreign and intolerable to them. Again case law and data of cases decided by traditional native courts are not available, and cases are not published for easy access, though proceedings at the Traditional Council are recorded, because records of the proceedings could be forwarded or requested by the High Court for supervision or enforcement. However, proceedings at the divisional chief's palaces (lower native courts) are mostly not recorded.

Furthermore, the comparative case study of the Ghana and England criminal law and procedure has unveiled the distinguishing features between the two systems and the rationale behind. The various similarities and differences as a hallmark is a collaborative indication of the impact of regional laws over the domestic procedural laws such as the African Charter/ ECOWAS Court on

Human Right over Ghana; and that of the European Convention on Human Rights over procedural rights in the criminal justice system of England and Wales. The Strasbourg Court has to some extent reshaped the English criminal procedural law through case law and human rights instruments by enforcing Article 6 of ECHR into the domestic laws of UK and making the establishment of the Human Rights Act 1998 a reality. However, the UK should not reduce the quality of its legal aid by austerity measures for interest of justice, and also in order not to exclude the most experience advocates from involving themselves in the legal aid regime. More so, the Crown Prosecution method of using conditional cautioning instead of direct prosecution in low crime offences is unique which help to reduce the workload of the Courts. However, I think the Director of Public Prosecution's authority and discretion to discontinue private prosecution should be subjected to judicial review in the UK.

The comparative case study of Ghana and the UK which of cause is because Ghana legal system is a legacy from the British colonial rule has got its limitations and merits as well. The merits of the comparison have shown and identify that:

- There is impact of the European Court on Human Rights on the English legal systems; and likewise the African Commission on Human Rights, and the ECOWAS Court respectively on the Ghana legal system.
- It is easy and appropriate to compare Ghana and UK because both countries have common features.
- The strength and weaknesses of both countries can be measured, and
- Both systems in one way or the other influence each other.

The limitations of the comparison could be explicitly stated as:

- The justice system of Ghana is partly based on state and partly on traditional or customary laws for adjudication which is different from the UK that has only the state court to deal with cases.
- The UK has more advance and sophisticated institutions to monitor trial proceedings than Ghana which is a developing nation, and
- The Strasbourg Court of Human Rights that monitors the UK cases and serves as the ultimate appellant court on fair trial is stronger and well established institution as compared to the African Commission on Human Rights and the ECOWAS Court which are very young institutions. It is very probable that there is also difference in terms of proceedings, funding, or resources, and institutional design which are not the same between both courts.

I have argued that the constitutional right to fair trial which Ghana has an obligation to protect within the domestic and procedural right regime and also in the context of international norm is in serious breach and violated. Fair trial as a right is unpredictable and measures to protect the innocent people from going to jail has been inadequate. Many criminal suspects not charged by a court suffer and dies illegally at the various custody and prison detention centers without judicial remedies and due process of the law. The dissertation has advocated that the current legal instruments within the liberal framework for protection are misguided, and the existing instruments do not provide adequate protection to the right to fair trial in Ghana.

Also the arrest procedure and detention system highly contribute to infringement of the said right in questioned which allow lengthy pre-trial periods resulting to the phrase "*tried within a reasonable time"* a mere declaration and without any effect. Case law in criminal matters has shown that the current instru-

ments needs to be reviewed and replaced by other reliable, conceptual, substantial, statutorily and procedural mechanisms for interest of justice to guarantee fairness throughout the three stages of the trial proceedings such as pre-trial, trial and post-trial. The project has highlighted the shortcomings and weaknesses of the current criminal justice system in Ghana in terms of protection of the accused by ensuring that procedural rights of the accused is respected, applicable and therefore enforced. If this is done, and the dockets of the accused are kept or constructed electronically, the problem of missing files/ dockets of the accused resulting to delay of prosecution and protraction of proceedings while accused are kept in custody for longer periods could be avoided and therefore the newly constructed High Court facility behind the Nsawam prisons responsible for reviewing detention cases would not be necessary. What is most essential is to avoid the innocent citizens or incompetent accused (mentally sick) from been kept behind bars for years on remand before realising that there was an error or miscarriage of justice which was due to lack of legal aid/representation provision to the accused. Meanwhile, the accused wrongly jailed are not properly compensated by the state in Ghana. The theoretical declarations and the pretense of procedural rights in the Constitution 1992 and the Criminal Code 1960 (Act 29) and (30) should be given practical effect and demands the strengthening of resources and legislative institutional governance to guarantee and enforce the right to fair trial in Ghana.

6.0 APPENDIX 1: Methodology: Interview Questions

Questions discussed during the interviews

1. How do you evaluate access to criminal justice, and fairness?
2. Why is the legal aid board not able to provide counsel to defendants wishing to rely on public funding?
3. Do you often have criminally accused persons unrepresented at your court during proceedings and what do you do as a judge?
4. Why disclosure of documents in summary trial by prosecutors not allowed?
5. Why are some offences classified as non-bailable?
6. What time frame constitutes trial within a reasonable time in Ghana?
7. Why Ghana prohibits private prosecution, and would it be needed alongside the state prosecutors?
8. Why there is no speedy trial?
9. Why defendants spend so many years on remand waiting for trial?
10. Any impact of the European Human Rights Convention over the UK criminal law and procedure?
11. What impact do the African Charter has over the criminal law procedure of Ghana?
12. Are the police prosecutors trained to perform prosecutorial roles?
13. Would the Superior Court judges need researchers to assist and support them of their work load to ensure speedy trials?
14. Do the customary law courts guarantee fairness?
15. Do the chiefs receive consistent informal or formal legal training and updates of the laws in the country?
16. Do the chiefs take bribes?

17. How long have you been on remand? Do you have a lawyer? If you could not afford, were you given a counsel to represent you at the police station, and during the hearing at court?
18. Were you beating by the police after your arrest?
19. Did the police informed you of your rights when you were arrested and brought to the station? Who wrote your statement, and were you given an advice?
20. When was the last time you appeared before a judge?
21. How many years are you serving and what did you do?

In fact, the knowledge, experiences and answers of the informants deepened my understanding and enabled me to some extent know for myself what practically is going on.

6.0.1 APPENDIX 2: Questionnaires for England & Wales/ Ghana

England &Wales Questionnaire Administered

Please tick Profession

Judge	
Academic	
Barrister/Solicitor /Advocate	
Prosecutor	
Probation Officer	
Prison Officer/Other	

1. How do you rate access to criminal justice in England and Wales?

Excellent	
Above average	
Average	
Below average	
Poor	

2. How do you rate the legal aid system in England and Wales?

Very Satisfied	
Somewhat Satisfied	
Dissatisfied	
Most dissatisfied	

3. How would you rate the quality of legal aid after the reforms in 2012?

Very high quality	
High quality	
Neither high nor low quality	

Low quality	
Very low quality	

4. **How do you rate fairness in the criminal trial (Pre-trial, trial, and post-trial stages) of proceedings?**

Extremely well	
Very well	
Somewhat well	
Not so well	
Not at all well	

5. **Overall how satisfied or dissatisfied are you with the criminal justice system and procedure?**

Very satisfied	
Somewhat satisfied	
Neither satisfied nor dissatisfied	
Somewhat dissatisfied	
Very dissatisfied	

6. **Do you have any recommendations, comments or concerns about the legal system?**

Ghana Questionnaire Administered

Please tick Profession

Judge	
Academic	
Barrister/Solicitor /Advocate	
Prosecutor	
Probation Officer	
Prisons Officer/Other	

1. How do you rate access to criminal justice in Ghana?

Excellent	
Above average	
Average	
Below average	
Poor	

2. How do you rate access to justice in general in Ghana?

Excellent	
Above average	
Average	
Below average	
Poor	

3. How do you rate the legal aid system in Ghana?

Very Satisfied	
Somewhat Satisfied	
Dissatisfied	
Most dissatisfied	

4. How would you rate the quality of legal aid in Ghana?

Very high quality	
High quality	
Neither high nor low quality	
Low quality	

Very low quality	

5. **How do you rate fairness in the criminal trial (Pre-trial, trial, and post-trial stages) of proceedings?**

Extremely well	
Very well	
Somewhat well	
Not so well	
Not at all well	

6. **Overall how satisfied or dissatisfied are you with the justice system and procedure of Ghana?**

Very satisfied	
Somewhat satisfied	
Neither satisfied nor dissatisfied	
Somewhat dissatisfied	
Very dissatisfied	

7. **How do you evaluate fair trial right in Ghana?**

Extremely well	
Very well	
Somewhat well	
Not so well	
Not at all well	

8. **Should private prosecution be instituted alongside the state prosecution in Ghana?**

Extremely helpful	
Very helpful	
Somewhat Needed	
Not Needed	

9. **Please do you have any recommendations, comments or concerns about the Ghana Legal System/Criminal Law & Procedure?**

6.0.2 APPENDIX 3: Results of the Comparative Survey Diagrams

The survey shows the percentage of participants in Ghana and UK on diagrams at **figures 4.10.2a** and **4.10.2b** respectively.

The pie chart also represents the percentage of the respondents in Ghana and UK, and their evaluations by choosing from answers as in order of arrangement such as:

Figure 4.10.2c: Above Average, Average, Below Average, Excellent, Poor.

Figure 4.10.2d: Dissatisfied, Most Dissatisfied, Poor, Somewhat Satisfied, Very Satisfied.

Figure 4.10.2e: High Quality, Low Quality, Neither High Nor Low Quality, Very High Quality, Very low quality.

Figure 4.10.2f: Extremely well, Not so well, Not at all well, somewhat well, Very well.

Figure 4.10.2g: Above Average, Average, Below Average, Excellent, Poor.

Figure 4.10.2h: Extremely well, Not so well, Not at all well, somewhat well, Very well.

Figure 4.10.2i: Extremely helpful, Not Needed, Somewhat needed, and Very helpful.

Figure 4.10.2j: Neither Satisfied nor Dissatisfied; Somewhat Dissatisfied; Somewhat Satisfied; Very Dissatisfied; Very Satisfied.

Below are the diagrams and chart of the survey:

Figure 4.10.2a

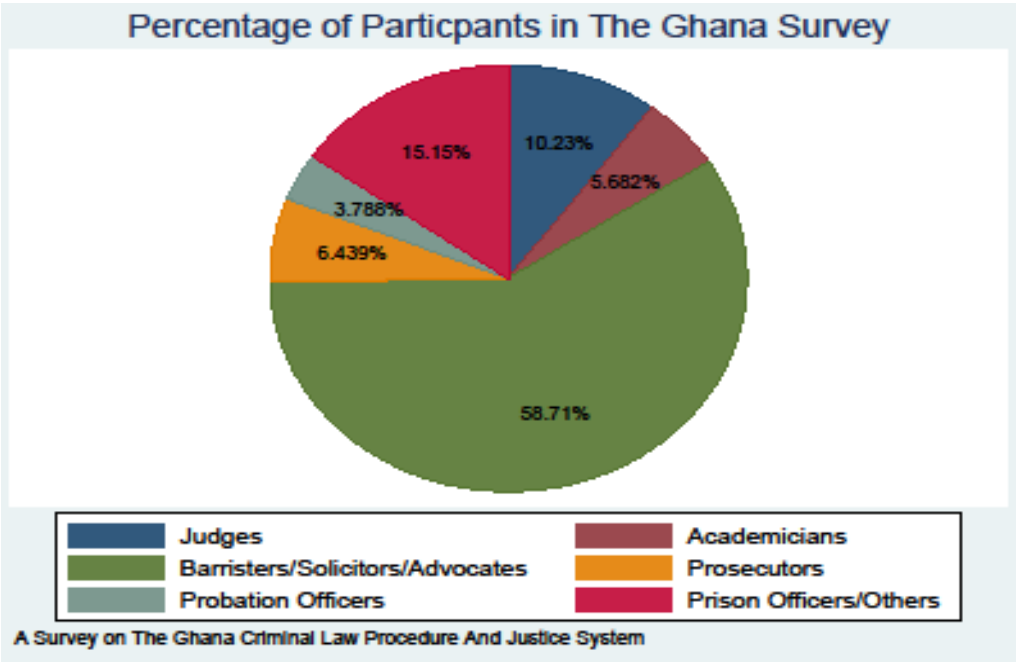


Figure 4.10.2b

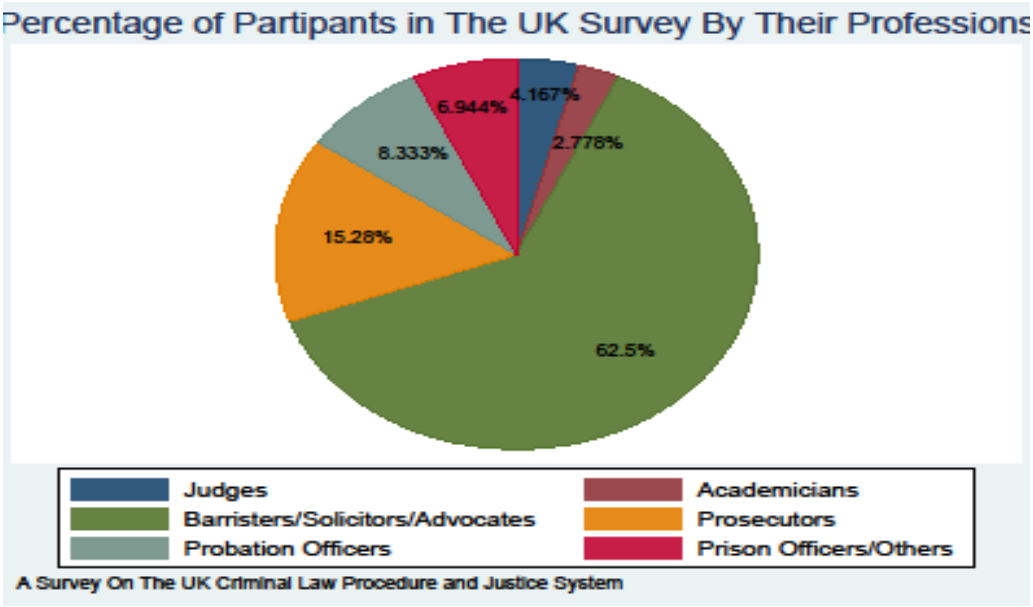


Figure 4.10.2c

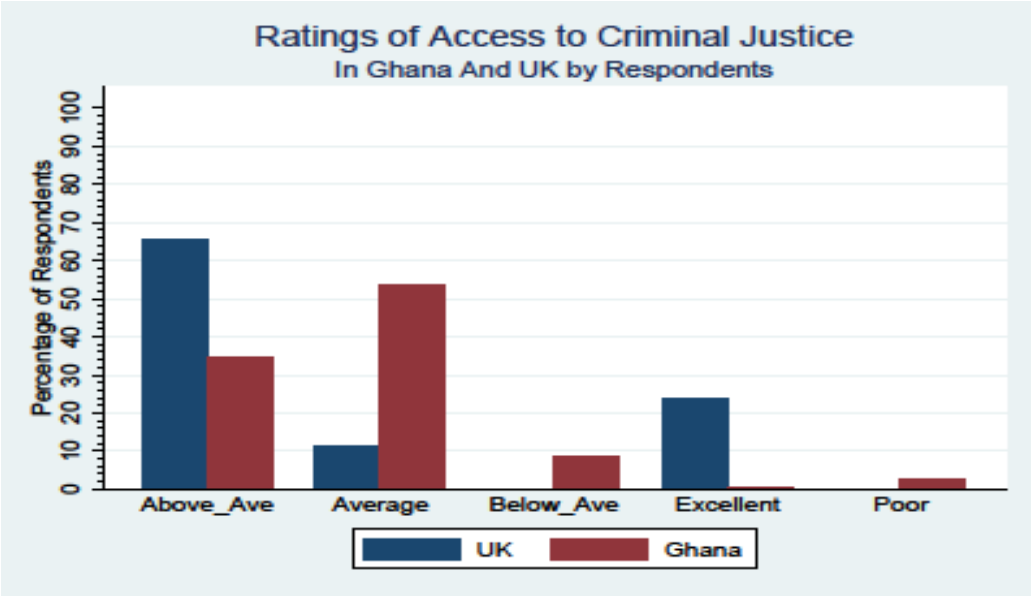


Figure 4.10.2d

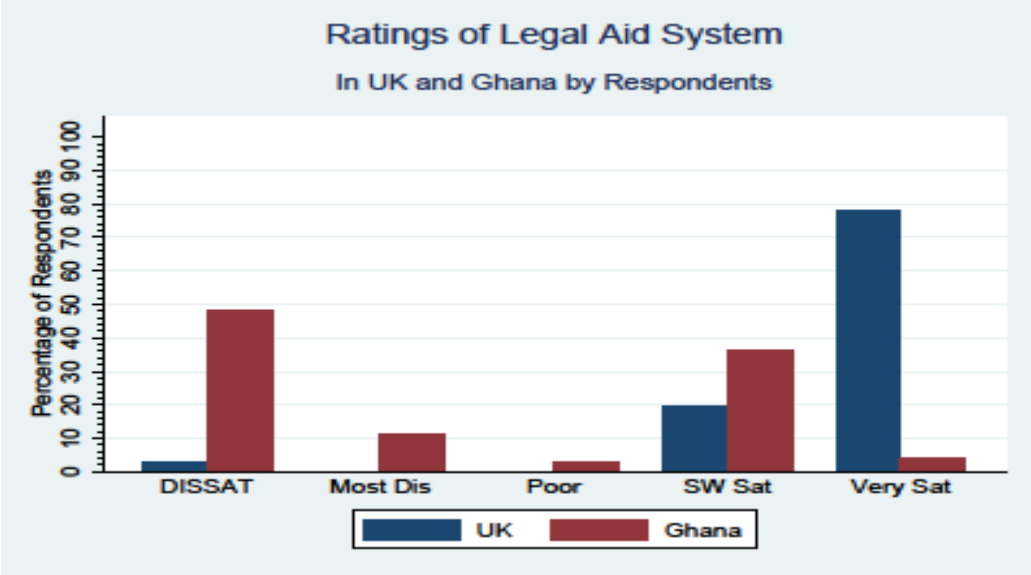


Figure 4.10.2e

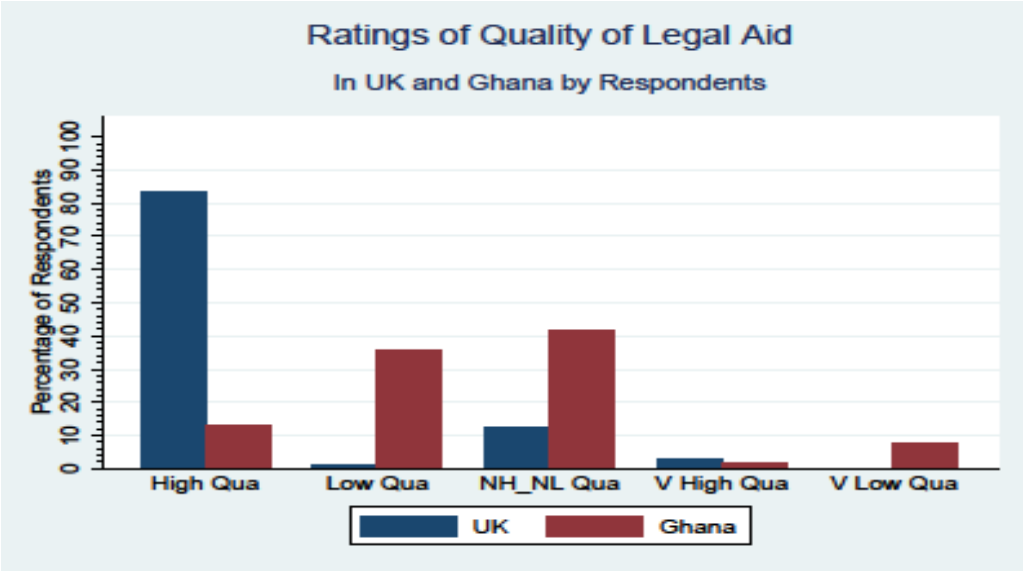


Figure 4.10.2f

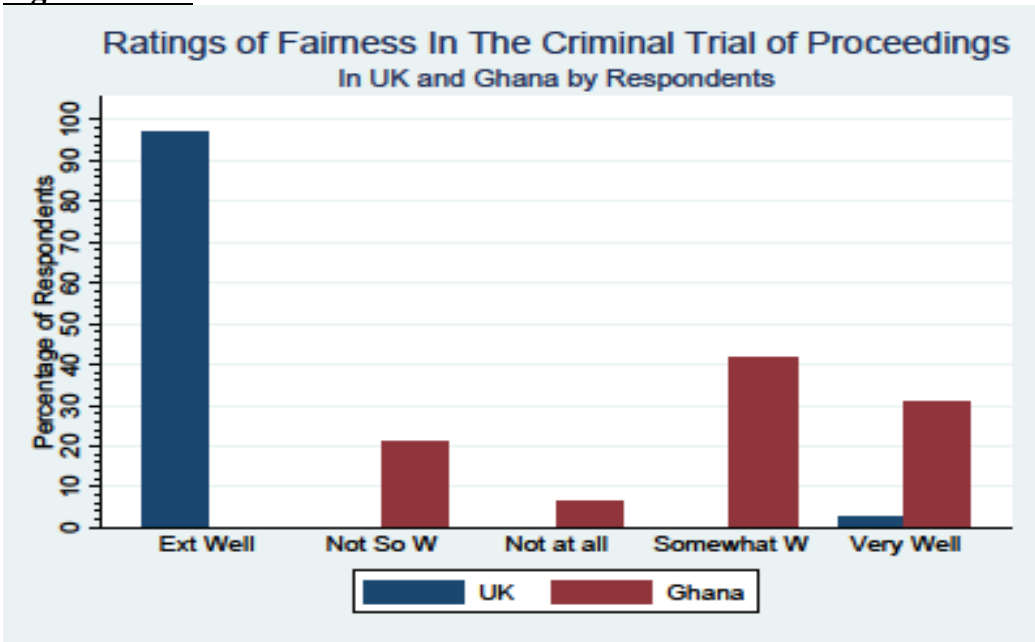


Figure 4.10.2g

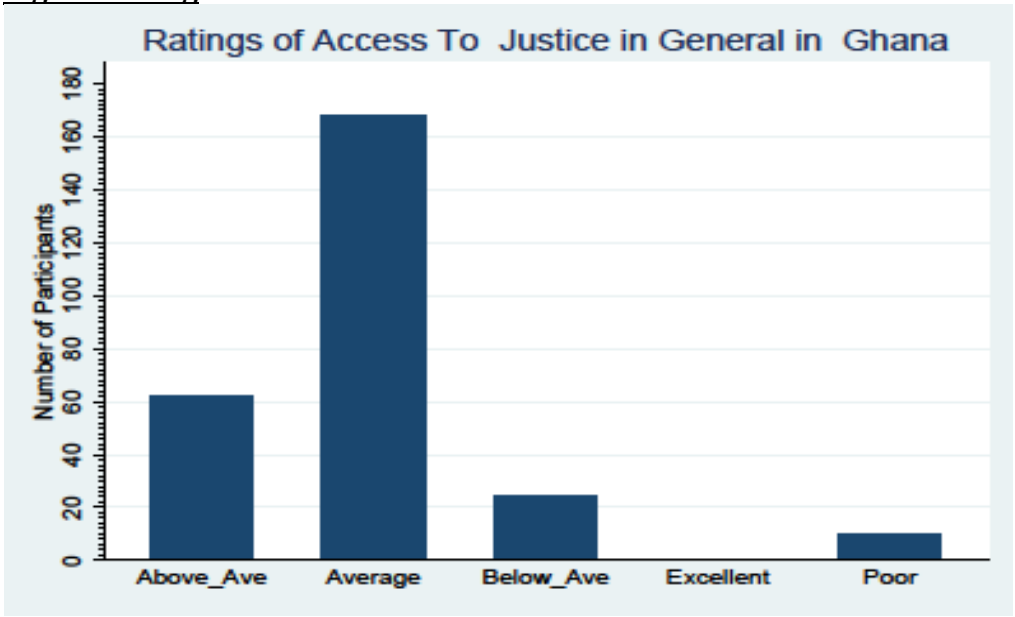


Figure 4.10.2h

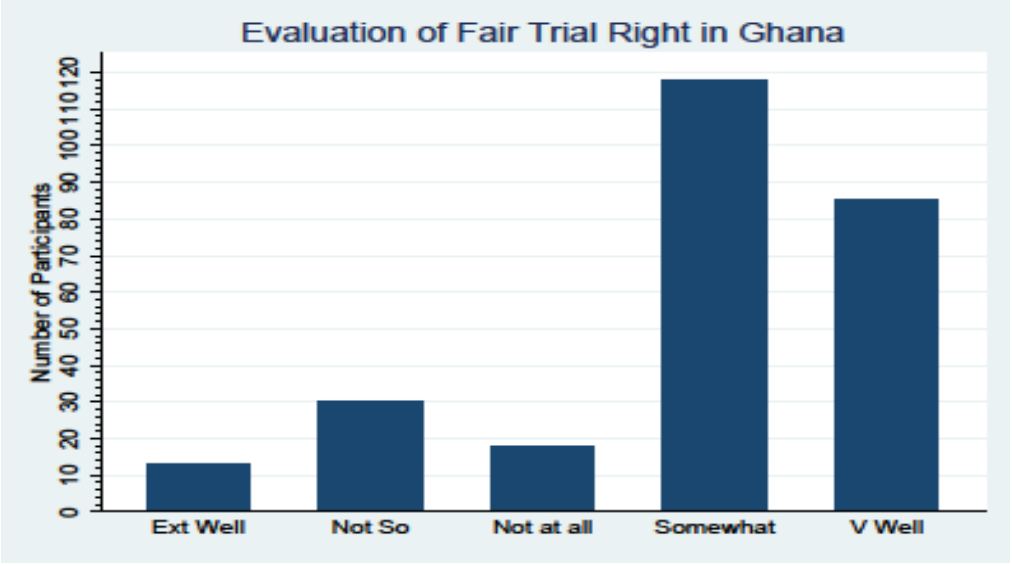


Figure 4.10.2i

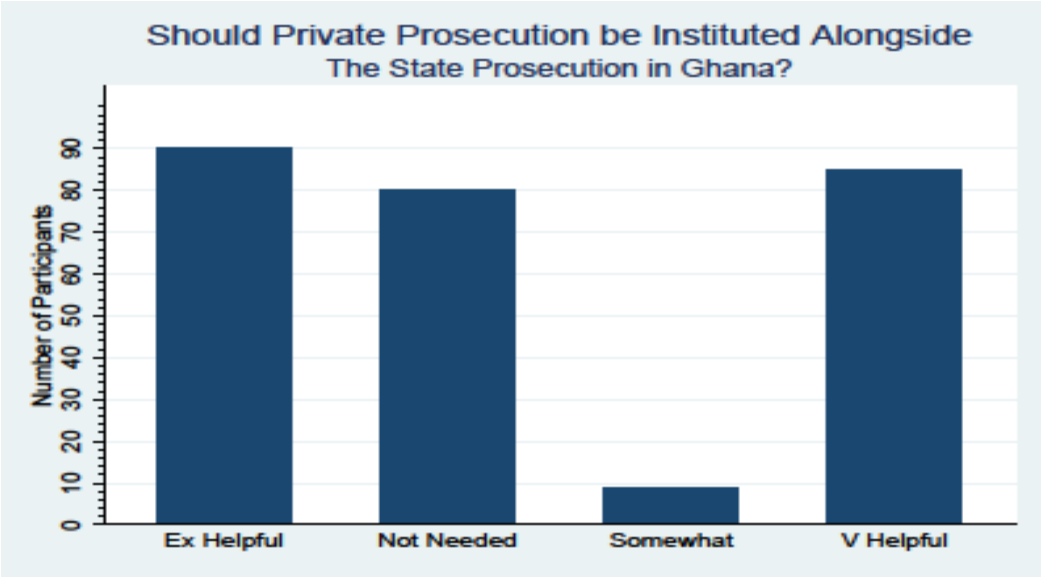
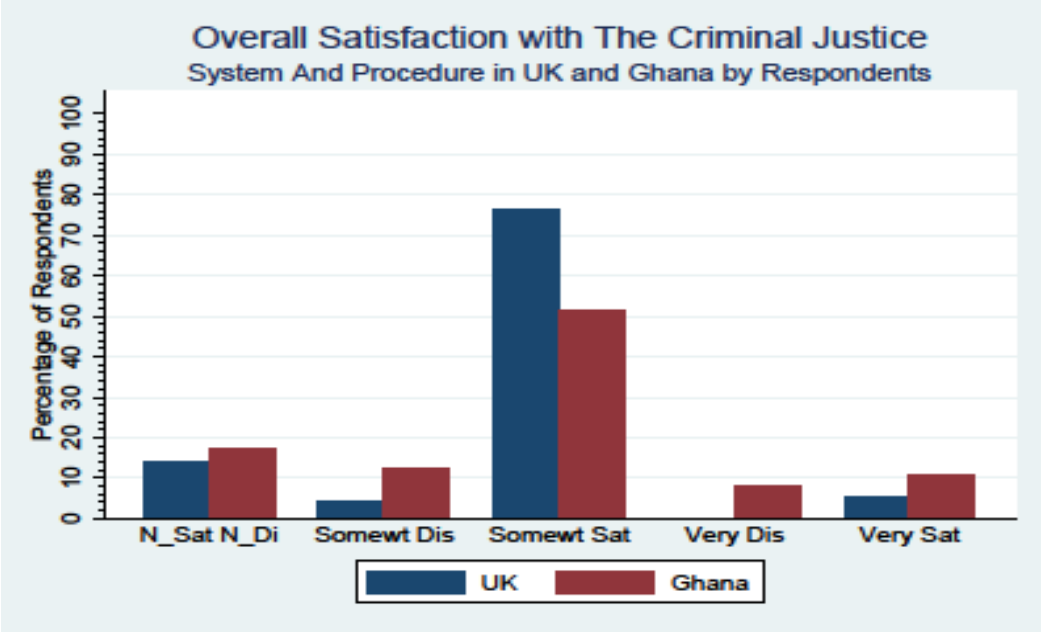


Figure 4.10.2j



6.0.3. Appendix 4: <u>Memorial of murdered Judges in 1982, Ghana</u>

The two inscriptions read: "Martyrs of the rule of law. On the 30th June 1982, during the curfew hours, ***three*** *High Court Judges and a retired Army Officer, namely: Mr. Justice Fredrick Poku Sarkodie, eminent Mrs. Justice Cecilar Afram Koranteng Addow; Mr Justice Kwadjo Agyei Agyepong; and Major (Rtd) Sam Acquah; were abducted from their homes and brutally murdered at the Bundase Military Range in the Accra Plains. The bodies of these hapless victims were then doused with petrol and set on fire. By divine intervention in the form of a light rainfall, which quenched the fire, the bodies were not wholly consumed. This led to the discovery of a most heinous crime-the abduction and murder of these innocent victims. These eminent judges were made to pay the ultimate price for their singular and unwavering dedication to the rule of law and impartial administration of Justice. This memorial is intended to help us draw inspiration from these gallant martyrs so that we can, as a Nation, rededicate ourselves jointly and severally to the cherished goals and principles on whose altar they made the supreme sacrifice: LEST WE FORGET".*

6.0.4 Appendix 5: <u>Photos from Ghana Prisons</u>

Ghana Prisons: Conditions of inmates

Ghana Prisons: How inmates sleep in the prison.

6.0.5 Appendix 6: <u>Some Traditional Chiefs in Ghana</u>

Nana Kwabena Korang VI & Queenmother (Awua -dumase) Traditional Council

His Majesty Otumfuo Osei Tutu II (The Asantehen)

King Mbandu III (Paramount Chief of Kangamba Ka Thapeyo

Some Divisional Chiefs of Awua-Odumase Traditional Council

His Majesty Okyehene Osagyefo Amoatia Ofori Panin

Paramount chief in Ghana at a durbar

HIS MAJESTY OSAGYEFO AMEYAW AKUMFI IV PARAMOUNT CHIEF (TECHIMAN)

His Majesty Osagyefo Agyeman Badu II (Paramount Chief, Dormaa-Ahenkro)

6.0.6 Appendix 7: Photos from Traditional Court (Rape case).

Man in suit is Eric (research student), Man in Red cloth is the "Odikro" (divisional chief) who sat on the case at the village now in trouble with his elders around him.

The research student given the opportunity to ask questions during the proceedings whiles the Paramount Chief and his counsel listen.

The Paramount Chief Nana Kwabena Korang VI gives his ruling over the matter, whiles his panel who are all divisional chiefs and audience outside the hall observe.

7.0. Table of Abbreviations

- ACHPR African Charter on Human and People's Rights
- ACHR American Convention on Human Rights
- ACmHPR African Commission on Human and Peoples' Rights
- ADR Alternative Dispute Resolution
- AfCHPR African Court on Human and Peoples' Rights
- AFRC Armed Forces Revolutionary Council
- AfriMAP African Governance Monitoring and Advocacy Project
- AG Attorney General
- APRM African Peer Review Mechanism
- BNI Bureau of National Investigations
- CAA Criminal Appeal Act
- CCMF Criminal Case Management Framework
- CCTV Closed Circuit Television
- CDA Crime and Disorder Act
- CDA Crime and Disorder Act 1998
- CDS Criminal Defence Service
- CHRAJ Commission on Human Rights and Administrative Justice
- CJ Chief Justice
- CJA Criminal Justice Act
- CJA Criminal Justice Act
- CJPOA Criminal Justice and Public Order Act
- CJS Criminal Justice System

- CLSF Community Legal Service Fund
- CLSF Community Legal Service Fund
- CPIA Criminal Procedure and Investigations Act
- CPS Crown Prosecution Service
- CPS Crown Prosecution Service
- CQS Casework Quality Standards
- CTL Custody Time Limits
- CYPA Children and Young Persons Act
- DNA Deoxyribonucleic Acid
- DOVVSU Domestic Violence and Victim Support Unit
- DPP Director of Public Prosecution
- EACJ East African Court of Justice
- EC Electoral Commission
- ECF Exceptional Case Funding
- ECF Exceptional Case Funding
- ECHR European Charter on Human Rights
- ECHR European Convention on Human Rights
- ECOWAS Economic Community of West African States
- ECtHR European Court on Human Rights
- EDS Extended Determinate Sentence
- GBA Ghana Bar Association
- GDP Gross Domestic Product
- GLAB Ghana Legal Aid Board
- GPS Ghana Prosecution Service
- IA Independent Adjudicators

- ICCPR International Covenant on Civil and Political Rights
- ICS Immediate Custodial Sentenced
- IoJ Interest of Justice
- IPP Imprisonment for Public Protection
- KTC Kumasi Traditional Council
- LAA Legal Aid Agency
- LAC Legal Aid Council
- LAS Legal Aid Scheme
- LASPO Legal Aid Sentencing & Punishment of Offenders
- LRC Law Reform Commission
- LSC Legal Service Commission
- MCA Magistrates' Court Act
- MoJ Ministry of Justice
- NDC National Democratic Congress
- NDPB Non Departmental Public Body
- NDPB Non-Departmental Public Body
- NGO Non- Governmental Organizations
- NHC National House of Chiefs
- NIA National Intelligence Agency
- NLC National Liberation Council
- NPP New Patriotic Party
- NRC National Redemption Council
- OSIWA Open Society Initiative for West Africa
- OSIWA Open Society Institute of West Africa
- PACE Police and Criminal Evidence

- PCCSA Powers of Criminal Courts (Sentencing) Act
- PCMH Plea and case management hearing
- PDH Plea and directions hearing
- PNDC Provisional National Defence Council
- PP Progress Party
- RHC Regional House of Chiefs
- SADCT Southern African Development Community Tribunal
- SFO Serious Fraud Offence
- SMC Supreme Military Council
- UDHR Universal Declaration of Human Rights
- UK United Kingdom
- VAT Value Added Tax
- VATP Violence Against the Person
- VHCC Very High Cost Criminal cases
- VHCC Very High Cost Cases
- WACA West African Court of Appeal
- YJCEA Youth Justice and Criminal Evidence Act

8.0. Table of Cases

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- A-G Abia v A-G Federation (2002) 6 NWLR pt 763 264
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- Box [1964] 1 QB 430.
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